

Business tax round up

(Lecture B1181 – 16.38 minutes)

Employment allowance for larger employers

The government has published the draft Employment Allowance (Excluded Persons) Regulations 2020. From April 2020, the NICs employment allowance will apply to those employers with a secondary class 1 NICs liability below £100,000 in the preceding tax year.

The allowance claim will no longer be carried forward from one tax year to the next and employers will have to submit a fresh claim every year, with the requirements set out in a statutory notice.

This £100,000 threshold will apply cumulatively in the case of connected employers and the allowance will be operated as de minimis state aid.

Tax Journal (24 January 2020)

Suppression of partnership takings

Summary – The partnership deliberately failed to record cash sales; the Tribunal accepted HMRC's calculation of unreported profits.

Ghulam Rubani and his partners, Mr Hussain and Mr Shabir, traded in partnership as Shama Bingley. They ran a restaurant that also offered a takeaway service.

Following a Code of Practice 9 Civil Investigation into cases of Serious Suspected Fraud in relation to tax year 2012/13, HMRC issued a closure notice in respect of that year for unreported profits of £145,672, as well as discovery assessments for years 2011/12, 2013/14, 2014-15 and 2015/16 to tax unreported profits in excess of £350,000.

At a meeting with HMRC, the partners agreed that cash takings were not properly recorded and that the amount of cash sales had therefore been under-declared. The partners suggested that the deficiency was much lower than HMRC had arrived at, being around £100,000 from June 2009.

HMRC's figures were based on 118 slips obtained from the partnership that reflected activities from Sunday to Saturday for seventeen specific weeks between 14 October 2012 and 23 March 2013. For each slip, the total shown was significantly higher than the figure recorded for accounting and tax purposes. HMRC took these to be the true record of cash takings.

Decision

The First Tier Tribunal did not accept the partners' explanation for the discrepancy in takings. The partners stated that the slips were not the cash takings but rather a record of the cash in the till each day. They appeared to be stating that each day the partners brought in cash from home, unconnected with the business, put it in the till for use during the day, and then took it home again.

The Tribunal did not consider this explanation to be plausible. In their view, the only rational explanation was that the slips represented actual sales of the business.

Having been in business for six years, the partners must have been aware that the tax liabilities for the business could not be properly assessed without accurate accounts and yet no such accurate accounts were kept. Their action was deliberate behaviour.

The appeal was dismissed.

Ghulam Rubani T/A Shama Bingley v HMRC (TC07527)

Mixed partnerships – profit reallocation

Summary - Profits of two mixed LLPs, that had been allocated to a corporate member and transferred offshore, were reallocated to Nicholas Walewski, as member of both LLPs.

Nicholas Walewski had set up an equity fund in Luxembourg that was managed by one UK LLP and with trades executed by a second UK LLP. Nicholas Walewski was a partner in both LLPs.

Nicholas Walewski also set up a company, W Ltd, which was a corporate partner of both LLPs and where he was the sole director and employee. He had a contractual right to a salary of £200,000 per annum and a bonus. W Ltd paid out substantial dividends to its offshore owner that in 2014 and 2015 exceeded £70 million. Nicholas Walewski's children were named beneficiaries of the Kleber Trust that owned the offshore company in receipt of the substantial dividends that were paid.

Having shared the profits between the members of the LLPs, including W Ltd, HMRC sought to reallocate nearly £20 million from W Ltd to Nicholas Walewski under the mixed partnership anti-avoidance legislation. These rules operate to prevent individuals allocating profits to a connected corporate partner in order to reduce the amount of tax which is payable. HMRC argued that the profit allocated to W Ltd did not relate to his activities as an employee of the company, but rather because of his ability to enjoy them via the offshore trust to which W Ltd paid its profits.

Decision

The First Tier Tribunal needed to decide whether the profit allocated to W Ltd was justified based on the work that Nicholas Walewski performed as an employee of the company or for an alternative commercial reason.

The Tribunal concluded that his activities could not be split between him as member of the LLPs, employee or director of the company. He had effectively been performing a single role for multiple entities. As the Tribunal said 'he wore one hat in many places'. He had been working full-time for both LLPs and W Ltd at the same time.

The Tribunal concluded that the only reason for the allocation of profit to W Ltd was by reason of Nicholas Walewski's ability to enjoy those profits and so W Ltd's profit should be reallocated to Nicholas Walewski.

The appeal was dismissed.

Nicholas Walewski v HMRC (TC07554)

Kickboxing classes

Summary - kickboxing is not a subject ordinarily taught in school and so private classes did not qualify for VAT relief under the exemption for private tuition.

Premier Family Martial Arts LLP provided kickboxing classes across a range of age groups from children as young as 3 (little dragons) to adults who are in middle age. There is no external accreditation for teachers. The progression of pupils is measured by a system of grading or belts but there is no formally-codified general standard which underlies the assessment. Instead, the process is a subjective assessment by tutors. Pupils are put into groups for which there are weekly lesson plans and homework.

At the time, kickboxing did not form part of the UK's national curriculum and was not included on either the GCSE or A level lists of sports that were suitable for assessment. Kickboxing is a sport that had been proposed for inclusion but rejected on the basis that it was not recognised by Sport England.

To be exempt the activity must fall within Article 132(1)(j), transposed into UK legislation as Item 2 Group 6 Schedule 9 VATA 1994 as:

“The supply of private tuition, in a subject ordinarily taught in a school or university, by an individual teacher acting independently of an employer”.

HMRC argued that the supply of kickboxing classes was standard-rated and as a result Premier Family Martial Arts LLP was liable to be registered for VAT with effect from 1 April 2018; consequently, the LLP was liable for output tax for the period from 1 April 2018 onwards amounting to £411,497.00.

Premier Family Martial Arts LLP appealed.

Decision

The Tribunal confirmed that both parties agreed that the only question that needed to be determined was whether the tuition given in the kickboxing classes was tuition ordinarily taught in a school.

The Tribunal concluded that the word ‘ordinarily’ should be construed as ‘commonly’ (see *Hocking*) so that exemption can only apply where the activity is commonly taught at schools. The Tribunal said that the relevant question was not what the national curriculum said but what actually happens in practice and it was perfectly possible for schools in the UK to commonly teach kickboxing even if kickboxing was not part of the UK's national curriculum. However, unsatisfactory evidence was provided to suggest that it was commonly taught at schools in the UK, or the EU as a whole and so the appeal was dismissed.

Premier Family Martial Arts LLP v HMRC (TC07509)

Supply of crafts and a magazine

Summary - The supply of educational children's boxes were a mixed supply of crafts and a magazine of standard and zero rated items.

ToucanBox is an online retailer of children's activity boxes designed to be educational and entertaining and are aimed at 3-8 year old children.

Customers subscribe to receive these boxes on a regular basis, either monthly or fortnightly, having already trialled a free box.

The company supplied three different types of box: Super, Grande and Petite. From the outset, the Super and Grande boxes had been treated as mixed supplies of standard rated craft materials and a zero rated book. The Petite boxes did not initially include the magazine and the company accepted that during that period, the Petite box consisted of a standard rated supply of craft activities. From August 2015 when the magazine was included in the box, the company treated the boxes as a mixed supply.

The gross revenue figures for the periods from January to June 2015 (before the introduction of the magazine) was roughly half the revenue compared to that from July to December 2015 (after its introduction). The company stated that there were no other changes in the business (apart from the introduction of the magazine) which could account for this. The company regularly conducted customer surveys to obtain feedback from customers. The products evolved in response to that feedback. One such change was made to the Petite box that went from craft activities to only to include a magazine. The magazine had 12 pages containing activities separate from the crafts. The possibility of selling the magazines separately was discussed, but not pursued at the time. The magazines are now sold separately. Results from the survey confirmed that customers saw the magazine as being an equally important element of their product.

HMRC accepted that the first two box types that included a book were mixed supplies but that the Petite boxes were standard rated. The company argued that the Petite box was a mixed supply of a zero-rated magazine together with standard-rated craft products.

Decision

The First Tier Tribunal agreed that the supply was a mixed supply. The two products were capable of being sold separately as had been demonstrated by the fact that the box was initially sold without the magazine and that the magazine is available for separate purchase. This was supported by the company's survey that showed that a typical consumer viewed the box as a supply of crafts and a magazine, not a single supply of crafts. Both the magazine and the crafts were equally important to the customers.

The appeal was allowed.

Dodadine Limited t/a ToucanBox v HMRC (TC07505)

As Andrew Hubbard commented in his case summary:

“Although HMRC tried to cast doubt on the significance of the survey, the tribunal did attach some weight to the findings. This is a good example of how a taxpayer can use real evidence, rather than assertions, in order to prove its case and the lessons learned here may be valuable in other disputed cases.”

Ski lift passes

Summary – The provision of lifts to transport skiers to the top of an indoor slope was a supply of a cable-suspended passenger transport system. As transport services, the lower rate of VAT applied

Snow Factor Limited operate a snow dome and conference centre in Glasgow, which include an indoor ski slope with two drag lifts used by customers to convey them to the top of the ski slope.

No charge was made to use the slope but there was a charge for customers wanting to use of the lifts. Unsurprisingly, the majority of customers chose to use the lifts but a small number of Nordic and freestyle skiers chose not to.

The issue in this appeal was the correct VAT treatment of the money paid by customers who use the lifts.

Snow factor Limited argued that the supply was taxable at the reduced rate as it was “the transport of passengers by means of a cable-suspended chair, bar, gondola or similar vehicle designed to carry not more than 9 passengers” (Item 1, Group 13, Sch 7A VATA 1994);

HMRC argued that the supply was excluded from item 1 by note 1 that reads:

‘Item 1 does not include the transport of passengers to, from or within—

(i) a place of entertainment, recreation or amusement’

In defence Snow Factor Limited claimed that buying the lift pass resulted in customers saving time and so being able to ski down the slope more frequently. Note 1 was not relevant as admission to the slope was free and so there was no supply of a right of admission for consideration.

Decision

The Upper Tribunal posed the question “Why does a customer purchase a lift pass?” The Tribunal concluded that customers bought a lift pass ‘to ski down the slope without the effort and inconvenience of walking up it’. As the minority had demonstrated, skiers could gain access to the slope without a pass. Snow Factor Limited supplied access to the lifts for consideration.

It was common ground between the parties that the word “supply”, where it appears in Note 1, must be given its technical VAT meaning of something done for a consideration. The Upper Tribunal agreed with Snow Factor Limited that Note 1 was not applicable because there was no supply, for consideration, of a right to use the slope in the snow dome. Use of the slope was free.

Snow Factor Limited v HMRC [2020] UKUT 0025 (TCC)

Incorrect zero-rating certificate

Summary – Marlow Rowing Club had a reasonable excuse for issuing an incorrect zero-rating certificate.

Following a devastating fire to the clubhouse in August 2011, the members of the old club decided to construct a new facility, to be owned by a limited company.

Marlow undertook the construction of a “Water Sports Hub” building to be used by itself and other sports clubs in the local area and also to provide a gym facility for which it offered membership to non-club members.

It issued the zero-rating certificate to a supplier of construction services on the basis that the building was intended to be used “for a relevant charitable purpose otherwise than in the course or furtherance of a business”.

Prior to issuing the certificate, Marlow sought advice from VAT accountants and counsel. At the time, a case (*Longridge* on Thames ((TC2574))), had been heard by the First Tier Tribunal and concerned a similar project. The Tribunal had found in favour of *Longridge* but the case was appealed. Marlow Rowing Club’s accountants advised them that the *Longridge* appeal would need to succeed for Marlow to issue the certificate. The accountants had suggested that Marlow should seek HMRC’s opinion prior to issuing the certificate.

In November 2013 Marlow Rowing Club issued the certificate and nine days later the Upper Tribunal upheld the *Longridge* decision.

On 18 November 2014 HMRC issued a routine compliance check into the issuing by Marlow Rowing Club of the Certificate. On 27 July 2015 a Notice of penalty assessment was issued. Marlow Rowing Club appealed to the First Tier Tribunal on 21 June 2016.

On 1 September 2016 the Court of Appeal issued its decision in *Longridge* finding in favour of HMRC. In the light of this decision, Marlow Rowing Club did not seek to argue the Certificate was correctly issued but appealed against the penalty on the basis it had a reasonable excuse.

The First Tier Tribunal stated that Marlow Rowing Club was clearly aware that the *Longridge* decision was not final at the time that it made its decision to issue the zero-rating certificate and was clearly aware that its actions in issuing the certificate would not be agreed by HMRC. The Tribunal concluded that Marlow did not have a reasonable excuse. A trader in the same position as Marlow would have sought HMRC’s opinion before issuing the certificate, could have appealed any disagreement with HMRC and should have requested that the decision was stayed behind the *Longridge* case.

Marlow appealed to the Upper Tribunal arguing that, as an unregistered entity, if HMRC had refused to allow the certificate to be issued, this would not have been appealable. For an appeal to be eligible for statutory review or a hearing before the tribunal, the relevant supply must have taken place.

Decision

The Upper Tribunal confirmed that the First Tier Tribunal had erred in law. In order to appeal a decision, the zero-rating certificate had to be given before the supply was made. A negative decision from HMRC with no certificate, meant no appeal. The Upper Tribunal also stated that had Marlow Rowing Club proceeded without issuing the certificate and so paid over the standard rated VAT, it was uncertain as to whether the builder would have cooperated in enabling Marlow Rowing Club to reclaim that VAT at a later stage if it was subsequently confirmed that zero rating was appropriate.

The Upper Tribunal remade the First Tier decision by concluding that Marlow Rowing Club did have a reasonable excuse for incorrectly issuing the zero-rating certificate.

Marlow Rowing Club v HMRC [2020] UKUT 0020 (TCC)