

Business tax round up (Lecture B1241 – 21.35 minutes)

Retrospective notice and ATED penalties

Summary – As notice of daily late filing penalties was given after the period for which the penalties applied the penalties were void.

D & G Thames Ditton Limited was incorporated on 28 August 2014 and on 10 October that year the company bought a property in Thames Ditton, Surrey. The Stamp Duty Land Tax return showed that the price paid was £650,000. The filing date for the ATED return for the year ending 31 March 2019 was 30 April 2018 but it was not until 21 March 2019 that the company filed a Relief Declaration Return. Although 325 days late, no tax was due.

HMRC issued the following penalty assessments in respect of the late filing:

- 9 December 2019 Automatic £100 fixed penalty for the initial failure;
- 23 January 2020 Daily penalties for return three months late (£900);
- 23 January 2020 Automatic £300 fixed penalty for filing six months late.

D & G Thames Ditton Limited appealed against all of these penalties, arguing that they were unaware of the obligation to file an ATED return and in any event, there was no liability to tax.

Decision

The First Tier Tribunal held that both the £100 and £300 automatic penalties were valid as the company had not shown a reasonable excuse for their late filing. There were no special circumstances which might have allowed a reduction in the penalties.

Para. 4 Sch. 55 FA 2009 states that, if after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are payable. However, to be valid, Para 4(1)(c) states that HMRC must give prior notice to the taxpayer, specifying the date from which the penalty will be payable. In this case, HMRC had not given notice of daily penalties until January 2020, so after the period to which they related.

As notice had been given retrospectively, the daily penalties were therefore cancelled.

D & G Thames Ditton Limited v HMRC (TC07961)

Paying Self Assessment, including Class 2

Taxpayers who deferred their second payment on account for 2019/20 due by 31 July 2020 will have had the following payments falling due on 31 January 2021:

- deferred July 2020 payment on account;
- balancing amount due for 2019/2020 including Class 2 NIC;
- their first 2020/2021 payment on account.

Those who had difficulty in making all 3 payments at once may have set up a Time to Pay instalment arrangement with HMRC.

HMRC has confirmed that, in order to minimise the interest that will be charged, deferred July 2020 payment on account will be cleared first. However, this could result in the 2019/20 Class 2 NIC being paid after their due date of 31 January 2021, which can have a detrimental effect on certain contributory benefits claimed.

HMRC are advising that such taxpayers should contact them for help, as they may be able to allocate monies already paid for 2019/20 against the Class 2 owed. This may result in a small amount of interest, but this will protect any contributory benefit claim.

The guidance also highlights that for Self Assessment payments due on 31 January 2021, taxpayers can avoid the first late payment penalty if they set up a Time to Pay arrangement by 2 March 2021 and the 6 month and 12-month late payment penalties can be avoided if taxpayers pay all the tax owing under that arrangement on time.

<https://www.gov.uk/guidance/defer-your-self-assessment-payment-on-account-due-to-coronavirus-covid-19>

Off-payroll working rules for private sector

From 6 April 2021 off-payroll working rules will apply to:

- public sector authorities engaging contractors who work through their own limited company or other intermediary;
- medium and large-sized private sector organisations engaging contractors who work through their own limited company or other intermediary;
- employment agencies and third parties which supply contractors.

HMRC has published “HMRC issue briefing: supporting organisations to comply with changes to the off-payroll working rules (IR35)” that explains its IR35 compliance strategy for the changes to the off-payroll working rules from 6 April 2021.

HMRC has confirmed it will adopt a light touch approach to penalties. Consequently, there will be no penalties for inaccuracies relating to the off-payroll working rules in the first 12 months, unless there is evidence of deliberate non-compliance. However, where HMRC believe contractors are adopting artificial, contrived arrangements claiming to avoid the application of the off-payroll working rules or result in customers paying less tax than should be the case, HMRC will take action.

HMRC has also confirmed that they will not use information acquired as a result of the changes to the off-payroll working rules to open a new compliance enquiry into returns for tax years before 2021/22, unless there is reason to suspect fraud or criminal behaviour.

The briefing document explains the taxpayers’ responsibilities under the off- payroll rules and provides a series of case studies to show how the rules apply.

<https://www.gov.uk/government/publications/hmrc-issue-briefing-supporting-organisations-to-comply-with-changes-to-the-off-payroll-working-rules-ir35>

Taxi driver's assessments reduced

Summary – Three discovery assessments relating to a taxi-driver's failure to declare income were valid but the tax payable was reduced as the assessments were overstated.

Mark Turner was a self-employed taxi driver who had been within the Self Assessment regime since February 2006.

In January 2012, as a result of receiving information from Gloucester County Council indicating he had undertaken driving work for them, HMRC notified Mark Turner that they intended to visit him and discuss his business records.

Following a meeting in June 2012, Mark Turner agreed he would provide HMRC with his business records but failed to do so, despite information notices being issued.

In 2014, after having received information from another client, HMRC wrote to Mark Turner telling him that they would be raising determinations for three tax years increasing his net profits as follows:

- 2009/10 From £10,026 to £23,696;
- 2010/11 From £5,326.48 to £26,513;
- 2011/12 From £2,940.24 to £20,721.

Out of time to raise assessments, HMRC raised discovery assessments for the three tax years in question. Expenses were based on national trends for similar businesses and calculated as 37% of turnover.

In the summer of 2016, following assistance from HMRC's "Needs Extra Support" ("NES") Team, Mark Turner submitted tax returns for 2007/08 to 2015/16.

HMRC invited Mark Turner to make a late appeal, which he did in November 2017.

Decision

On appeal, Mark Turner stated that he was now in a position to produce evidence to support his appeals against the three discovery assessments. The Tribunal directed that, by no later than 30 June 2020, he should provide HMRC with details and supporting evidence of his business expense claims for these years. Having supplied this information, HMRC withdrew the late filing penalties which they had previously assessed.

On appeal, the First Tier Tribunal accepted HMRC's income figures for contract work but, based on Mark Turner's evidence, included additional income for parcel delivery. Further, the Tribunal included cash income of just £10 per week based on the evidence there was little cash trade where he worked.

The only evidence supplied regarding wages was information contained in Mark Turner's Halifax statements for the 2011/12. The Tribunal used this figure to substantially reduce the figures claimed by Mark Turner in all three years.

The Tribunal stated that:

“by approaching the analysis this way, there is no need for us to speculate about significant amounts of additional cash which the appellant might or might not have obtained from his operations.”

By extrapolating evidence provided on fuel purchased for a three-month period in 2011, the Tribunal were satisfied that Mark Turner’s expense figure was reasonable, accepting this higher figure.

Other expenses in his tax returns were allowed as the Tribunal concluded that the NES must have been given documents to justify the expenses claimed, despite that evidence not being available to the Tribunal.

In conclusion, the Tribunal directed HMRC to adjust the assessments to reflect these revised profit figures.

Mark Turner v HMRC (TC07982)

Lack of evidence supporting R&D claims

Summary – A company failed to provide sufficient written evidence to support its claim that it was undertaking work to resolve a scientific or technological uncertainty or to advance overall scientific knowledge

Hadee Engineering Co Ltd was an engineering company which submitted claims for 2009 and 2010 for R&D relief under s.1044 CTA 2009 totalling approximately £300,000.

The claims were formulated and submitted by a specialist R&D advisor, but the advisor did not assist the company with HMRC’s enquiries. In support of the claims, the company submitted a report compiled by the advisor which itemised the amounts claimed under seven separate projects.

HMRC concluded that the company had not met the burden of proof that any of the expenditure had satisfied the tests to be classed as R&D. The company appealed.

Decision

The First Tier Tribunal considered that the company had to demonstrate that there was a clear methodology behind its activities which 'identified the uncertainty it sought to resolve and in doing so attempted to produce ... a material change or improvement which added to or extended knowledge in a field of science or technology which was not publicly available or could be worked out by a competent professional in that field without difficulty'.

The First Tier Tribunal treated the adviser's report with caution as no evidence was provided from its author and its contents were therefore untested. There was no evidence to show what source documents were used in its compilation.

The First Tier Tribunal dismissed the company's appeal in relation to six of the seven projects but allowed the appeal in respect of the seventh, subject to the parties agreeing the correct amount of the claim.

Hadee Engineering Co Ltd v HMRC [2020] TC07969

Adapted from the case summary in Tax Journal (22 January 2021)

VAT deferred under COVID-19

As a part of the government's COVID-19 support package, businesses were able to defer VAT due between 20 March and 30 June 2020. Unless a business opts to pay by instalments under the VAT deferral new payment scheme, this VAT is payable by 31 March 2021.

VAT deferral new payment scheme

The scheme is open to join between 23 February and 21 June 2021 inclusive. Taxpayers must join the scheme themselves; their agent cannot do this for them.

Providing a taxpayer is up to date with their VAT returns, rather than paying their deferred VAT by 31 March 2021, they can choose to join this scheme, and further delay payment by opting to pay in equal instalments, interest free.

The number of instalments

Taxpayers will be able to choose the number of monthly instalments, up to a maximum, over which to settle their liability:

<u>Join by</u>	<u>Maximum instalments available</u>
19 March 2021	11
21 April 2021	10
19 May 2021	9
21 June 2021	8

The first instalment is payable on joining the scheme, with remaining instalments then settled by Direct Debit.

Unable to use the online service

Where a taxpayer is unable to join the new online service, perhaps because they do not have a UK bank account, they should contact the COVID-19 helpline when the scheme opens by phoning 0800 024 1222.

Errors in VAT returns

At the end of January 2021, HMRC updated its guidance to include what to do if a business has made errors in the VAT returns that are covered by the deferral period.

Businesses should:

- complete Form VAT652;
- send it to the VAT Error Correction Team.

Where any extra VAT is payable as a result of the error, this must be paid by March 2021 unless the taxpayer has contacted the COVID-19 helpline (tel: 0800 024 1222) to discuss including the additional amounts due in the deferred balance at the time of joining the VAT deferral new payment

scheme. Further, a taxpayer cannot include correction payments in their instalments, where notified to HMRC after 31 March 2021.

<https://www.gov.uk/guidance/deferral-of-vat-payments-due-to-coronavirus-covid-19>

Online newspapers

Summary – Digital news services were not ‘newspapers’ and so online newspapers were not eligible for zero-rating until new legislation was introduced from 1 May 2020.

This case concerned whether or not "newspapers" as defined by Item 2 Group 3 Schedule 8 VATA 1994 should include digital newspapers, making them zero rated.

The digital newspaper editions relevant to this case were The Times, The Sunday Times and The Sun, including The Sun on Sunday. News Corp UK & Ireland Limited argued that these were ‘newspapers’ and so should be zero rated.

The First Tier Tribunal concluded that, although the content of the digital and printed editions was fundamentally the same, the digital editions provided digital services rather than goods. The legislation relating to zero rating was confined solely to goods.

On appeal, the decision was overturned, with the Upper Tribunal finding that zero rating applied. Tribunal had reached its decision on the basis of the 'always speaking' principle, in that the law should be interpreted in a way that kept pace with developments. They concluded that when the legislation was drafted, digital newspapers did not exist but such products now carry out the same or very similar functions as a printed version and so were ‘newspapers’ with zero rating applying.

HMRC appealed the decision arguing that the First Tier Tribunal had been correct. They argued that the Upper Tribunal had misinterpreted or misapplied the "always speaking" principle and had failed to apply a strict interpretation of the zero-rating legislation.

Decision

The Court of Appeal stated that the general rule is that VAT is applied at the standard rate to all supplies unless the legislation states otherwise. When deviating from this rule the language used to identify specific, items and not others, indicates a narrow Parliamentary intention, and not a broad, permissive one.

The requirement of strict interpretation of legislation does not exclude the "always speaking" principle from operation, but they must be applied concurrently. However, where there is a new development that does not fit with Parliament’s original intention, the court must not fill any gap to make the legislation fit. It is not appropriate to allow a wider policy than statutory language permitted, which they said the Upper Tribunal had done when concluding that purpose of the legislation was to ‘promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate’. If that were true, digital newspapers serve the same purpose as a "rolling news" service but as the Court stated: “nobody suggests that a rolling news service is a newspaper.”

When enacted in 1972 it was intended that only tangible matter be included within Group 3. The fact that the zero-rating in respect of music was limited to music in printed form (and not audio recording) was a good indicator of their intention. The Court of Appeal overturned the Upper Tribunal's decision finding that there was a need for a strict approach to be taken when interpreting the zero-rating provisions and that the word "newspapers" in Item 2 Group 3 could not be read as including intangible digital news services.

Note: Since the Upper Tribunal decision, new legislation has been introduced effective from 1 May 2020 extending zero-rating to all electronic newspaper publications, but this legislation does not apply retrospectively. Hence the Court of Appeal's decision here only affects supplies prior to that date, including any protective claims made.

News Corp UK & Ireland Limited v HMRC [2021] EWCA Civ 91

Ceroc dancing tuition

Summary – Teaching Ceroc dancing in dance classes was not the supply of private tuition in a subject ordinarily taught in a school or university and so did not qualify for zero rating.

Anna Cook ran Ceroc dancing classes for the public under a franchise agreement. She had not registered for VAT as she believed that she was supplying private tuition, in a subject ordinarily taught in a school or university. When supplied by an individual teacher acting independently of an employer this was exempt under Item 2, Group 6, Schedule 9 VATA 1994.

The First Tier Tribunal concluded that Ceroc included elements of various types of dance and so represented the teaching of 'dance', rather than a specific style of dance. Consequently, the Tribunal concluded that the Ceroc classes run by Anna Cook did fall under Item 2, Group 6, Schedule 9 VATA 1994 as a subject ordinarily taught in schools or universities.

HMRC appealed.

Decision

The Upper Tribunal found that the First tier Tribunal had erred in law.

Ceroc is a style of dance, performed in pairs, that includes elements of other dance styles, including jive and salsa. However, the Tribunal concluded that, despite this, Ceroc was a specific style of dance and could not be treated as the generic subject 'dance' ordinarily taught in schools or universities.

HMRC's appeal was allowed meaning that the supplies were standard rated.

HMRC v Anna Cook [2021] UKUT 0015 (TCC)

Provision of state funded education

Summary – Free education/vocational training funded by government agencies was a supply of services for consideration. However, HMRC were allowed to bring into account input tax previously reclaimed under the Lennartz principle, despite being outside the four-year time limit.

Colchester Institute Corporation is a further education corporation providing further and higher education and vocational training programmes to over 11,000 students.

In 2008, Colchester Institute Corporation started a major building project. At that time, it was agreed that the provision of education and vocational training, when funded by a relevant funding body, was not a “business” activity within the scope of VAT.

Colchester Institute Corporation was granted permission to deduct the VAT incurred on the building project under the rule in *Lennartz*, whereby the input tax could be deducted up front, provided it accounted for deemed output tax on its non-business education and vocational training. By 07/10, total input tax repaid to Colchester Institute Corporation under *Lennartz* was £2,225,806. Thereafter, it continued to account for output tax on deemed supplies.

By 2014, Colchester Institute Corporation had changed its mind and claimed that its provision of education and vocational training to students was, after all, a business activity (making it exempt) and so there was never any need to have accounted for the deemed output VAT under the *Lennartz* principle. In April 2014, it claimed a repayment of the output tax accounted for in the previous four years. However, Colchester Institute Corporation did not net off the input tax claimed under the earlier building project as this was outside the four-year cap imposed by s80 VATA 1994. Colchester Institute Corporation believed that this prevented HMRC from making such a recovery assessment.

HMRC denied the claim stating that the provision of education and vocational training did not amount to the making of supplies for consideration. They maintained that it was a non-business activity and that output tax had been correctly accounted for. Alternatively, if they were wrong, HMRC argued that s81(3A) VATA 1994 allowed it to reduce the overpayment claim to nil by offsetting the input tax initially recovered, despite the four-year capping provisions.

The First Tier Tribunal held that the Colchester Institute Corporation’s provision of education was a non-business activity and dismissed the appeal.

Colchester Institute Corporation appealed to the Upper Tribunal.

Decision

The Upper Tribunal disagreed with the First Tier Tribunal. Despite the fact that the state funding was not specific to any particular course and not every student would necessarily benefit from the funding, there was a link between the funding and the provision of education. There was third party consideration for a supply of education (*Rayon d’Or SARL v Ministre de L’Économie et des Finances* (Case C151/13)). Consequently, Colchester Institute Corporation was making exempt supplies of education and it was entitled to reclaim the output tax previously accounted for.

The Upper Tribunal moved on to consider HMRC’s alternative argument, referring to *Birmingham Hippodrome(2014) EWCA Civ 684*. Here, the Court of Appeal had explained that, when correcting a mistake, s.81(3A) VATA 1994 allowed all of the consequences of a mistake to be taken into account. Here, the *Lennartz* principle had been incorrectly applied as there were no non-business supplies. To correct this, the deemed output tax should be repaid but so too should the input tax from more than four years ago.

Colchester Institute Corporation v HMRC [2020] UKUT 0368 (TCC)

Import/export grant to help SMEs

HMRC has announced a new SME Brexit Support Fund providing up to £2,000 to seek advice and training on:

- how to complete customs declarations;
- how to manage customs processes and use customs software and systems;
- specific import and export related aspects including VAT, excise and rules of origin.

PwC will administer the grants for HMRC and online applications for the grants will open soon.

Qualifying businesses

To be eligible a business must:

- have no more than 500 employees;
- have no more than £100 million turnover;
- have been established in the UK for at least 12 months before submitting the application, or hold Authorised Economic Operator status;
- not have previously failed to meet its tax or customs obligations;
- import or export goods between Great Britain and the EU or moves goods between Great Britain and Northern Ireland.

Further, the business must either:

- complete or intend to complete import or export declarations internally for its goods;
- use someone else to complete declarations but needs extra help internally.

<https://www.gov.uk/guidance/grants-to-help-small-and-medium-sized-businesses-new-to-importing-or-exporting>

Uber drivers are not self-employed

The Supreme Court has ruled that the 35 drivers that took the case back in 2016 were indeed employees of Uber and as such were entitled to employment rights such as minimum wage and holiday pay.

It should be noted that employment law cases do not automatically apply to tax but HMRC may choose to take this further. If the passenger income belongs to Uber rather than an unregistered driver the VAT due is likely to be significant.