

Personal tax update (Lecture P1241 -17.18 minutes)

Domicile and remittance basis

Summary – HMRC could not issue a partial closure notice covering the taxpayer's domicile without a calculation of the tax due as a result of rejecting the taxpayer's remittance basis claim. The taxpayer had to supply details of their overseas income and gains.

For the tax years 2014/15 and 2015/16, Epaminondas Embiricos believed he was non-UK domiciled and claimed the remittance basis in his tax returns.

Having opened enquiries into the claims, HMRC concluded that the taxpayer was in fact UK domiciled and the remittance basis was denied. A claim for the remittance basis does not require the taxpayer to quantify the amount of the claim and so HMRC issued an information notice request to enable them to calculate the amount of tax that was now due.

The taxpayer believed that the details were 'not reasonably required until his domicile status had been confirmed' and so applied for a partial closure notice, allowing him to appeal the domicile decision.

However, HMRC stated that it could not issue a closure notice until it had quantified the amount of tax which would be due on the basis that the remittance basis was denied. To do so, they needed details of the foreign income and gains specified in the information notice issued. The domicile decision could not be separated from the remittance basis tax calculation.

The taxpayer appealed.

HMRC relied on the Court of Appeal's decision in Regina (Archer) v HMRC [2017] EWCA Civ 1962 where a closure notice was held to be valid only if it stated the amended amount of tax for which the taxpayer was liable. The taxpayer argued that this decision was restricted to final closure notices and had no application to partial closure notices.

On appeal, the First Tier Tribunal confirmed that the Archer decision predated the introduction of partial closure notices, that resulted in a 'fundamental change' in the rules so that Archer did not apply to partial closure notices. The First Tier Tribunal disagreed with HMRC, concluding that a partial closure notice denying the taxpayer's claim to benefit from the remittance basis should be issued. The partial closure notice did not need to specify the amount of tax due.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal overturned the First Tier Tribunal's decision which it stated was flawed. The rules relating to partial closure notices had been adapted from the closure notice legislation, and not created separately. The rules were part of the existing closure notice system and so partial closure notices are subject to the same statutory restrictions as closure notices and must contain a calculation of the tax due.

After the First Tier Tribunal's decision, another First Tier case was heard, *The Executors of Mrs R W Levy v HMRC* [2019] UKFTT 418 TC ("Levy"). This case concluded that a partial closure notice cannot be issued without specifying the amount of tax due. Although not binding, it served to support the decision made by the Upper Tribunal.

Note: In its decision, the First Tier Tribunal had concluded that if it was wrong about the partial closure notices, then the information requested would be reasonably required by HMRC, and the appeal against the notices would be dismissed.

HMRC v Epaminondas Embiricos [2020] UKUT 0370 (TCC)

Private use by car dealership director

Summary – Two cars taxed as off road when not used did not prevent the cars being treated as available for private use by the director, and so were taxable as a benefit in kind.

Tim Norton Motor Services Ltd runs a Ford car dealership selling new and second-hand cars, as well as undertaking repair work. The company directors are Tim Norton and his wife who live about 10 miles from the company premises.

The company employs some 20 people and typically has around 50 new and second-hand cars on its site at any one time. In 2001 the company bought a rare Maserati and in 2005, a Ford GT40. The keys for both cars were kept in a locked box, in a locked safe in the office. Only Tim Norton had access to the box and he was the only person insured to drive the cars.

The two cars were:

- used to attract business at trade shows and race events, including one in Le Mans;
- taxed as off road except when taken out to an event;
- occasionally used for private journeys and declared on P11Ds when relevant.

However, following a 2016 PAYE audit, HMRC concluded that these cars had been made available to Tim Norton for periods longer than had been declared on his P11Ds. Consequently, HMRC issued NIC determinations for the years 2010 to 2017, income tax assessments for the years 2012/13 to 2014/15 and 2016/17, and a closure notice for 2015/16.

Tim Norton Motor Services Ltd and Timothy Norton appealed HMRC's decisions. The company argued that there was no additional private use issue as the cars were taxed as off road when not used and an SORN was submitted when needed.

Decision

When a car is made available for private use to an employee, even if they do not actually use the car, a benefit arises. The issue in this case was whether the company had taken sufficient steps to prevent the cars from being available.

The First Tier Tribunal concluded that the restriction arising from the SORN was not a real restriction on private use, as Tim Norton could easily remove the SORN restriction and be able to drive the car. This was not enough to convince them that the car had not been available for private use.

Consequently, the Tribunal found that in any year where the cars had actually been used for private journeys, they had effectively been made available to Tim Norton for the entire year. In fact, they went further, concluding that the cars were available for private use for more years than had been declared on P11Ds. However, the Tribunal accepted that the evidence showed the Ford GT40 was used for business only in the years 2011/12 to 2012/13.

The appeals were largely dismissed.

Tim Norton Motor Services Ltd and Timothy Norton v HMRC (TC07973)

No transfer of assets abroad

Summary – The sale of UK shares to an offshore company owned by an offshore trust followed by dividend payments by the UK company did not fall foul of the transfer of assets abroad rules.

Andreas Rialas was UK resident and ordinarily resident, but not UK domiciled. Together with Mr Cressman, they each owned 50% of the shares in Argo, a UK incorporated company.

Around December 2004, the relationship between the shareholders deteriorated, and Andreas Rialas found a buyer for the company but only if Mr Cressman was not involved with Argo. To facilitate the sale Andreas Rialas formed a new company, Farkland that was incorporated in the British Virgin Islands, and whose shares were owned by an offshore discretionary trust in Cyprus, with assets held for the benefit of Andreas Rialas' family.

Mr Cressman agreed to sell his 50% interest in Argo at market value to Farkland, with the purchase funded by a third-party loan. Following this, Argo declared and paid interim dividends of £2,153,873 in 2005 and £3,318,460 in 2006 with half of the dividends being paid to Farkland in respect of the 50% shares that the company now owned. The other 50% was paid to Andreas Rialas, who continued to own the other 50% of the Argo shares.

Farkland later sold their shares in Argo to a third-party company.

HMRC assessed Andreas Rialas to tax on his own dividends as well as the dividends received by the trust arguing that, under the transfer of assets abroad regime, he had the power to enjoy the income and had procured the transfer of assets abroad.

The First Tier Tribunal disagreed with HMRC. Although he had arranged the sale of Argo to a subsequent third party, Andreas Rialas had no power to force Mr Cressman to sell his Argo shares to the Farkland.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal agreed with the First Tier Tribunal. Andrea Rialas had had no control over whether Mr Cressman agreed to sell the shares. He should not be treated as if he had carried out the share transfer and so the transfer of assets abroad rules did not apply.

HMRC had put forward an alternative argument that the £10 transferred by Andreas Rialas to set up the discretionary trust in Cyprus was a transfer of assets abroad and that all subsequent transactions were associated operations. Rejected by the First Tier, this argument was also rejected by the Upper Tribunal. The dividend payment was not made 'by virtue or in consequence of' the transfer of the £10. The dividend payment was only guaranteed once the business partner sold his shares.

The appeal was dismissed.

HMRC v Andreas Rialas [2020] UKUT 0367 (TCC)

Employment lacking for entrepreneurs' relief

Summary – Entrepreneurs' relief was denied as the taxpayer was not an employee for the required 12 months before selling his shares.

Bglobal Metering Limited operated a smart metering business for commercial businesses, local authorities and other public bodies.

In March 2007, Bglobal plc was set up as a vehicle through which Bglobal Metering Limited would be listed on the Alternative Investment Market. The listing sought to provide capital to roll out the company's smart metering technology across residential markets.

Peter Kennedy held close to 24% of the company's shares and was a director of the company. There was an unsigned service agreement between Peter Kennedy and Bglobal dated 22 March 2007 under which he was employed. His salary was £150,000 pa which included director's fees.

However, from May 2009, Peter Kennedy started to provide consultancy services to Bglobal through his personal service company, PBK Consulting Limited. From this time, he received a salary from the consulting company as well as director's fees paid by Bglobal.

On 15 August 2013 following a disagreement, Peter Kennedy ceased to be a director of Bglobal and his 2013/14 tax return stated that his employment ceased on that date. His consultancy work stopped at the same time.

In September 2014, following the sale of two business units, Bglobal was de-listed from AIM. The company made a capital distribution to shareholders from which Peter Kennedy realised a gain of £2.5 million. The company entered members' voluntary liquidation and on 16 September 2015, Peter Kennedy crystallised a further gain of nearly £450,000 on the final distribution to members. In his 2014/15 and 2015/16 tax returns, Peter Kennedy claimed entrepreneurs' relief against both gains.

HMRC opened enquiries into both years and, in July 2018, issued closure notices denying the entrepreneurs' relief. HMRC argued that Peter Kennedy was not an officer or employee of Bglobal plc throughout the period of one year ending with the date of each disposal.

Although his role as director had ceased in 2013, Peter Kennedy argued that he had continued to be an employee, as his written service agreement was never properly terminated.

Decision

The First Tier Tribunal agreed that Peter Kennedy had been carrying out duties as director between May 2009 and August 2013 but ceased from that date.

Although Peter Kennedy had a written service agreement from April 2007, the Tribunal concluded that this ceased when he started working through his personal service company. From this time, he received director's fees of £6,000 a year but his consultancy fees were paid to PBK Consulting.

As his directorship terminated more than 12 months prior to sale, there was no further employment relationship, and he was not eligible to claim entrepreneurs' relief.

The appeal was dismissed.

Peter Kennedy v HMRC (TC07987)

Failure to take corrective action

Summary – Penalties for failure to take corrective action required by follower notices were upheld but the amounts payable were reduced from 42% to 24% of the tax advantage denied under the notices.

In an attempt to mitigate his income tax and NICs payable, Michael Bentley entered into a scheme marketed as 'IR35 arrangement', that was promoted by Montpelier tax advisers.

Following enquires by HMRC, closure notices were issued in 2009 and 2011 for each of the three years in question, increasing both income tax and NICs: by the following amounts:

- 2005-2006: £30,010.49 (from £3,308.87 to £33,319.36);
- 2006-2007: £32,146.52 (from £2,287.99 to £34,434.51);
- 2007-2008: £25,031.96 (from £2,409.17 to £27,441.13).

Montpelier appealed these notices on behalf of Michael Bentley. The appeals were put on hold pending the outcome of the appeal in Robert Huitson v HMRC [2015] UKFTT 488. Following this decision where the scheme failed, HMRC issued accelerated payment and follower notices to Michael Bentley in respect of all three years. The follower notices required him to take the necessary corrective action by a specified date in 2017 but Michael Bentley did not take such action until April 2019.

For the three years in question, HMRC issued penalty notices totalling just over £43,000 for failure to take corrective action. The penalties were calculated as 50% of the denied tax advantage which is, broadly, the Income Tax and NICs purportedly 'saved' by the Scheme.

Michael Bentley appealed these penalties arguing that he did not understand what corrective action was required and was confused by the notices.

Decision

The First Tier Tribunal did not accept that it was reasonable for Michael Bentley to take no corrective action because, as non-tax expert, the notices confused him. If he was capable of investigating a potential scheme to mitigate his taxes, he was capable of reading the letters that he had received with the follower notices. The Tribunal stated that:

“Given the significant financial consequences of having to pay penalties of up to 50% of the tax saved, the reasonable taxpayer in Mr Bentley’s position would have investigated further (and a great deal of information is available online)”.

The Tribunal found that the letters that accompanied the follower notices were clear, confirming the taxes they covered, the action that was needed by the recipient as well as what would happen if he failed to take the appropriate action. It was unreasonable for him not to have taken corrective action by the due date and in principle, the penalties were upheld.

The First Tier Tribunal went on to consider whether the amount of the penalties was excessive. The penalties were calculated as 50% of the denied tax advantage which as the Tribunal stated is “basically the Income Tax and NICs purportedly ‘saved’ by the Scheme.”

The case summary in Tax Journal (29 January 2021) neatly sums up the First Tier Tribunal approach:

“Having upheld the penalties in principle, the FTT went on to consider their amount. The maximum penalty was 50% of the denied advantage and this could be reduced for cooperation, but not below a minimum of 10%. The FTT followed the approach in an unpublished case, *Barlow v HMRC*, defining two categories of cooperation; quantifying the advantage and counteracting it. A maximum reduction of 20% of the denied advantage was then to be applied to each category depending on the timing, nature and extent of the cooperation.

However, the judge departed from that decision in holding that the need for the penalty regime to apply proportionately required consideration not only of what a taxpayer did or failed to do, but also of why they did or did not do it. Applying these considerations to the appellant's circumstances the judge reduced the penalties to 24%.”

The taxpayer's appeal was dismissed.

Michael Bentley v HMRC (TC07989)

Legitimate interest in penalties procedure

Summary – A barrister was allowed access to an email contained in the bundle of documents presented in evidence by HMRC in an earlier case.

Keith Gordon, a barrister, applied to the First Tier Tribunal for a copy of an e-mail referred to in the Tribunal’s decision in the case *Fastklean Limited v HMRC (TC07773)*. In the decision it was recorded that the email referred to HMRC’s current internal procedure for issuing penalties.

Keith Gordon was not a party to the appeal nor did he represent any party. He sought the document requested as a barrister practising frequently in the Tribunal with a particular interest in the operation of the Taxes Management Act. The Tribunal stated that legitimate interest did not require a 'direct personal or professional interest in the outcome of proceedings and that an interest in other related litigation, whether actual or in contemplation, is sufficient'.

Neither the Appellant in the case nor HMRC had any representations to make on the issue and, having considered the Tribunal’s power to allow access to the document they decided that he had a legitimate interest in seeing the email. and allowed access to the document.

Fastklean Ltd, HMRC and K Gordon (TC07981)

