

Business tax round up (Lecture B1301 – 16.48 minutes)

Adrian Chiles - IR35 did not apply

Summary – Although mutuality of obligation and control existed, Adrian Chiles was found to be operating his own hypothetical business that included working under contracts for both ITV and BBC. The IR35 rules did not apply.

In 1996, the BBC required Adrian Chiles to cease employment with them but to continue providing his services through his personal service company, Basic Broadcasting Ltd. This case concerns the tax years 2012/13 to 2016/17 during which time Basic Broadcasting Ltd provided Adrian Chiles's services for contracts with both the BBC and ITV as well as some other parties.

HMRC argued that during this time the intermediaries legislation applied to both the BBC and ITV contracts and issued determinations for income tax and national insurance contributions of £1,249,433 and £460,739 respectively. The determinations were made on the basis that hypothetical contracts between the BBC/ ITV and Adrian Chiles would have been contracts of service (employment) rather than contracts for services (self-employment).

Basic Broadcasting Limited argued that Adrian Chiles was a self-employed contractor, with no further liability on the part of his personal service company. In November 2021, Basic Broadcasting Limited made an application for disclosure of material in relation to IR35 decisions concerning television and radio presenters currently on appeal to the Upper Tribunal and the Court of Appeal. However, the First Tier Tribunal refused both of these applications.

Decision

The Tribunal stated that it was common ground that there was mutuality of obligation in relation to the BBC Contracts and found that mutuality of obligation also applied to the ITV contracts. Although there was no obligation on ITV to offer work, it was anticipated that ITV would offer work and that payment would be made for the work. ITV did call on Adrian Chiles to provide his services throughout the ITV contracts.

The Tribunal moved on to consider whether each of the contracts involved a sufficient framework of control to constitute contracts of employment by considering who controlled what, where, when and how his work was to be done. The Tribunal stated that in their view editorial control of the programme, including adherence to Ofcom rules and the BBC Standards and Editorial Guidelines, the form and content of the programme, the requirement to interview a particular guest or to require the presenter to move to a commercial break, was a relevant and important element of control. On balance, the Tribunal concluded that under both the ITV and BBC hypothetical contracts there was a sufficient framework of control to constitute Adrian Chiles being treated as an employee. Despite this conclusion, the Tribunal did not consider that the extent of either ITV or the BBC's control was in either case a compelling factor.

The First Tier Tribunal considered whether there were other provisions of the contracts or other factors which resulted in the hypothetical contracts being contracts for services. In the Tribunal's view the most significant other factor to consider was whether Adrian Chiles would have been in business on his own account, with the hypothetical contracts being seen as part of that business.

Adrian Chiles had contracted with nearly 100 different third parties and had undertaken a significant amount of other work in relation to projects which had not 'borne fruit'. He had also turned down a significant number of appearances on television. Further he had appointed both a managing agent to promote and further his career and reputation in the entertainment industry and a personal assistant to manage day-to-day affairs at significant cost to him. The Tribunal concluded that it was clear that Adrian Chiles, through his personal service company, was building a business and his agent was helping him to build that business.

But were the hypothetical contracts separate contracts of employment with ITV and BBC, or were they part of this business? The Tribunal noted that the contracts involved Adrian Chiles working for the competing broadcasters at the same time as a TV presenter for ITV and a radio presenter for the BBC. Considerable research and preparation for both was undertaken when and where he chose. He provided some of the tools and resources required for the better performance of his duties. All of these were matters pointing towards both the ITV and BBC contracts being part of his business.

Although the contracts prohibited a substitute presenter, the Tribunal considered that this reflected the nature of the industry in which he worked. He was not in the business of supplying presenters, but rather supplying his own services as a presenter.

The income generated from his work with both ITV and the BBC was significant, but the Tribunal acknowledged that it is not uncommon for a business to have individual clients contributing a large proportion of turnover. The services provided for both ITV and BBC 'fell fairly and squarely within the scope of his existing business activities'.

Looking at the big picture, the Tribunal concluded that the hypothetical contracts formed 'part and parcel' of his own business and that IR35 did not apply.

The appeal was allowed.

Basic Broadcasting Limited v HMRC (TC08400)

Compensation and Consumer Redress

Summary – Compensation and Consumer Redress payments were not incurred wholly and exclusively for the purposes of the trade and Redress payments did not qualify as charitable donations.

The companies were licensed non-domestic energy suppliers, one supplying electricity and the other supplying gas. Between them they had some 40,000 customers, most of which were small businesses.

Following an investigation by the Gas and Electricity Markets Authority, the companies admitted seven regulatory breaches and a Settlement Agreement was signed. This required the companies to pay compensation to affected customers (Compensation Arrangements) and make a charitable donation to the Money Advice Trust (Consumer Redress).

The companies reduced their profits chargeable to corporation tax by the total value of the payments relating to the Compensation Arrangements and the Consumer Redress.

HMRC argued that the settlement agreed was a penalty, as the Settlement Agreement was entered into to avoid higher penalties being levied by Ofgem. A total of £980,000 between the two companies should not be deductible. They did, however, allow deductions for the payments in

excess of that, and also in the following year since they were not included in the Settlement Agreement.

The companies appealed, arguing that the payments were incurred wholly and exclusively for the purposes of their trades, making them deductible from their trading profits. If this was not the case, the Consumer Redress payments qualified for relief as charitable donations.

Decision

All parties agreed that the leading authority on the scope of entitlement to deduct expenses relating to disciplinary or regulatory proceedings was the House of Lords judgment given by Lord Hoffman in *McKnight v Sheppard*. In this case it was decided that penalties were not incurred to enable the company to generate profits but rather “they were unfortunate incidents which followed after the profits had been earned”, making them non-deductible.

In this case, the reason for the Settlement Agreement payments was that Ofgem required this as an alternative to levying a more substantial penalty. As a result, applying the principle in *McKnight* the payments were not deductible as they were made in order to punish the companies. It did not matter that the package of payments was a penalty to be paid to third parties rather than HMRC. To be incurred wholly and exclusively for the purposes of the trade payments must be made for the purpose of earning profits. In this case payments were made to reduce the total potential financial burden and to settle the enquiry. Referring to *McLaren Racing Ltd v HMRC*, it was stated that:

“A deliberate activity which is contrary to ... the rules and regulations governing the conduct of the trade, which is not an unavoidable consequence of carrying on a trade and which could lead to the destruction of the trade is not an activity carried on in the course of that trade ...”.

The Tribunal found that the companies had made a deliberate decision not to invest in their complaints handling processes and it was this that caused the breaches that were made, resulting in the penalties being imposed. Consequently, the Tribunal held that the payments were not incurred wholly and exclusively for the purposes of the taxpayers' trade.

Finally, could the Consumer Redress payments be treated as charitable donations? “Qualifying charitable donations” are defined by s.190(1)(a) CTA 2010 as “payments which are qualifying payments for the purposes of Chapter 2”. They can only qualify if Conditions A to F set out in S.191 CTA 2010 are met. In this case, HMRC agreed that Conditions A-E were met but challenged Condition F (that the payment is not disqualified under S.195 (associated benefits received by the company)). Agreeing with HMRC, the Tribunal found that agreeing to make the Consumer Redress payments gave the companies the right to pay a lower sum overall which was a valuable benefit. The Tribunal found that the Settlement Agreement made it clear that if the sums were not paid, the penalty would be higher. With the Consumer Redress providing for a 'lesser outlay', the payments did not qualify for charitable donations relief.

The companies' appeal was dismissed.

BES Commercial Electricity Ltd and Business Energy Solutions Ltd v HMRC (TC08340)

Farming loss relief denied

Summary - The farming taxpayer was not entitled to sideways relief for any of the five years of claimed losses as the reasonable expectation of profit test was not met.

In 1995 Mr Naghshineh bought a working farm together with 75 acres of agricultural land. Realising that he could obtain premium prices for organic farm produce compared to conventional produce, he decided to convert the farm to organic production. To make the farm economically viable he acquired a further land in the years that followed so that in total he was managing 438 acres. Further, he decided to work towards ways of direct selling to the public, which he thought would enable him to achieve significantly higher prices than conventional routes.

He was a businessman and had no experience of running a farm, he never lived in the farmhouse and, in 2007, he employed a general manager but had to make him redundant in 2010.

He operated on an organic basis until 2009/10, but for a number of reasons decided to revert to farming on a conventional basis. Over the years he carried on various different agricultural and non-agricultural activities on the farm, with activities often changing from year to year but broadly falling into three categories:

1. arable, comprising crop, vegetable, and fruit production;
2. livestock, comprising the rearing of cattle and sheep;
3. egg production.

Additional business ventures included a direct delivery box scheme, a farm shop, renting out of property on his land, a micro-brewery and a mustard business.

At all material times Mr Naghshineh intended that the farm should operate on a commercial basis and should realise profits. However, he made losses from 1994/95 until 2011/12, finally becoming profitable from 2012/13, 18 tax years from when he started.

Mr Naghshineh claimed sideways loss relief for the five-year period to 2011/2012 but HMRC denied the relief on the grounds that there was no expectation of profit before 2010. (s.67 ITA 2007: sideways loss relief is denied where losses have arisen for each of the previous five tax years unless the taxpayer can meet the reasonable expectation of profits test in s 68).

The First Tier Tribunal allowed the appeal but this was overturned by the Upper Tribunal. The case moved to the Court of Appeal.

Decision

The Court of Appeal agreed with the Upper Tribunal and effectively confirmed that s.68(3) ITA 2007 allowed the five-year rule to be extended where farming activities were expected reasonably to be profitable. In looking at this time frame, s.68(3)(b) did not state that it was appropriate to consider the competence of the farmer (as the First Tier Tribunal had done). The legislation stated that in considering the extension, the farmer was a competent person.

Based on the expert's evidence presented in this case, there was a reasonable expectation that a competent person would make a profit from the activities undertaken well before it actually did.

With the business not run on a commercial basis, sideways loss relief was not available and the appeal was dismissed.

Church of England spiritual retreat

Summary - The provision of spiritual retreats supervised by the Church of England were not exempt welfare services organised by a state-regulated body.

Reverend Jane Taylor is an active priest in the Church of England, who conducts services in the Exeter diocese, but her primary work was as director of the retreat centre, Mill House Retreats.

She is a “self-supporting minister”, which means that she is not in receipt of a stipend from the Church of England. Although she is self-supporting, she remains subject to the same quality of training and supervision as a paid member of the Church of England clergy.

Through the Church of England, she received training in spiritual direction and provided spiritual welfare through activities at Mill House Retreat

She claimed that Mill House Retreat was state-regulated by the Church of England and that the activities provided were VAT exempt as welfare services organised by a state-regulated body under Item 9 Group 7 (Health and Welfare), Schedule 9 VATA1994

HMRC disagreed stating that the activities were standard rated.

Reverend Jane Taylor appealed.

Decision

Note (6) to Group 7 provides that 'welfare services' includes the provision of spiritual welfare as part of a course of instruction or retreat. There was no dispute that the provision of spiritual welfare provided in this case was of the kind described in Note (6) to Group 7.

The main issue was whether the retreats were state regulated.

To qualify as state-regulated, the services must be linked or controlled by a government minister or act of parliament. Supervision by the Bishop of Exeter, minister for the Church of England, was not supervision by a government minister.

The Tribunal agreed that Mill Hill Retreat was regulated by the state but found that it was not 'state-regulated'.

The appeal was dismissed.

In its conclusion, the First Tier Tribunal took the unusual step of suggesting that the retreat might be registered as a charity within the Church of England. The Tribunal acknowledged that this could be difficult as the retreat was also her home but suggested that “she might benefit from specialist legal advice as to whether it might be possible to reorganise her affairs in a way that would make registration feasible.”

Reverend Jane Taylor Trading as Mill House Retreats v HMRC (TC08315/V)

Share sale professional fees

Summary – VAT suffered on professional fees incurred disposing of shares in a subsidiary was recoverable. The share proceeds were used to fund the development of a new hotel, making them directly and immediately linked to the parent company's future trading activities.

Hotel La Tour Ltd was the 100% holding company of Hotel La Tour Birmingham Ltd to whom it provided management services. The companies were in a VAT group.

In 2015, the parent company decided to develop a new hotel in Milton Keynes that would cost approximately £34,500,000. Having considered a number of financing options, the parent decided to sell Hotel La Tour Birmingham Ltd, whose business had plateaued and could grow no further. The shortfall would be borrowed from a bank.

The sale went ahead in 2017, with the parent company incurring professional fees of £383,000. The company sought to reclaim £77,000 VAT but this was disallowed by HMRC on the basis that the sale of shares was an exempt supply.

Hotel La Tour Ltd appealed to the First Tier Tribunal on the grounds that the professional fees were incurred as part of the sales process used to raise funds for the new Milton Keynes development. Consequently, there was a direct and immediate link between the sale and the intention to make taxable supplies from the new hotel development.

Decision

The First Tier Tribunal confirmed that a sale share is an exempt supply.

However, following the Supreme Court decision in HMRC v Frank A Smart & Son Ltd [2019] UKSC 39 and the CJEU decision in Skatteverket v AB SKF (Case C-29/08), the VAT incurred when selling the shares could be recovered provided that the purpose of the sale was to generate money to fund general overheads or specific taxable activities of the business making the sale. The Tribunal found that the shares were sold to fund the new hotel's taxable activity and the costs incurred when selling the shares were paid for out of the proceeds. Hence these costs reduced the amount available for the new taxable hotel activity and so were a cost of that activity. With a direct and immediate link between the share sale and the Milton Keynes hotel development activity, VAT on the professional fees was reclaimable.

There was a late argument submitted that the parent's management services to the Birmingham subsidiary should be disregarded, as they were in a VAT group. This meant that there was no economic activity and so the sale of shares was outside the scope of VAT rather than exempt. The first time that this argument was raised was in further written submissions after the hearing. The First Tier Tribunal found that there was no good reason for the failure to apply to introduce this argument earlier and the late submission was refused. However, the Tribunal then stated that even if they had allowed the late argument, it would have been dismissed as a VAT grouping does not mean that transactions are ignored, but rather are simply allocated to the representative member.

The First Tier Tribunal also dismissed the claim that the share sale should be treated as a transfer as a going concern as there was no transfer of the parent's management of its Birmingham subsidiary and the subsidiary held all of their relevant assets. Ultimately, the First Tier Tribunal allowed the appeal on the basis of a direct and immediate link between the sale of the shares and the new Milton Keynes taxable activities.

Reclaiming VAT when not invoiced

Summary – The taxpayer was not entitled to reclaim VAT on a standard rated supply, treated as exempt at the time of supply, as no additional VAT was actually charged by the supplier.

You may remember, this is a test case in respect of supplies of services by Royal Mail that were wrongly treated as exempt.

Zipvit Ltd supplies vitamins and minerals by mail order. Between 1 January 2006 and 31 March 2010, Royal Mail supplied postal services to Zipvit Ltd under contracts which all parties, including HMRC, believed were exempt under Group 3 Schedule 9 VATA 1994. However, following the CJEU decision in *R (oao TNT Post UK Ltd) v HMRC* (Case C357/07), it was confirmed that postal services for which the price is individually negotiated is a standard rated supply. Group 3 Schedule 9 VATA 1994 was subsequently revised in 2011.

Royal Mail did not attempt to recover the VAT from Zipvit Ltd and other customers and HMRC did not issue claims against Royal Mail for the VAT, as it considered that Royal Mail had grounds for a defence based on legitimate expectation.

Zipvit Ltd took the view that previous payments made to Royal Mail should be regarded retrospectively as including VAT and submitted two applications for deduction of input VAT relating to the supplies for a total £415,746, together with interest.

HMRC dismissed both applications arguing that the supplies had not been subject to VAT and that Zipvit Ltd had not paid any tax.

The issue progressed through up to the Supreme Court, who referred the matter to CJEU.

Decision

The CJEU decided that under Article 168(a) of the Principal VAT Directive, VAT could not be regarded as being due or paid when:

- the customer and supplier have mistakenly assumed supplies were exempt due to an incorrect interpretation of EU law by the national authorities;
- consequently, the invoices issued did not refer to VAT;
- the contract between the customer and supplier stated that if VAT were due, the customer should bear the cost of it; and
- no steps to recover the VAT were taken in good time, so that any action to recover the unpaid VAT was time barred.

VAT was irrecoverable as none of it was regarded as due or paid on the Royal Mail supplies.

Zipvit Ltd v HMRC Case C-156/20