

## **Business tax (Lecture B1361 – 19.06 minutes)**

### **Former rugby union player wins IR35 case**

*Summary – A former rugby union player provided commentary services to Sky TV in business on his own account. Tax had been correctly paid through his personal service company.*

A former rugby union player, Stuart Barnes became a freelance writer, TV presenter and commentator, as well as a newspaper columnist. His services were provided through his personal service company, S & L Barnes Limited to a range of organisations including the Times and the Sunday Times newspaper, Rugby World Magazine and other broadcasters such as Ireland's TV3 and Fox Sports.

This case concerned Stuart Barnes' work for British Sky Broadcasting Limited (now Sky TV Limited) covering the period from 6 April 2013 to 5 April 2019. HMRC issued PAYE and NICs determinations totalling some £695,000 covering this period, arguing that Stuart Barnes was effectively a Sky TV employee during this time.

The parties agreed a four-year initial term, followed by a second two-year contract. In exchange for up to 228 days of work in total, an annual fee was agreed at £235,000, paid monthly in arrears. This increased annually by £10,000 for the next three years. During this time, around 60% of the company's income was received from Sky, dropping substantially to closer to 30% in 2019/20.

During this time, S & L Barnes Limited agreed to provide Stuart Barnes services, to include preparatory work and rehearsals, commentary as well as analysis programmes and interviews. Typically, the production team would draw up a schedule of sports events at the beginning of, and on an ongoing basis during, the season and schedule from a roster of commentators in advance. Where Stuart Barnes was unable to provide services himself, any substitute was always subject to Sky's approval. More typically, if he was unavailable, Sky would choose another pundit to take his place.

While Stuart Barnes would carry out his own research and write his own script, he was required to adhere to Ofcom Guidelines and was expected to work under the direction of Sky's production manager, with Sky having full editorial control over programmes.

Sky provided all necessary studio equipment and made the necessary travel and accommodation bookings, reimbursing reasonable expenses claimed by Stuart Barnes.

Stuart Barnes assigned all intellectual property and copyrights to Sky, giving Sky exclusive rights to commercially exploit the work he did for them. Stuart Barnes agreed not to exploit his image rights, or to undertake other broadcasting or media assignments that breached the 'non-compete' clause within his agreement.

### *Decision*

As with other personal service company cases, the First Tribunal considered the hypothetical contract that existed between Stuart Barnes and Sky, applying the three-stage test from the Ready Mixed Concrete case.

Mutuality of obligation: Sky was required to pay Stuart Barnes a fixed monthly fee over the contracted period and in return he was obliged to provide his services. S & L Barnes Limited accepted that this test was met.

Control: The core services being provided was live commentary. Sky had control over the date, location and timing of this work. While Stuart Barnes decided the content of his commentary, this was within the wider controls of Ofcom rules, Sky's Editorial guidelines, and the directions of the executing producer for the Sky Sports programmes. Further, the contracts included warranties, non-solicitation and non-disclosure clauses assigning rights to Sky, ensuring that Sky would retain the absolute control over the exploitation of the output from the games broadcast. This was met.

Finally, the First Tier Tribunal considered 'Other provisions and factors'.

Typically, the days worked in each year were less than half of the maximum stated in his contracts. As a result, the Tribunal viewed the money paid as a 'block fee' for the exclusive right to have first call of Stuart Barnes' services. This was not a salary.

Stuart Barnes worked for many organisations, with only 60% of income coming from Sky. He was not financially dependent on Sky and as the Tribunal stated his income from the Times/Sunday Times "was by no means modest." Further, at the end of his second contract in 2019, he refused to enter into a new contract with Sky.

Although the contract stated that Sky had first call on his time, there was a long-standing understanding between the parties that Stuart Barnes would be unavailable to commentate during the Six Nations season, and the World Cup, key events in the rugby calendar, not broadcast by Sky. However, during this time, he could be asked for pre-match interviews by Sky Sports News, not something that would be asked of an employee.

The Tribunal found that, as a world-renowned expert on rugby, Stuart Barnes reputation was personal to him. He was not dependent on Sky. Without Sky's exclusive right for his services, he would have found other media-related work.

Stuart Barnes was able to publish his views for other media organisations, with Sky-related analysis often replicated in his Sunday Times columns. Sky's ownership of intellectual rights did not prevent this happening.

The Tribunal found that he was in business on his own account.

The appeal was allowed.

*S & L Barnes Limited v HMRC (TC08697)*

## **Creditors Voluntary Liquidation and PLNs**

*Summary – Inaccuracies in the company's records were a result of deliberate actions by the sole director and shareholder of a company and led to inaccurate VAT and corporation returns being submitted. With the company in liquidation, personal liability notices were valid.*

Colm Malone had traded as a sole trader, and then a partnership that had been required to provide security due to unpaid VAT of £20,818 and surcharges. Subsequently, he set up another partnership with his son which became insolvent in May 2014, owing £75,718 in unpaid VAT and an additional

£11,369 in surcharges. At this time, the business was continued from the same premises as a newly formed company, Maloney's Diner Limited, with Colm Malone as the sole director and shareholder.

In 2018, as part of a compliance check, HMRC officers visited the premises twice, concluding that takings did not match those declared for tax purposes.

Later, the company was issued with estimated corporation tax and VAT assessments for undeclared income and penalties.

With the business likely to become insolvent, HMRC issued Colm Malone with two personal liability notices for VAT and corporation tax inaccuracies. Shortly after, the company was placed in Creditors Voluntary Liquidation.

Colm Malone appealed, arguing that the notices were invalid, as the inaccuracies were not deliberate.

### *Decision*

The First Tier Tribunal noted that there was no appeal against the assessments and penalties by either the company or its liquidator.

The Tribunal agreed with HMRC that:

- there was a deliberate act by the company to conceal records leading to inaccurate VAT and corporation tax returns;
- the returns were provided in the knowledge that they were not accurate and with the intention that HMRC should rely on them;
- the inaccuracies were attributable to Colm Malone, as the sole director and shareholder.

With the deliberate inaccuracies attributable to Colm Malone, the personal liability notices were upheld.

*Colm Brendan Malone v HMRC (TC08720)*

### **Organix and Nakd bar products**

*Summary – The First Tier Tribunal had erred in law in deciding that whole food bars were confectionery, making them standard rated. The case has been referred back to the First Tier Tribunal to be reconsidered by a differently constituted panel.*

In 2017/18, WM Morrison Supermarkets Plc sought to reclaim output tax of just over £1.1 million on the grounds that 'Nakd' raw fruit and nut bars as well as Organix bars for children had been wrongly treated as standard rated confectionery. The supermarket believed that they were zero-rated (Item 2 of Group 1 of Schedule 8 of VATA 1994).

HMRC refused the claim and WM Morrison Supermarkets Plc appealed. The First Tier Tribunal found in HMRC's favour. The bars did not look like cakes, were marketed as snacks rather than cakes and would have looked out of place on a plate of cakes.

The case moved to the Upper Tribunal.

## *Decision*

The Upper Tribunal found that the First Tier Tribunal had erred in law by:

- finding that the healthiness of the product, and its marketing as such, was irrelevant to their decision as to whether the products were confectionery;
- failing to consider the absence of traditional confectionery ingredients used in the bars such as cane sugar, butter and flour.

The Upper Tribunal concluded that had these two things been taken into account, the First Tier Tribunal might have reached a different decision. Without the full facts in front of them, the Upper Tribunal remitted the case back to the First Tier Tribunal to reconsider the case on the following basis:

- The case should be heard by a newly constituted tribunal to be selected by the First Tier Tribunal President, who may have access to the recording and transcript of the original hearing;
- Additional findings of fact must be made on the basis of the evidence before the original First Tier Tribunal and, if relevant, the new Tribunal's own taste test of the product samples.

*WM Morrison Supermarkets Plc v HMRC [2023] UKUT 00020 (TCC)*

Neil Warren, independent VAT consultant, commented:

"HMRC's view is that if the bars qualified as zero rated, then any VAT rebate paid to Morrisons would be reduced by law (VATA 1994, s 80) to net off any input tax claimed by Morrisons on the purchase of the goods in question, which would then be classed as zero rated. This could reduce the rebate for the 2014 to 2018 period from £1.1m to about £100,000 – on the assumption that supermarkets achieve an average gross profit of 10% on their goods – and Morrisons would have difficulty getting a VAT credit from their suppliers because the purchase invoices will be more than four years old, which is outside the error correction period. HMRC asked the Upper Tribunal judges to consider this issue, which they refused to do because it is currently hypothetical."

He also commented:

"As a separate issue, HMRC might also claim that the output tax rebate should be less than £1.1m because of "unjust enrichment" issues. In other words, some of the VAT refund should be repaid to the individual customers who purchased the bars in the first place and not Morrisons."

## **Default surcharge and COVID 19**

*Summary – The impact of COVID-19 on a new business, that had no access to government support, was a reasonable excuse for the company's defaults.*

Bicester Property Interiors Limited was an interior renovation company that fitted kitchens and bathrooms as well as other interior renovation work. The company began trading in August 2019 and was registered for VAT from 25 February 2020.

The company paid the VAT due on its returns late for all periods between July 2020 and October 2021 and submitted the majority of returns late. This resulted in 5% default surcharges becoming payable from April 2021, increasing to 10% and 15% for the next two quarters.

Jake Holdsworth, as company director, appealed. He argued that lack of funds caused by COVID-19 were a 'reasonable excuse' for the late payments and the surcharges should be cancelled.

He provided extracts from email correspondence with its clients setting out instances of the kinds of difficulties that had arisen as a result of the pandemic. These circumstances were clarified during the appeal.

Loss of revenue was one factor but so too was having to wait for revenue “for far longer periods than normal”. Projects would start but poor product availability would delay the project. Further delays arose as a result of the government’s 10-day isolation period when either staff or client contracted COVID-19. Jobs went on for two to three times longer than would have been expected, meaning that the business had to wait two to three times longer to be paid.

Jake Holdsworth admitted that he had consciously chosen to pay staff or suppliers over HMRC. In his view paying HMRC late had far less of a consequence than a staff member missing a mortgage payment or not being able to buy food.

As a new business, the company was not eligible to receive any COVID-19 related government grants; nor were loans or overdrafts available until 2022. Further, he pointed out that HMRC had extended the Self Assessment filing deadline by a month, whereas the longest HMRC had had to wait for his company to make its VAT payments had been 17 days.

Jake Holdsworth claimed that he “had made several attempts to call HMRC during the relevant period but had been placed on hold for very long periods of time before cancelling the calls.” HMRC had their own staffing issues at this time.

### *Decision*

The First Tier Tribunal found the director to be a credible witness who had provided comprehensive examples of how the pandemic had affected his business. Staff and customers isolating, driver shortages and lack of government support for the new company had all contributed to its problems. This was a company “with only around 5 staff, with very limited cash resources and no overdraft or other reserve funding”. The difficulties encountered as a result of the COVID-19 pandemic were particularly bad for such a company, which relied on staff going into homes for extended periods to carry out their work.

Under normal circumstances it is not appropriate for a taxpayer “to take matters into its own hands” and decide to pay staff and suppliers ahead of HMRC. However, the Tribunal found that in this case it was acceptable.

The Tribunal noted that:

- Raising sales invoices before the end of some jobs did not help the company’s cashflow position as VAT then became payable, even though the customer did not need to pay until the work had been completed;
- Using the cash accounting scheme would have benefitted the company as output tax would have been declared on payment by the customer rather the date that the invoice was raised. However, access to the cash accounting scheme is normally not available where a business is

not already up to date with VAT returns or payments. Once the company had begun its first surcharge liability period, it was too late to adopt the cash basis.

However, since COVID-19, the company has kept fully up to date with its VAT obligations. The invoicing system in operation has not caused defaults under normal circumstances.

The Tribunal concluded that, on balance, the company's actions were "objectively reasonable" and the failures were remedied without unreasonable delay. Further, the delays in question of between three and 17 days were not considered to be an excessive length of time. The appeal was allowed.

*Bicester Property Interiors Limited v HMRC (TC08675)*

## **Matchmaking services**

*Summary - A dating matchmaking service was not a supply of consultancy for VAT purposes. This meant the UK VAT would be due even when the services were supplied to customers outside the UK and EU.*

The background to the case arises from the way the place of supply rules apply to certain services. Usually, for services supplied to individuals, the place of supply (and where VAT should be accounted for) is where the supplier is established.

However, under Article 59(c) of the EU Principal VAT Directive (PVD), 'consultancy' services (and similar services including data processing and the provision of information) are not subject to UK VAT if supplied to overseas clients (non-EU for the services under consideration in this appeal, now non-UK applying the rules as they now stand post-Brexit).

The services provided by Gray & Farrar were high-end matchmaking facilities, and it operated three tiers of service levels (club, custom and private commission), with fees ranging from £15,000 to over £100,000 per annum. The unique selling point of Gray & Farrar was that it provided its clients access to an exclusive dating pool, with personalised levels of matchmaking services, rather than relying on the more modern methods of psychometric testing and app-based matches.

Gray & Farrar believed its services fell within the definition of consultancy services for VAT purposes, and thus, applying the legislation referred to above, took the view that its services to individuals outside the EU should be outside the scope of UK VAT.

HMRC disagreed with this. The First Tier Tribunal found in HMRC's favour, before the Upper Tribunal subsequently overturned this decision. The Upper Tribunal found that the First Tier Tribunal had erred in law by failing to correctly identify the predominant element of the single service provided by Gray & Farrar. The service was the provision of introductions, which involved the provision of expert advice and information. The Upper Tribunal found that based on the viewpoint of the typical client, the service should be categorised as consultancy and allowed Gray & Farrar's appeal.

### *Decision*

However, on further appeal, the Court of Appeal has allowed HMRC's appeal and reinstated the First Tier Tribunal decision. Whilst the Court of Appeal agreed with the Upper Tribunal that the predominant element test is the primary test to be applied in characterising a supply for VAT purposes, it held that the single supply in this case was of introductory services and not consultancy services.

In reaching this view, the Court of Appeal compared the services to those 'principally and habitually' provided by consultants, and the Court of Appeal concluded that the matchmaking service was not of a type habitually provided by consultants or consultancy firms. Accordingly, the services supplied to overseas clients did not fall within Article 59(c), PVD and they were within the scope of UK VAT.

*Gray & Farrar International LLP v HMRC [2023] EWCA Civ 121*

## **Raising funds for acquisitions**

*Summary – Input VAT incurred on costs to raise funds to make acquisitions were not recoverable as they were incurred by a company that did not have actual or intended business activities at that time.*

The VAT denied in this case related to the flotation of Gordon Dadds Group Limited on the Alternative Investment Market and the simultaneous raising of £20 million. This was effected using a reverse takeover in which Work Group plc acquired Gordon Dadds Group Limited, with Work Group plc joining the VAT group on the same day.

Work Group plc received and paid for services in relation to the takeover, and sought, via the VAT group representative member to recover the input tax.

HMRC denied the claim on the basis that Work Group plc did not make or intend to make taxable supplies.

Gordon Dadds Group Limited, the representative member, appealed on the bases that:

- the supplies were treated as made to the VAT group representative which was carrying on the taxable economic activities of the group as a whole;
- the cost of the supplies formed part of the overheads of the VAT group representative and were recoverable as such.

## *Decision*

The First Tier Tribunal accepted that:

- Work Group plc had joined the VAT group;
- Work Group plc incurred costs for the purpose of raising funds;
- The funds were to be used to make acquisitions that would benefit from the management services supplied by the representative member of the VAT group.

The Tribunal found the use of the funds did not result in the direct and immediate link between the costs incurred by Work Group plc and the management services supplied by the representative member; or that the costs should be treated as overhead costs for VAT recovery purposes.

The First Tier Tribunal's reasoning was summed up in Tax Journal (3 February 2023):

"The decision in *Heating Plumbing Supplies Ltd v HMRC* [2016] UKFTT 753 (TC) may appear to support the argument for VAT recovery referred to above, but the FTT commented that that decision 'seems partly to rely on the (wrong) proposition that the VAT group itself is the single taxable person, which the Supreme Court in *HMRC v Taylor*

Clark Leisure plc [2018] UKSC 35 said is wrong'. In deciding that the VAT incurred by WG was not recoverable, the FTT distinguished the facts in this case from those in Frank A Smart & Son Ltd v HMRC [2019] UKSC 39 and in Hotel La Tour Ltd v HMRC [2021] UKFTT 451 (TC), where it was found that VAT on the cost of raising funds was recoverable. In each of those cases, it was the entity which had incurred the cost of raising the funds that had used the funds to develop business activities that provide entitlement to VAT recovery."

*Ince Gordon Dadds LLP v HMRC (TC08699)*