

## Personal tax update (Lecture P1361 – 16.29 minutes)

### Gold bullion was earnings

*Summary – Gold bullion paid for by directors was found to be taxable earnings, with no deduction available for the company.*

Wired Orthodontics Limited was a close company that provided dental products and supplies. The company had two directors, Susan Bessant and Ian Hutchinson, who were both participators and employees of the company.

In October 2014, under a scheme devised by Qubic Tax Ltd, the company established The Wired Orthodontics Limited Employee Trust 2014, for the benefit of the company's employees and office holders. The company awarded the two directors £300,000 of gold bullion, which was paid for by its immediate sale by the directors, creating credits on the directors' loan accounts. The directors subsequently extracted this value as cash drawings but with agreements in place under which the directors undertook to pay the £300,000 (plus an RPI uplift) to the Trust (an employee benefits trust) ten years later in 2024.

HMRC referred the arrangements to the GAAR advisory panel who found the arrangements to be 'abnormal and contrived' designed to exploit a loophole in anti-avoidance legislation contained in Part 7A ITEPA 2003 and stated:

“The most likely comparable commercial transaction, without the overlay of contrived or abnormal steps, would be a funding by the Company of the EBT followed by a loan from the trustees of the Trust to the Directors”.

The panel went on to state that this “would give rise to a charge to income tax under Part 7A and the associated PAYE and NICs charge with no reduction being available under section 544Z8. The time of the corporation tax deduction would be linked to the time when the Directors suffer tax on the reward.”

HMRC raised assessments on the basis that:

- the directors were taxable on the £300,000 as earnings, despite their obligation to fund the trust at a later date. They were liable for tax on a benefit as they had not made good the PAYE and NIC that should have been withheld by the company;
- the company was not entitled to a corporation tax deduction as the costs were not incurred wholly and exclusively for the purposes of the company's trade.

The company appealed, effectively maintaining that the gold and/or the cash received by the directors on its sale were not earnings because of the obligation to pay the £300,000 (plus an amount reflecting RPI) to the Trust at a later date.

## *Decision*

The First Tier Tribunal summed up the facts, stating that:

- the directors received £300,000 worth of gold in their names;
- they immediately sold the gold, using the proceeds to pay its purchase invoice;
- settling the invoice gave rise to a debt owed to the directors, reflected in the directors' loan accounts; and
- the directors later extracted cash, clearing the loan account balance.

Further, the Tribunal noted that, once the scheme had been implemented, the Directors received no other reward for their services.

The First Tier Tribunal found that the gold provided to the directors was the provision of money or money's worth and that this was a reward for their services taxable under s.62 ITEPA 2003.

There was no provision within legislation or case law entitling the directors to "a deduction or allowance for the obligation to make payment at a future time to the Trust."

The Tribunal moved on to consider the deductibility of the £300,000 paid for the gold and the £40,500 paid as fees for its purchase. Under normal circumstances the 'earnings' would be deductible expenses. However, by implementing the scheme, the wholly and exclusively test was not met as the expenses had a dual purpose:

- To reward employees;
- To implement a pre-arranged scheme to provide tax-free cash to the directors combined with a corporation tax deduction for the company.

As the Tribunal stated:

"The purpose of the transactions was not simply to reward the employees. That could have been achieved in various, much simpler ways."

The taxpayers' appeal was dismissed.

*Wired Orthodontics Limited, Ian Hutchinson and Susan Bessant v HMRC (TC08679)*

## **Course fees paid**

*Summary – The taxpayer received salary and not an exempt bursary as the course was neither attended on a full-time basis nor did it cover a complete year. Consequently, the claim to recover income tax and NICs paid on his salary were denied.*

Edward Phelan worked as a volunteer counsellor for a charity for some years before taking up a fixed term salaried contract with the charity. Between 30 April 2012 to 22 March 2013, he attended a work-related course on a part-time basis, one day a week with the University of Essex. His continued employment was conditional on him attending and passing this fully funded course. On the days that he was not on the course, he provided one-to-one counselling sessions as a

Psychological Wellbeing Practitioner to patients within GP surgeries. During this time, he paid tax and NICs on the salary that he received from the charity.

In March 2017, he claimed a repayment of these sums on the basis that the course fees were a bursary rather than salary and so were exempt from:

- tax (s.776 ITTOIA 2005);
- NICs (Sch 3, Part VII, para 12 of the National Insurance Contributions Regulations 2001).

Further, he argued that he was not taxable nor subject to NICs because the Course had been a “Widening Access Training Scheme” course, and so fell within a concession entitled “Widening Access Training Scheme: refunds for NHS Trust workers”.

In 2019, HMRC disallowed the income tax claim, stating that it was out of time and refused the NICs claim as the necessary conditions had not been satisfied.

### *Decision*

For the refund claim to be valid, the sums paid must relate to a full-time course lasting a complete academic year and neither of these conditions were satisfied. The First Tier Tribunal did not accept the argument that the four days spent working at the GP surgeries each week were part of the course as these days continued after the course had been finished. The payments to Edward Phelan were not a bursary and so did not fall within the National Insurance exemption.

The First Tier Tribunal agreed with HMRC that the claim was out of time for income tax as he would have needed to make the claim within the four-year time limit. Edward Phelan’s letter dated 12 March 2017 was not a valid in-time claim for a repayment of income tax because:

- he did not quantify the amount of relief he was claiming;
- it did not explicitly state that he was making a claim for “overpayment relief”; and
- he did not provide a signed declaration that the particulars given in the claim were correct and complete to the best of his knowledge and belief.

As the letter of 12 March 2017 was not a valid in-time claim for a repayment, and as the four-year time limit had expired on 5 April 2017, he was out of time to make a claim for the income tax to be repaid. The Tribunal went on to state that even if the claim had been made in time, it would have been rejected for the same reasons as the NIC claim.

Finally, the Tribunal stated that it had no jurisdiction to decide disputes over the WATS concession. Had that jurisdiction existed, the Tribunal would have agreed with HMRC that the taxpayer did not fall within its scope as Edward Phelan was not an NHS employee, but rather he was employed by the charity.

The appeal was dismissed.

*Edward Phelan v HMRC (TC08688)*

## **Voluntary Class 3 NICs non-refundable**

*Summary – Voluntary class 3 contributions were non-refundable as no error or mistake had been made.*

Mrs Garwood was a teacher who was employed between 1975 until 2008, with some gaps when she took time off to bring up her children. Although she retired in 2008, she did briefly return to work in 2015/16.

In 2019, having contacted the DWP's pensions helpline she learned that under the new pension rules she was not entitled to a full state pension. However, if she made voluntary contributions for three years (2016/17, 2017/18 and 2018/19), she would become entitled to the new state pension in full. She was told that the economic return from the voluntary contributions would be recovered after five years, and so was worth making if she expected to survive for five years after reaching state pension age.

At the time:

- Mrs Garwood did not tell the DWP advisor that she was recovering from cancer
- The DWP advisor did not tell Mrs Garwood that voluntary contributions were not refundable.

On 8 March 2019, she transferred £2,236 to HMRC as payment of the voluntary NICs.

In December 2019, Mrs Garwood learned that her cancer had spread, she was terminally ill and sadly, died a month later. This was just nine days after becoming entitled to her state pension.

As executor to her estate, her husband applied for a refund of the voluntary contributions. He stated that his wife was not told that the contributions were non-refundable, or that the voluntary payment deadline for payments for class 3 NICs for 2016/17 was 5 April 2023. He argued that had she waited until nearer the deadline to make the additional contributions, she would likely not have made the payment as by that time she would have known that she was terminally ill.

### *Decision*

The First Tier Tribunal was sympathetic with the taxpayer's position but found that there had been no error or mistake made by the DWP advisor which would give rise to a right to a return of the class 3 NICs paid.

As Mrs Garwood did not tell the advisor of her cancer diagnosis, he would have been unaware of her concerns about her prognosis, and the risk that she might die within five years of reaching state pension age.

It was unfortunate that she had made the payment of the voluntary contributions with the intention of increasing the amount of her state pension but unfortunately only benefitted from that increase for the few days.

The Tribunal concluded that it was a matter of speculation whether Mrs Garwood would have deferred making the voluntary class 3 NICs if she had been made aware that they were non-refundable, and that the payment deadline was in 2023. The Tribunal were aware that one of the reasons that she made the payment in March 2019 was in order to avoid the increase that would occur if payment was made after 5 April 2019.

The appeal was dismissed.

*Stephen Garwood as Executor of Rosemary Garwood v HMRC (TC08710)*

## **Redress payment chargeable?**

*Summary – Redress payments of some £370,000 received for a mis-sold hedging product were refunds that were chargeable to income tax, and not non-taxable damages or payment to prevent further legal action.*

In 2007, David Fox and Ian Barnett borrowed money from Barclays to acquire a property to be used by their company. Encouraged by the bank, the pair entered into an interest rate swap to hedge interest rate movements between exchange and completion of the property.

David Fox and Ian Barnett later fell out with the bank and following an independent review the hedging product was found to have been mis-sold.

In 2014/15, David Fox and Ian Barnett received a redress payment of £443,592.69, after deduction of income tax from the interest element of the redress payment. Both individuals included the interest payments on their tax returns but not the redress payment.

Following an enquiry by HMRC, closure notices were issued on 16 October 2017 charging the full amount received to income tax.

The taxpayers appealed.

Both parties agreed that if the basic redress amount was found to be a payment to refund all the amounts that would not have been paid by the pair had they not entered into the mis-sold swap, then it would be subject to income tax.

### *Decision*

The First Tier Tribunal found that the fact that David Fox and Ian Barnett had started litigation did not change the nature of the redress payment. They chose to enter into the redress arrangement, and as stated in the offer letter, the payment of just over £370,000 was a refund of the amounts paid by the taxpayers for the mis-sold products.

Consequently, the First Tier Tribunal upheld the closure notices, with the full sum being liable to income tax.

The penalties for carelessness were also upheld. As experienced businessman, they should have informed their advisers about the full sums received and not just the interest element.

*I.A. Barnett and D.J. Fox v HMRC (TC08704)*

## **EIS relief - disqualifying arrangements?**

*Summary – EIS relief was denied as, although the risk to capital conditions had been met, disqualifying arrangements were in place, with the production company being involved in the arrangement.*

The company had been incorporated to develop and produce an animation show, “Daisy Boo and Monkey Too”.

In 2014 the company applied for and was granted advance assurance that share issues qualified from SEIS/EIS relief.

The company issued shares between 2015 and 2018, but having requested further information about the company's activities, HMRC refused to issue the compliance certificates for the shares, stating that:

- the company did not meet the risk to capital condition; and
- there were disqualifying arrangements.

Following an unsuccessful review, the company appealed to the First Tier Tribunal.

### *Decision*

The First Tier Tribunal found that the company did meet the risk to capital condition as it could show that it intended to grow and develop its trade.

The original application for HMRC clearance included the statement that

“If Daisy Boo & Monkey Too” is successful, it is anticipated that the Company will distribute the show's broadcast rights both domestically and internationally and licence the show's content to toy manufacturers, children's clothes producers and app and video game developers as well as exploring other monetisation options.”

Having reviewed the evidence, the Tribunal was satisfied that turnover growth was intended, with long-term business planning having been undertaken. The aim was for broadcasting to lead on to merchandising, publishing and online content revenue.

Further, the executive producer was incentivised by linking remuneration to turnover. It did not matter that the number of employees did not increase as part of the growth plan. The executive producer, acting as the company's agent, would decide what to produce and how to make it. The actual production could be validly outsourced to create the intellectual property from which fees were earned.

However, relief was denied as there were disqualifying arrangements. The money raised from the share issues was paid to the production company for producing the show and that company was also a counterparty to the production agreement. This made it a 'relevant person'. The fact that the payments were agreed by the parties to be on third-party terms did not change the legislative analysis.

*Hoopla Animation Limited (Formerly Daisy Boo and Monkey Too Limited) v HMRC (TC08683)*

### **Access to communal garden**

*Summary – The purchase of a leasehold flat bought with the right to use a communal garden was chargeable to the residential rates of SDLT.*

On 19 January 2018 Dannielle and Emma Sexton jointly acquired a leasehold interest in a London flat. Provided they paid the 'garden rate' and used the garden in a quiet and considerate manner, they also had access to a communal garden.

Initially Dannielle and Emma Sexton paid SDLT at the residential rate, but later submitted an overpayment relief claim. They argued that the garden was non-residential as to be residential, the

right to access the garden had to exist for the sole benefit of their flat. Shared used with other property owners meant that non-residential rates applied.

HMRC disagreed.

#### *Decision*

The First Tier Tribunal found that acquiring the leasehold interest in the flat was the main subject matter of the transaction and that was “residential property” within s.116(1)(a). Acquiring the right to use the gardens did not change the overall substance of the transaction.

Alternatively, if the Tribunal was wrong and the main subject matter of the transaction was the leasehold interest in the flat and the Easement relating to the garden, the main subject matter of the transaction would still fall entirely within section 116(1), the Flat falling within (a) and the Easement within (c).

The appeal was dismissed.

*Danielle Katie Sexton and Emma Rachel Sexton v HMRC (TC08708)*

### **ADS and the 18-month rule**

*Summary – Additional Dwellings Supplement was not refundable as completion on the sale of the first property was more than 18 months after the effective purchase date of the second property.*

Ian Tavendale owned a home in Grangemouth.

On 26 February 2021, he bought a second home in Forres, disclosing and paying Additional Dwellings Supplement (ADS) on his Land and Buildings Transaction Tax return of £7,106.

Subsequently he disposed of the first property and on 26 August 2022, he submitted a claim for repayment of the ADS previously paid. The refund was claimed on the basis he had sold his first property within 18 months of buying the second one.

Revenue Scotland refused the claim, as the evidence submitted showed the sale of the first property took place more than 18 months after the acquisition of second property.

Ian Tavendale appealed arguing that the sale of his first home had been agreed in writing within the required 18-month window.

#### *Decision*

The First Tier Tribunal for Scotland found that, as a matter of law, the effective date for Land and Buildings Transaction Tax was the date of completion, which was 29<sup>th</sup> September 2022. This was after the 18-month window had expired and so the ADS was not refundable.

The appeal was dismissed.

*Mr Ian Alexander Tavendale v Revenue Scotland [2023] FTSTC 1*