

Business tax update (Lecture B1421 – 22.28 minutes)

Company credit card and loan write off

Summary – A director's personal use of his company credit card was taxable employment income and the write-off of an intercompany loan had an unallowable purpose.

James Keighley was a shareholder and director of Primeur Limited.

For many years, he used a company credit card to pay for personal expenses but never reimbursed the company.

No adjustments were made in the company accounts, the sums did not appear on his P11Ds and he never declared the expenses on his personal tax returns.

James Keighley also owned shares in Valley Dale Properties Limited.

Primeur Limited and its shareholders made loans to Valley Dale Properties Limited:

- The shareholder loans were unsecured;
- The loan from Primeur Limited was secured on a property.

Valley Dale Properties Limited sold the property at a loss. With insufficient funds to repay the loans, the loans to the shareholders were repaid in full, while the loan from Primeur was written off. Based on advice received, Primeur Limited claimed the loan write off as a loan relationship debit.

Following an enquiry, HMRC issued:

- discovery assessments and penalties to James Keighley based on deliberate behaviour for all years from 2001 to 2017, with years prior to 2013/14 based on the presumption of continuity.
- NIC and penalty determinations as well as assessments to Primeur Ltd;
- a discovery assessment denying relief for the loan write off on the basis that either the:
 - two companies were connected; or
 - loan write off had an unallowable purpose.

James Keighley and Primeur Limited appealed.

Decision

The First Tier Tribunal found that the discovery assessments and associated penalties in respect of the credit cards issued to James Keighley were upheld, with his conduct found to be deliberate. It was hard to believe he did not know or question the tax implications of such high personal expenditure incurred using a company credit card. James Keighley was unable to provide evidence to justify that HMRC's assessments based on 'presumption of continuity' were excessive.

While James Keighley's penalties based on deliberate behaviour were upheld, those issued to Primeur Limited's in respect of NIC were reduced as the director's deliberate behaviour could not simply be transferred to the company. HMRC had failed to show that the company intended to mislead HMRC.

Moving to the loan write off, the First Tier Tribunal concluded that the companies were unconnected but that the loan write off did have an unallowable purpose.

James Keighley and a second shareholder held a majority of the shares and votes in each company but the companies were found to be unconnected as a third person, Mr Fearnley:

- held shares in Primeur Ltd (but not in Valley Dale Properties Ltd);
- a shareholders' agreement provided a list of things which could be done only with his consent.

However, on the sale of the property, Valley Dale Properties Limited was obliged to repay the secured loan in full. Repaying the shareholders first meant that the unsecured creditors benefitted, which deliberately deprived the company of income. Repaying in this way represented an unallowable purpose, which was not within the company's business or commercial purposes.

The Tribunal found that the accountants, acting on behalf of Primeur Limited, had been careless as it made no mention that the loan was secured and failed to even consider the unallowable purpose rule. The assessment was not out of time.

Mr James Keighley and Primeur Limited v HMRC (TC09023)

Serviced accommodation

Summary – The letting of serviced apartments was the supply of sleeping accommodation in an establishment similar to a hotel, inn or boarding house, meaning it was a taxable supply.

Realreed Limited owned a property in London that comprised 656 self-contained apartments, let on short- and long-term leases as well as some commercial units.

The issue in this case related the VAT treatment of the letting of 235 self-contained studio, one-bedroom or two-bedroom apartments that were let on a short-term basis, often as company lets. Advertised as 'home from home' apartments, the building looked similar to other residential buildings in the area, with no signage outside. Tenants could, and did, stay for extended periods of time.

While Realreed Limited supplied the apartments, Chelsea Cloisters Services Limited (a company under common ownership) provided optional maid service, as well as dry cleaning, Wi-Fi vouchers, key replacement, luggage storage and linen changes to guests staying in the apartments.

Chelsea Cloisters Services Limited:

- issued invoices for room rental, acting as Realreed Limited's agent;
- charged standard rated VAT on its own services supplied;
- receive payment from occupiers for both rental and additional services supplied.

At the end of each month, an inter-company adjustment was made representing the total value of the room rental, but no invoice was raised and no VAT was charged.

The company argued that:

- it was supplying exempt accommodation under Item 1, Group 1, Schedule 9 VATA 1994;
- services related to these apartments had been correctly treated as standard rated by Chelsea Cloisters Services Limited.

HMRC disagreed, arguing that:

- the supplies were excepted under item (d), which applies to "the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation".
- Note 9 to Group 1 provides that "similar establishment" "includes premises in which there is provided furnished sleeping accommodation whether with or without the provision of board or facilities for the preparation of food, which are used or held out as being suitable for use by visitors or travellers".

Decision

The First Tier Tribunal found that Realreed Limited provided temporary accommodation, with individuals typically staying for limited periods.

However, in deciding whether the exclusion from the VAT exemption applied, the ancillary services supplied by Chelsea Cloisters Services Limited must also be considered. In reality, Realreed Limited was providing sleeping accommodation in an establishment similar to a hotel for use by travellers and visitors.

The Tribunal moved on to consider the 'careless' behaviour penalty appealed by Realreed Limited, even though this was not needed. The First Tier Tribunal noted that nothing in financial terms turned on its decision as the penalty had been suspended and the period of suspension had passed.

Even though HMRC had previously conducted compliance visits and had not challenged the VAT treatment adopted by Realreed Limited at those times, the First Tier Tribunal upheld the careless behaviour penalty. Having received advice in 1991, over the years there had been significant changes to the way the company's business was run. A person taking reasonable care would have enquired as to whether the VAT treatment had changed.

The company's appeal was dismissed.

Realreed Limited v HMRC (T09013)

'Sensations Poppadoms'

Summary – "Sensations Poppadoms sold by Walkers are standard rated, falling within the same VAT category as potato crisps.

"Sensations Poppadoms" produced by Walkers Snack Foods Limited are available in two flavours: Lime & Coriander Chutney and Mango & Red Chilli Chutney.

- The company argued that the products are zero rated under Item 1 Group 1 Part II to Schedule 8 VAT 1994, being “food of a kind used for human consumption.” These should be treated as traditional zero-rated poppadoms.
- HMRC argued that the products were standard rated as they fell within excepted item 5 Group I Schedule 8 VATA 1994 which includes “...potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch...”.

Further, Walkers contended that the products should be zero-rated under the principle of fiscal neutrality but HMRC disagreed.

The company appealed to the First Tier Tribunal.

Decision

At the hearing, both parties agreed that the poppadom products were packaged for human consumption without further preparation.

The First Tier Tribunal reminded us that the title given to a food does not determine its VAT rating. Poppadoms, in the traditional sense, are zero-rated and are not made from potatoes but rather gram flour. The Walkers product was not made traditionally. What mattered here, was whether the Walkers product was similar to a potato crisp and was made from potato.

The First Tier Tribunal stated that this was an aggregate test that took into account all of the potato-based ingredients, including potato granules. The Tribunal referred to the Pringle case (Proctor & Gamble UK [2009] EWCA Civ 407) where it was stated that ‘the proportion of potato flour is significant being over 40 per cent’. As the poppadoms contained 40% potato-derived ingredients, the Tribunal were satisfied that the proportion of potato content was significant compared to other ingredients and the products fell within Item 5.

Referring again to the Pringles case, the Court of Appeal had found that similarity involves a question of degree and a multifactorial assessment of all the factors. The First Tier Tribunal considered the ingredients, manufacturing process, flavour, appearance and marketing strategy before concluding the poppadom products were similar to potato crisps.

The Tribunal found that the Walkers products fell within Note 5 and were standard rated for VAT purposes. The Tribunal agreed with HMRC, that the principle of fiscal neutrality had not been breached, as the company was unable to establish that their products were objectively similar to traditional poppadoms.

The appeal was dismissed.

Walkers Snack Foods Limited v HMRC (TC09024)

Neil Warren commented in Taxation (15 February 2024):

“Neil Warren, independent VAT consultant, said: 'The case report was a revelation to me – I didn't realise that poppadoms were zero rated in the first place. I have just reviewed HMRC's policy note VFOOD8160 in its VAT Food manual and the list of products it considers to be standard rated and zero rated. This revealed that pork scratchings, twiglets and Doritos are accepted as being zero rated but not Wotsits or savoury rice cakes.

'There is only one word that can adequately summarise the legislation on VAT and food: ludicrous.'

Ride-hailing taxi service

Summary – The supply of a mobile private hire passenger transport service, without any additional services, was a provision of travel that fell within the scope of the Tour Operators Margin Scheme (TOMS).

Bolt Services UK Limited ran an on-demand private hire passenger transport service, whereby customers booked and paid for their journey via the company's smartphone App. Journeys were allocated to self-employed private hire vehicle drivers.

Under separate contracts, the drivers supplied Bolt Services UK Limited, who in turn resupplied the service on to their customers. There was no contractual relationship between the passenger and driver.

Rather than account for VAT on the full fare received from customers, Bolt Services UK Limited argued that VAT should be accounted for under the TOMS, calculated on the difference between the amount paid by passengers and the sums paid to drivers.

However, having failed to obtain a non-statutory ruling from HMRC that the TOMS applied, Bolt Services UK Limited appealed to the First Tier Tribunal.

It was common ground that many of the TOMS conditions were met, but HMRC disputed whether the company:

- provided services of a kind commonly provided by tour operators; and
- made an onward supply of drivers to its customers, without material alteration or further processing.

Decision

The First Tier Tribunal found in the company's favour on both points.

Taking a high level or general view, the passenger transport services were of a kind commonly provided by travel agents or tour operators. It did not matter that the rides were booked on-demand rather than being pre-booked.

The First Tier Tribunal stated that, where possible, it must interpret UK legislation that conformed with the EU legislation from which it was derived. Consequently, the correct test was whether drivers' services were supplied without material alteration or further processing '*so as to change them into in-house supplies*', made from the company's own resources. The Tribunal found that the drivers' services directly benefited the travellers and were not inhouse services or materially altered or processed.

The appeal was allowed.

Bolt Services UK Limited v HMRC (TC09014)

Is ageing a health disorder?

Summary – Ageing is not a disease and worrying about looking older is not a health disorder, meaning the related cosmetic treatments were not exempt medical care.

Aesthetic-Doctor.com Ltd operates a private medical clinic providing a wide range of cosmetic treatments.

HMRC argued that the company was making standard rated cosmetic supplies and, as the VAT threshold had been breached in April 2010, was required to register for VAT.

HMRC issued an assessment totalling £1,635,614 to collect VAT for the periods from 1 June 2010 to 31 March 2020. Further assessments were subsequently issued.

The company disagreed, arguing that their supplies were exempt medical supplies (Group 7, Schedule 9 VATA 1994).

The parties agreed that the director and shareholder was a qualified medical professional and so the services were wholly performed or directly supervised by qualified medical professionals.

The issue to resolve surrounded the fact that the exemption can only be claimed if the purpose of the service is to diagnose, treat, and insofar as possible, cure diseases or health disorders including the protection, maintenance or restoration of health.

Decision

The First Tier Tribunal acknowledged that it is possible for cosmetic treatments to fall within the concept of medical care but was that the case here?

The Tribunal found that it was clear from the evidence that the company's patients chose the company's services because "they wished to improve their appearance". The patients self-referred because they were dissatisfied with some aspect of their appearance. That does not mean that their health was affected or that they had a health disorder.

Based on the evidence provided the First Tier Tribunal found that the company was not diagnosing, treating and, in so far as possible, curing diseases or health disorders.

The company should have been registered for VAT, with the supply of services standard rated.

The appeal was dismissed.

Aesthetic-Doctor.com Ltd v HMRC (TC09030)