

Personal tax round up (Lecture P1421 – 17.23 minutes)

Sky Sports football pundit and IR35

Summary – Services provided by a former footballer to Sky through their personal service company fell within IR35 and were taxable as employment income.

Between 1994 and 1998, Phil Thompson appeared on Soccer Saturday as a panel member providing live match analysis and punditry. Having moved into football management, he took a break from punditry, returning to his role at Soccer Saturday in 2004.

From 2013, Phil Thompson contracted his work through his personal service company, PD & MJ Limited. The company contracted with Sky to:

- provide Phil Thompson's services on any programme they required; and
- prevent him from his providing services to anyone else in the UK;
- permit him to work elsewhere but not to provide similar services to other television, radio or media organisations.

HMRC argued that IR35 applied and sought to assess PD & MJ Limited for PAYE and NIC totalling £294,000 covering the years 2013/14 to 2017/18. PD & MJ Limited disagreed and appealed, arguing that the Intermediaries Legislation did not apply.

Key terms of the contract stated that:

- PD & MJ Limited was required to provide Phil Thompson's services "as a commentator, presenter, interviewer, guest ... in a studio or on location, live or recorded."
- Phil Thompson was required to travel on dates, times and to venues specified by Sky.
- Sky agreed to pay the company for the services supplied, monthly in arrears.
- If Phil Thompson was unable to provide his personal services, a substitute could be suggested, but Sky had the right to reject that person.

Two cases in particular were referred to, one by PD & MJ Limited and the other by HMRC:

- PD & MJ Limited argued that the First Tier Tribunal should follow the decision in *S&L Barnes Limited v HMRC*, where Stuart Barnes had worked for Sky, under similar contracts, but was found to be working outside the intermediary rules;
- HMRC argued that the *Barnes* case was not binding and had been incorrectly decided. Instead, *Alan Parry Productions Ltd v HMRC* should be followed, arguing the contracts in that case were very similar to the current case where the First Tier Tribunal had found that the Intermediaries Legislation applied.

Decision

The First Tier Tribunal found that it was bound by neither *S&L Barnes Limited v HMRC* nor *Alan Parry Productions Ltd v HMRC*, stating:

'whilst the underlying contracts were similar, the factual differences as to how those contracts operated when compared to the present case require their own analysis'.

The First Tier Tribunal reviewed the actual contractual arrangements, identified the terms of the hypothetical direct contract between Phil Thompson and Sky and moved on to consider if the hypothetical contract would be a contract of employment under the three-stage test in the *Ready Mixed Concrete case*.

The Tribunal found that:

- there would be mutuality of obligation, as the company was required to provide Phil Thompson's services and in exchange Sky was required to pay for those services;
- there was a high degree of control, with Phil Thompson severely restricted in the activities he could undertake for competitors. Sky determined when and where services were provided, with Phil Thompson having no option to refuse work;
- the company generated some 80% of its income from the Sky contract. This was the main element of Phil Thompson's professional income.

The Tribunal concluded that:

"the terms of the hypothetical contract and the circumstances in which the professional relationship was performed were consistent with an employment contract."

The Tribunal did not take into account the facts that from 2020, Phil Thompson became a formal employee of Sky and that he confirmed during his oral evidence that he performed his work in the same way after he became an employee.

PD & MJ Limited (in Members' Voluntary Liquidation) v HMRC (TC09029)

IR35 - Atholl House decision final

HMRC will not appeal the First Tier Tribunal's decision in *Atholl House* (TC9026) involving presenter Kaye Adams. (Details of the hearing can be found in our January 2024 notes).

An HMRC spokesperson said:

'Given this litigation has been ongoing for a number of years and the First Tier Tribunal does not set binding legal precedents, we don't think it would be proportionate to appeal in this case.'

Kaye Adams said she was 'extremely pleased that HMRC has decided not to roll the dice on a fifth time lucky shot on my case'. However, on HMRC's comment that it would not be proportionate to appeal, she said 'it was never proportionate'.

Dave Chaplin, chief executive officer of IR35 Shield, who has been assisting Kaye Adams with her case for six years was also perplexed by HMRC's claim about proportionality:

'The net tax at stake was £70,000 – so if proportionality was an issue, why did HMRC even bother with the first hearing, let alone the second, the third and the fourth?'

First Tier Tribunal rulings do not set binding precedents, Mr Chaplin stated:

'The importance of *Atholl House* cannot be underestimated and has set considerable legal precedents at both the Upper Tribunal and Court of Appeal, which HMRC's litigation teams are currently relying on in other cases being litigated. To ignore *Atholl House* is to deliberately ignore the law.'

Adapted from the article in Taxation (1 February 2024)

Salary in lieu of dividends not allowed

Summary – Coronavirus Job Retention Scheme (CJRS) payments should have been based on salary shown on an RTI return made on or before 19 March 2020.

Graham Smith was a director and shareholder of Bandstream Media and Corporate Communications Limited. Up until 31 March 2020 he was paid a salary of £600 per month and dividends of £2,500.

The company's accountant:

- watched a televised parliamentary debate where Rishi Sunak, the then Chancellor of the Exchequer, suggested directors receiving a small salary and dividends could take advantage of the CJRS;
- recommended that, from April 2020, Graham Smith replace some of his dividends with additional salary, enabling the company to claim CJRS grants based on the maximum earnings figure of £2,500.

CJRS claims were submitted for the period from 1 April 2020 to 30 September 2021 based on the increased salary.

Later, having checked the company's CJRS claims, HMRC concluded that the claims should have been based on a salary of £600 per month and issued assessments accordingly.

Following a statutory review, the company appealed to the First Tier Tribunal.

Decision

The Tribunal confirmed that they must look at the words appearing in the legislation and could not take into account any parliamentary debates that had taken place prior to enactment.

The First Tier Tribunal confirmed that CJRS claims should have been based on the salary shown on an RTI return made on or before 19 March 2020, which was £600. Employers were not permitted to inflate an employee's wages after the introduction of the scheme.

Bandstream Media and Corporate Communications Limited v HMRC (TC09016)

Employee travel expenses relief denied

Summary – Each assignment under an overarching contract of employment was treated as a separate employment, meaning that reimbursed home to work travel expenses were not deductible.

Exchequer Solutions Limited was an umbrella company that contracted with construction sector employment agencies, to match individuals to specific construction work assignments with end user clients.

Under the contracts, the parties agreed that Exchequer Solutions Limited took on the role of employer for the individuals undertaking the assignments.

The issue in this case concerned the treatment of reimbursed travel expenses and whether they were taxable on the employees:

- If there was an overarching contract of employment which also covered the gaps in between the assignments, each assignment location would be a temporary work location, with no PAYE and NICs on reimbursement of home to work employee travel;
- If Exchequer Solutions Limited was only the employer during the period(s) of assignment, each assignment location was a permanent workplace, with the reimbursed sums covering ordinary home to work commuting.

The First Tier Tribunal agreed with HMRC that there was no overarching contract of employment and that the required mutuality of obligation was missing. Under the contracts there was no obligation:

- for Exchequer Solutions Limited to provide any work at all; and
- on the individual to accept work.

Indeed, there was no commercial reason for the company to retain employees as employees were referred to Exchequer Solutions Limited once the employment agencies had matched the employee to specific assignments.

The First Tier Tribunal had agreed with HMRC and so the expense payments were taxable.

The company appealed on five grounds:

1. continuation of the contract;
2. lack of obligation to provide, or endeavour to provide work;
3. obligation to procure future work;
4. lack of benefit to employees; and
5. obligation on employees to carry out or accept work from ESL.

Decision

The Upper Tribunal stated that to be able to set aside the First Tier Tribunal's findings, the company needed to show its findings either lacked supporting evidence or that the First Tier Tribunal's decision was not reasonable.

The Upper Tribunal found that the First Tier Tribunal had not erred in law and had correctly interpreted the contract of employment. Each assignment was a separate employment, with workers free to work for others during any periods when not contracted to work for Exchequer Solutions Ltd

Exchequer Solutions Ltd v HMRC [2024] UKUT 00025 (TCC)

NOTE:

The Upper Tribunal noted that at the time of release of this decision, the judgment on mutuality in the Supreme Court case Professional Game Match Officials Ltd (PGMOL) v HMRC was still awaited. HMRC's view on the matter was that the PGMOL case was "concerned with a different topic and that its likely impact was not such that we ought to stay the hearing or defer handing down judgement."

PPR relief evidence lacking

Summary – With little evidence to support the taxpayer's main residence claim over a three-year period, Principal Private Residence relief was denied.

Sabbir Patwary lived with his parents at their London address.

On 9 April 2010 he bought a property, where he lived with his girlfriend, whom he married in 2012 and later divorced, and a tenant friend who shared the entire property with them.

From October 2013, Sabbir Patwary moved back to live with his parents. The tenant remained living in the property until it was sold in February 2016, crystallising a £202,000 gain that Sabbir Patwary argued was covered by Principal Private Residence relief and Letting relief.

HMRC denied the relief, arguing that he did not live at the property as his only or main residence, and secondly, if at any time he had done, his occupation lacked any degree of permanence or continuity as he never changed his address with his bank, HMRC or for the electoral roll.

He was unable to provide supporting documentation for his claim but argued that:

- He did not change his address for correspondence as he accessed most information, online. He worked with his father, who was able to deliver any post on a daily basis.
- He did not register to vote at his new address, claiming that "he preferred to vote in the more marginal constituency of his parents' home where his vote would carry more weight."
- He did not need a parking permit at his property as he walked to work.
- He did not own a TV and so he did not have a TV licence.

Due to an administrative error, the details of which were not disclosed in the case summary, HMRC did not contest the lettings relief claim.

Decision

The First Tier Tribunal agreed that there was 'remarkably little' evidence to show a period of permanent residence over the three-year ownership period.

Indeed, the Tribunal noted that there was not even any supporting informal evidence from his tenant, his now ex-wife, or anyone else who knew his presence at the property.

The appeal was dismissed.

Mr Sabbir Patwary v HMRC (TC09035)

Residential use despite ventilation shaft

Summary – Potential access to a tunnel ventilation shaft by Network Rail did not make the property mixed use.

On 18 May 2018, the company bought 39 Fitzjohn's Avenue, Hampstead, London NW3 for approximately £20 million and paid SDLT on the basis that the property was wholly residential.

Nearly three years later, the company's agent submitted an overpayment relief claim for £1,899,250.

A railway tunnel operated by National Rail and Thameslink passed under the grounds and house at the property, with a ventilation shaft for the tunnel situated at the rear of the property. With Network Rail having the right to come onto the land, the company argued that the property was therefore mixed use and non-residential SDLT rates applied.

Subsequently, the agent also argued that there was a commercial tenancy allowing a carpenter to use a workshop inside the house at the time of completion.

HMRC refused the claim, with the decision upheld by a review conclusion letter dated 15 July 2022.

The company appealed.

Decision

The First Tier Tribunal found that:

- the ventilation shaft was excluded from the lease title deeds, but the surrounding land and the fence were part of the title;
- No specific obligations were imposed on the lessee other than the obligation to allow access;
- Considering the overgrown state of the track and the whole area surrounding the shaft, there had been no recent access;
- Network Rail had the right to come on to the land to carry out works, but were required to restore the surface to its original condition.

The Tribunal concluded that the shaft and potential access by Network Rail did not prevent the land constituting the grounds of the dwelling.

The First Tier Tribunal accepted that there was some evidence of a small workshop in the building that a carpenter had been using but there was no formal lease for this occupation. The contract for sale stated that:

“The Property is sold with vacant possession (here meaning vacant of persons and free from any occupational interests) on completion... .”

There was no evidence supporting a commercial lease being in place on completion of the purchase.

The company’s appeal on both grounds was dismissed.

39 Fitzjohns Avenue Limited v HMRC (TC09021)