

Business tax round up (Lecture B1311 – 15.34 minutes)

Property development income

Summary - A self-employed property developer had undeclared income and gains, with the Tribunal confirming that HMRC's calculations were valid.

Tom Nash registered with HMRC as self-employed in December 2006, describing his business as that of 'property developer'. He submitted tax returns for 2006/07 onwards declaring small profits or losses each year.

In September 2015, HMRC opened an enquiry into Tom Nash's 2013/14 tax return, requesting copies of business records, details of rental income since 5 April 2008 and details of all property transactions since 5 April 2008.

HMRC closed the enquiry in March 2017, making a number of adjustments covering all years.

- HMRC calculated his turnover for 2005/06 to 2013/14 as 2.5 times expenses claimed. HMRC argued that he was unlikely to have understated the expenses in his tax returns. They applied a multiple of 2.5 to these expenses, based on internal analysis of data from other similar traders. They argued that it was reasonable to believe that the same understatement of turnover applied to earlier years,
- Income from the sale of a property referred to as 19RHL was added to turnover for 2007/08 as income from property development;
- Funds received from his brother-in-law were treated as self-employment income due to lack of alternative evidence;
- A gain on disposal of land to the rear of properties 147TR and 149TR was liable to capital gains tax in 2011/12 (no main residence relief was available and mortgage interest costs were not deductible);

Discovery assessments were issued for 2005/06 to 2012/13 and penalties were charged for all years.

On 28 February 2018, Tom Nash appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal did not accept Tom Nash's argument that:

- he earned little or nothing from being self-employed;
- the property purchases and renovations were funded by inheritances and re-mortgaging.

The First Tier Tribunal accepted the manner in which HMRC had arrived at their adjustments.

His appeals against the assessments and penalties were dismissed

Mr Tom Nash v HMRC (TC)8422)

Gross Payment Status removed

Summary – HMRC were correct to remove Gross Payment Status based on compliance failures that happened eight years earlier.

RMF Construction Services Limited filed its Corporation Tax return for 2010 late as well as a number of other compliance failures including submitting late construction industry scheme returns and a late P35 return.

HMRC accepted that the company had a reasonable excuse for failing to submit contractor's monthly returns on time but did not accept that this was true for the other compliance failures. As a result, HMRC sought to cancel the company's gross payment status under the Construction Industry Scheme.

In December 2012, RMF Construction Services Limited appealed to the First Tier Tribunal but HMRC requested the appeal be stayed behind *JP Whitter (Water Well Engineers) Limited v HMRC*. RMF Construction Services Limited accepted that the compliance failures back in 2012 had taken place but that withdrawing gross payment status eight years later, in 2020, was wrong. The company argued that if it were to apply for gross payment status now it would be granted as the company had been fully compliant for a number of years.

The First Tier Tribunal allowed the company's appeal, finding that the eight-year delay in withdrawing CIS gross status would be disproportionate. The Tribunal stated that the objective of the CIS compliance system was to encourage compliance, and not to punish non-compliance. The threat of withdrawal had achieved the desired result as the company was now fully compliant and if it was to reapply now it was likely that gross status would be granted.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that in 2012, the company's compliance failures gave HMRC grounds to cancel their registration. The eight year delay was not relevant. The aim of the legislation was to ensure that everyone was treated in the same way, irrespective of whether they appealed their position or not. Under the scheme, penalties are issued for non-compliance. Being able to avoid penalties by subsequent compliance during the appeal process would undermine the system.

Further, the First Tier Tribunal had erred by taking into account the risk that the company might fail as a result of removing gross payment status. This too is not relevant to the CIS gross scheme.

HMRC's appeal was allowed.

HMRC v RMF Construction Services Limited [2022] UKUT 00067 (TCC)

Gas cavities not plant

Summary – The Court of Appeal found that underground gas storage cavities were not plant, meaning they were ineligible for plant and machinery capital allowances.

The companies' businesses involved the generation and supply of energy. They built underground cavities for the storage of gas from the national transmission system (NTS).

The cavities allowed the removal of the gas to the NTS to enable its owners to profit from gas price volatility. They were created by a leaching process which involved drilling a borehole into salt rock into which water is pumped to dissolve the rock. The cavity is converted to gas storage by exchanging the resulting salt water with gas through boreholes (debrining).

The companies claimed capital allowances on the expenditure incurred on leaching and debrining but both the First Tier and Upper Tribunals dismissed their appeal.

The companies appealed to the Court of Appeal.

Decision

The Court of Appeal said it could find no legal error in the lower tribunals' decisions. The companies argued that the cavities were plant, but the judge said there was a 'fundamental preliminary hurdle in the path' of that argument. No man-made structure or equipment was put into the cavities – they were not artificially lined.

The only element introduced into the debrined cavities was the cushion gas and this was to prevent the cavity collapsing. It had the same effect as a beam or brace giving stability to a structure. The land was not in its 'natural state' but the alterations were to carry out the taxpayers' stock-in-trade.

Even assuming that hurdle was surmountable, any plant-like function was 'not only incidental' to the way the cavities were created but was also outside the taxpayers' control and not a common use. The cavities were 'little more than receptacles' in which gas could be stored at high pressure.

The taxpayers' appeals were dismissed.

Cheshire Cavity Storage 1 Limited and EDF Energy (Gas Storage Hole House) Limited v HMRC [2022]
EWCA Civ 305

Adapted from the case summary in Taxation 24 March 2022

Nursing agency had no legitimate expectation

Summary - The VAT concession that allows employment agencies to exempt supplies of medical staff to third parties could not be relied on retrospectively.

First Alternative Medical Staffing Ltd and Delta Nursing Agency Ltd were companies that provided nurses and other medical staff on a temporary basis to both hospitals and care homes.

Both companies charged clients by the hour, with the hourly rate covering the wage payable to the nursing and medical staff plus a commission element payable for providing the staff. VAT was charged on the commission element only, on the basis that they were acting as agents.

Subsequently, HMRC raised VAT assessments on the companies for £2.1 million for the periods between 2013 and 2016, on the basis that the companies were in fact acting as principals, meaning that VAT was due on the full charge made to clients.

The companies acknowledged that they were principals but argued that a letter from HMRC sent in 2004 gave rise to a legitimate expectation. This letter confirmed that it was correct to charge and account for VAT on the commission element only because it was acting as an agent.

The High Court agreed the 2004 letter had been capable of giving rise to a legitimate expectation. However, by 2013, as a result of subsequent HMRC public statements, the companies could no longer rely on that legitimate expectation. In 2010, HMRC had published Revenue and Customs Brief 12/10 on 'Nursing Agencies Concession' allowing employment agencies to exempt the supply of nursing and health care staff to third parties where specific requirements are met. However, the companies had previously been relying on their 2004 letter and so could not now rely on this Brief retrospectively.

Decision

There was confusion over whether HMRC had accepted that the companies had met the conditions of the concession. However, the Court of Appeal proceeded on the assumption that the conditions were met as this was, in any case, a moot point given the conclusions that would follow.

The Court of Appeal stated that the companies had to choose whether or not to rely upon the 'Nursing Agencies Concession' and the question in this case was whether that choice had to be made prior to the relevant supply or could it be made retrospectively.

Agreeing with the High Court, the Court of Appeal found that the 'Nursing Agencies Concession' could not be relied on retrospectively. Under UK law, there was no 'legitimate expectation' inherent within the wording of the concession as there was nothing that the 'ordinarily sophisticated taxpayer' would understand to mean the concession could be applied retrospectively. It found that the concession would be understood by the 'ordinarily sophisticated taxpayer' to require a choice to be made in relation to each supply by the time that the client was invoiced. At the time the companies raised their invoices, they had not considered this concession as they were relying on the 2004 letter instead.

The companies' appeal was dismissed.

NOTE: The companies have also contended that their services were exempted from VAT as supplies of medical services under Schedule 9, Group 7, item 1, VATA 1994. HMRC disagree and this point is pending appeal to the First Tier Tribunal, having been stayed awaiting the outcome of this judicial review.

First Alternative Medical Staffing Ltd and Delta Nursing Agency Ltd v HMRC [2022] EWCA CIV 249

Parking penalties

Summary – Penalties charged by a car park operator represented additional consideration for the 'excessive use' of the car park.

Apcoa Parking Danmark A/S operated car parks on private land under agreements with site owners. Similar arrangements are quite common in the UK, where supermarkets might engage an operator to oversee and fix the rules for parking at their stores.

The company set the conditions for using the car parks and imposed a €69 'control fee' if drivers did not comply with them, for example by exceeding the permitted parking time or parking across multiple bays.

Decision

The CJEU considered the facts of the agreements and concluded that such fees were subject to VAT. There was a requirement to pay the control fees as part of a legal relationship created between the company and the driver when they decided to park their vehicles on the site. In other words, the driver had to comply with the general terms and conditions for using the car park.

The court decided that the penalties represented additional consideration for the 'excessive use' of the car park. There was a link between the control fees and the provision of parking.

Apcoa Parking Danmark A/S v Skatteministeriet (Case C-90/20), Court of Justice of the EU

Adapted from the case summary in taxation (24 March 2022)

Exported goods were zero-rated

Summary – The taxpayers had sufficient evidence to support the zero-rating of their exports to China.

Junjie Liu and Zhe Li bought and sold clothes and accessories. They had one customer in China who bought a lot of their goods.

In 2016, due to a lack of export evidence, HMRC raised an assessment treating the exported goods as supplied in the UK. HMRC argued that the evidence provided did not satisfy the requirements of VAT Notice 703 para 3.3 which stated that 'vague descriptions of goods, quantities or values' were not acceptable. Parcelforce documents referred to the category of exports as 'personal effects', 'clothes' as the description of the items and £100 as the total value on every shipment.

Junjie Liu and Zhe Li claimed that the evidence that they had provided was sufficient proof for zero rating. The reason that they had used vague descriptions and a low value was to avoid theft of the goods while in transit to China.

Decision

The First Tier Tribunal accepted the need to use vague descriptions and a fixed value of £100 as the value on every shipment.

Referring to HMRC v Arkeley Ltd (in liquidation) [2014] STC 309, the First Tier Tribunal found that evidence must be 'taken as a whole' rather than by looking at each document separately.

While the taxpayers' packing lists did not include their VAT number and were not VAT invoices, they did describe in detail each item to be exported in the parcel, the value per item and the Parcelforce or Royal Mail tracking code for the parcel in which they were exported. They were able to cross refer each item on a sample packing list to the client's order, retail sales receipt for the goods ordered.

There was no suggestion that the value of £100 entered for each shipment should be treated as the value of the supply for VAT purposes. The Tribunal accepted that the value of the goods exported was the value clearly set out in the packing lists.

The First Tier Tribunal found that *Junjie Liu and Zhe Li* had satisfied them that they:

- held sufficient evidence to prove that the exports of goods to China took place; and
- had supplied suitable evidence that clearly identified the goods with an accurate value, such that the conditions for the zero-rating the exports were met.

The appeal was allowed.

Junjie Liu and Zhe Li (TC08396/V)