

Personal tax round up (Lecture P1311 – 14.54 minutes)

TV personality loses IR35 appeal

Summary – A former footballer provided punditry services to Sky through his personal service company in such a way that if the services were provided under a contract directly between the footballer and Sky, he would be regarded as an employee of Sky.

McCann Media Limited is the personal service company of Neil McCann, a former Scottish Premiership footballer. After retiring as a player, he moved into punditry, providing services to British Sky Broadcasting Ltd (Sky) through this company. Neil McCann was the only person who provided services on behalf of McCann Media Limited under the Sky Contracts

Concluding that the arrangements fell foul of IR35, HMRC issued various determinations and notices to McCann Media Limited for some £210,000 in respect of the tax years 2013/14 to 2017/18 in relation to PAYE and NICs.

The company has appealed.

Decision

The First Tier Tribunal started by considering the contracts that existed between Sky and McCann Media Limited. These were standard contracts with no bespoke terms. Under these contracts, services were provided by Neil McCann. There was a clause stating that there was a right to propose “other employees or sub-contractors” to perform the services but Sky had the right to assess their suitability. The contract included restrictive covenants preventing services being provided to other television, radio, media, print and betting organisations. The contract also included non-solicitation and non-compete clauses.

The Tribunal moved on to consider the ‘hypothetical’ contract between Sky and Neil McCann and whether, by removing the personal service company, there would have been a contract of employment. The Tribunal found that such a hypothetical contract would include the actual Sky contracts as well as a Non-Disclosure Agreement signed by Neil McCann.

The Tribunal concluded that the required level of mutuality of obligation existed. Under the contracts, Neil McCann was entitled to an agreed annual fee, payable monthly irrespective of the amount of work actually requested by Sky or agreed to by Mr McCann. It was not significant that Sky did not have an absolute right to dictate the dates on which Neil McCann agreed to work.

Secondly, the Tribunal concluded that Sky did have a sufficient degree of control. For each game, Sky selected which pundits to use from their pool of experts and determined the roles to be performed within their agreed format. Although Neil McCann provided his own expertise, this was considered a neutral factor.

Looking at the bigger picture, the Tribunal concluded that Neil McCann was not in business on his own account. He did not provide his own equipment, he experienced minimal risk with no opportunity to profit. This was very different to the Adrian Chiles case. Neil McCann had no management agent to whom he paid a percentage of revenue, had no personal assistant, had no other clients and had little control over the work that he performed.

The Tribunal concluded that a hypothetical contract would be consistent with a contract of employment.

The appeal was dismissed.

McCann Media Limited v HMRC (TC 08435/V)

Termination was the trigger

Summary – A settlement payment made by a bank to a former employee was taxable as a termination payment, and not a non-taxable payment relating to a discrimination claim.

Following an investigation by the bank regulator, looking into the manipulation of interbank offered rates, DB Group Services (UK) Limited entered into a negotiated settlement under which it was required to pay a penalty of £600 million and terminate the contracts of several employees, including Shivani Mathur.

On 30 April 2015, she received a letter terminating her contract and requiring her to sign a settlement agreement under which she was offered £82,135 in return “for the termination of” her contract.

Shivani Mathur took her case to the Employment Tribunal, finally reaching an agreement under which but she received £6 million. Not prepared to accept any risk in relation to the tax position of the Settlement Payment, her employer applied PAYE to all but £30,000, paying over £2,677,460 to HMRC.

Shivani Mathur sought repayment of the PAYE deducted in her tax return.

On 30 January 2020, following an enquiry into that return, HMRC issued a final closure notice in which the HMRC officer amended her tax return in line with his decision, which was:

“The payment of £6,000,000 you received following the termination of your employment with the Bank is chargeable under s401 ITEPA 2003 except for an element of £44,000 which I can accept as being in relation to your discrimination claims during employment and therefore unrelated to the termination.”

The £44,000 was allowed because that was the top of the upper band for the most serious cases for Employment Tribunal awards relating to injury to feelings.

Shivani Mathur appealed, arguing that the payment was unrelated to her employment being terminated. Rather, the payment arose from negotiations relating to the discrimination and victimisation she had experienced while employed. She argued that her employer agreed to the settlement so as to avoid bad press.

Decision

The First Tier Tribunal found that the settlement payment was not received in consideration of the termination, nor was it received directly in consequence of the termination.

However, the payment was received *indirectly* in consequence of, or otherwise in connection with, the termination. Her termination was what triggered her claim to the Employment Tribunal and was the reason that she was able to negotiate so successfully. While employed, Shivani Mathur had been

reluctant to take any formal action against the bank for discrimination. It was the termination that convinced her otherwise.

Consequently, the First Tier Tribunal agreed with HMRC. The settlement agreement referred to termination payments which, with the exception of the £30,000 and exempt legal cost, was chargeable to income tax as employment income in accordance with under s.403 ITEPA 2003.

Shivani Mathur v HMRC (TC 08419/V)

Oppenheimer wins residency battle

Summary – A taxpayer was treaty-resident in the Republic of South Africa as the centre of his personal and economic relations were located there.

Jonathan Oppenheimer is a fourth generation South African, born in Johannesburg. His great-grand father established the De Beers diamond mining company, now known as Anglo American plc, whose headquarters are in the UK.

He was educated in England and at the age of 18, his parents bought him a London flat, held in trust. He travelled in America, where he met his future wife, returned to South Africa for National Service and then in 1993, moved to London to undertake an internship with Rothschild Bank.

In 1994, he married and the couple moved into his London flat. He worked for De Beers in London for a year before moving initially to Zimbabwe and then on to South Africa where they lived in a house that they had constructed.

The couple had three children, all born outside the UK. Having decided to educate their children in the UK, in 2007 the couple moved to England, acquiring a substantial home to live in while retaining the South African home. They spent their time between these two properties as well as other properties that they owned in the US.

Jonathan played sports in various countries and belonged to clubs in both South Africa and England. He voted in South Africa, and not England. His main doctor and dentist were in South Africa. He provided details of where he worked as well as a summary of day counts as he moved between countries.

Believing that Jonathan Oppenheimer was UK tax resident, HMRC sought to recover some £10 million in tax relating to the period between 2010/11 and 2016/17.

Jonathan Oppenheimer accepted that he was resident and ordinarily resident in the UK for some years and under the statutory residence test for the years from 2014/15. However, he claimed that he was also resident in South Africa and maintained a permanent home there. He argued that under the UK's tax treaty with South Africa, he should be treated as tax resident in South Africa

Decision

To be treated as treaty-resident in a country, the First Tier Tribunal needed to decide whether Jonathan Oppenheimer's personal and economic relations, were in South Africa or the UK. If the 'centre of his vital interests' could not be determined, there was a 'tiebreaker' issue to deal with that took into account his nationality and 'habitual abodes'.

Having considered a vast amount of information covering all aspects of Jonathan Oppenheimer's way of life, his employment, investments and movement around the world, the First Tier Tribunal found that his 'centre of vital interests' was more likely to be South Africa than the UK. Although he spent significant amounts of time in the UK because of schooling, and in the US because of his wife, he could and did return to South Africa for 'important meetings and other matters including family, business, philanthropic, political and social activities. It was a normal, regular and important part of his life.'

Further, if the tie-breaker clause was applied, his stays in both South Africa and the UK were both 'part of the settled routine of his life and were of sufficient frequency, duration and regularity' to constitute having 'habitual abodes' in both countries. Consequently, as a South African national, he was deemed treaty-resident in South Africa.

Jonathan Oppenheimer's appeal was upheld.

Jonathan Oppenheimer v HMRC (TC08443/V)

Disputed CGT proceeds

Summary - The proceeds to be used in the capital gains tax computation on the disposal of company shares were those stated in the sale and purchase agreement. The debt that was repaid from those proceeds was not deductible.

Michelle McEnroe and Miranda Newman each owned 50% of Kingly Care Partnership Ltd. The company owed just over £1 million to Allied Irish Bank.

During the tax year ended 5 April 2014, Michelle McEnroe and Miranda Newman sold the company with the sale and purchase agreement stating that the consideration for the 100% share ownership was £8 million plus an earn out element.

On the day of the sale, the buyer's solicitors transferred £8 million to their solicitors, who transferred funds to Allied Irish Bank to clear the loan outstanding. The balance of £6.9 million was transferred to the taxpayers' solicitors, who after deducting the professional fees paid £3.3million to each of the taxpayers.

Michelle McEnroe and Miranda Newman submitted their tax returns showing consideration for the shares as 50% of the £6.9 million, rather than the £8 million stated in the contract. They argued that the debt repayment should be deducted from the taxable proceeds.

HMRC enquired into the tax returns, later issuing closure notices stating that the correct consideration to use was 50% of the £8 million (plus the earn outs).

The taxpayers appealed to the First Tier Tribunal, arguing that the buyer had paid £6.9 million for the shares and £1.1 million to repay the bank debt. As they never received the full £8 million, the cash relating to the bank debt was not intended to be treated as consideration for the shares.

The appeals were joined.

Decision

The only issue to resolve was whether the total proceeds on sale of the shares to use in the capital gain tax calculations should be £8 million, or £8 million less the bank debt.

The First Tier Tribunal did not disagree that the buyer paid £6.9 million for the shares and £1.1 million to clear the bank debt.

The First Tier Tribunal found that the full chargeable consideration was £8 million, as specified in the sale and purchase agreement. Although the contract alluded that the debt would be cleared, it did not specify how this was to be done. The contracts did not refer to the £8 million being anything other than consideration for the shares. The contracts were clear.

The taxpayers' appeals were dismissed.

Michelle McEnroe and Miranda Newman v HMRC (TC08444)

Company not acting as agent

Summary – With no evidence to prove that payments were made by his company on his behalf, enhancement expenditure on building works reflected in the state of the property at sale was not deductible in arriving at his property gain.

Peter Lowe had acquired an interest in a property and in 2007, he sold that interest for £2 million. He held only a 50% interest in the relevant freehold titles, with the other 50% interest being held by Mr Almond, his business partner. Mr Lowe and Mr Almond also owned 50% each of the shares in a company called Hadee Engineering Co Ltd. Peter Lowe sought to deduct expenditure incurred on building works that had been undertaken.

HMRC did not dispute that the amounts had actually been paid; nor did they dispute that the expenditure in question was reflected in the state or nature of the property at the time of disposal. The problem arose because the evidence provided to support the building cost deductions consisted of building quotes addressed largely to Mr Lowe personally, while the invoices issued by the builders were largely addressed to Hadee Engineering Co Ltd.

Peter Lowe argued that the payments made by Hadee Engineering Co Ltd were made on his behalf and so deductible in arriving at his personal gain. He had the legal obligation to pay for them as the works were undertaken for a property belonging to him. He argued that his company had incurred the costs on his behalf and effectively recharged them back to him by through a debit to his Director's Loan Account, or by him receiving less remuneration in the future.

However, HMRC disagreed, challenging that the expenditure incurred by Mr Lowe had not been "incurred by or on behalf of" him by Hadee Engineering Co Ltd, as required by s38(1)(b) TCGA 1992.

Decision

The Upper Tribunal found that there was no evidence that Peter Lowe had suffered the cost of Hadee Engineering Co Ltd's payments. Agreeing with HMRC, the Upper Tribunal found that it was conceptually possible for Hadee to conclude that paying for the costs of building work on land it did not own was in its business and commercial interests. If it reached such a conclusion, it could quite properly pay for the works without declaring a dividend, debiting Mr Lowe's loan account or treating the sum as a payment of remuneration to Mr Lowe

With neither party providing any authority on how the phrase “incurred by or on behalf of” should be interpreted, the Upper Tribunal agreed with the First Tier Tribunal. For the phrase to be met, Hadee Engineering Co Ltd needed to act as Mr Lowe’s agent, which it did not.

The appeal was dismissed.

Peter Low and Civic Environmental Systems Ltd v HMRC [2022] UKUT 00084 (TCC)

Information not reasonably required

Summary – No useful purpose would be achieved by ordering that HMRC’s information notice should be complied with prior to the appeal hearing that had already been made against discovery assessments already issued.

Jack and Panayiota Yerou, a married couple, owned shares in Ascot Sinclair Associates Limited. Jack Yerou was the sole director and his wife was the company secretary.

In July 2012, the wife transferred shares to her father-in-law who was resident in Cyprus.

Between 2013 and 2016, the company paid dividends, with the father-in-law receiving the following amounts:

- 2013 - £460,000;
- 2015 - £210,000;
- 2016 - £240,000.

The majority of these dividends were either used to pay for school fees or returned as a loan to his son, Jack Yerou.

In February 2018, HMRC opened enquiries into the couple’s 2016/17 tax return, later issuing information notices to both the husband and wife. HMRC believed that either the transfer of assets abroad or settlements legislation applied.

HMRC issued discovery assessments for each of the years 2013/14 to 2016/17. The couple appealed these discovery assessments.

In 2019, the couple appealed information notices issued, arguing that the information sought was not reasonably required for the purpose of checking their tax position. They argued that HMRC had already had enough information to determine the tax liability as they had issued discovery assessments for the years concerned. Requesting further information was unreasonable.

Decision

The First Tier Tribunal found that it was clear that:

- by raising the discovery assessments, HMRC had already concluded that tax was due;
- the appellants disagreed and have appealed believing no tax was payable;
- HMRC were now seeking to check the taxpayers’ tax position, rather than establish whether there had been an understatement.

The issue to decide was whether the information requested was reasonably required to check this tax position.

The Tribunal stated that it seemed very unlikely that the parties would come to any agreement as to their tax position even if the requested information was provided before Tribunal proceedings were substantively underway. Consequently, the Tribunal did not consider that any useful purpose would be achieved by ordering that the information notice be complied with. The information was not reasonably required.

The Tribunal concluded by saying:

“Whilst it will often be desirable for matters to be resolved without recourse to the Tribunal, the appellants in this case have effectively demonstrated that they do not wish to facilitate an early resolution to the disputes.”

Jack George Yerou and Panayiota Yerou v HMRC (TC08410)