

Business tax round up (Lecture B1431 – 24.25 minutes)

Tax Administration and Maintenance Day

On 18 April 2024 the government announced various tax policy proposals and updates which included the those detailed below.

VAT treatment of private hire vehicles

The government published a consultation on the potential tax impacts of the two Uber-related High Court cases (Uber Britannia Limited v Sefton Borough Council (2023) and Uber London Limited v Transport for London (2021).

The High Court found that where private hire vehicle organisations accept bookings from passengers they are acting as principal under a contractual obligation with the passenger to provide the journey and so must charge VAT on their fares.

Ahead of the ongoing appeal of the 2023 High Court judgment, the government's consultation invites views on potential government interventions that could help to mitigate any undue adverse effects on the private hire vehicles sector and its passengers.

The consultation closes on 8 August 2024

https://assets.publishing.service.gov.uk/media/661e7dd67469198185bd3e51/PHVs_ConDoc_-_FINAL.pdf

Charitable donations

In order to encourage charitable giving, later this year the government plans to consult on introducing VAT relief for low value goods donated by businesses to charities which charities then give away free of charge to people in need.

Tackling Non-Compliance in the Umbrella Companies Market

In June 2023, the government consulted on options to reduce tax non-compliance in the market and will publish a response to its consultation in due course.

HMRC has announced that it will publish new guidance later this year, including an online pay checking tool to help umbrella company workers to check whether the correct deductions are being made from their pay.

The government will introduce a due diligence requirement to drive out “bad actors from labour supply chains”. This will be achieved by working with the recruitment industry and other key stakeholders to consider the details of a statutory due diligence regime aimed at reducing non-compliance.

<https://www.gov.uk/government/consultations/tackling-non-compliance-in-the-umbrella-company-market>

Mandating postcode provision for Freeports and Investment Zones NIC reliefs

Employers operating in a Freeport or Investment Zone are able to claim secondary Class 1 NIC relief.

Provided that 60% of an employee's working time is spent in the tax site, employers do not have to pay any employer NICs on up to £25,000 of the eligible employee's earnings per year for up to 36 months.

In an attempt to reduce employer error and enable assurance of claims by HMRC without them having to contact the employer, the government is consulting until 15 May 2024 on draft regulations under which employers will be required to provide their employees' workplace postcode to HMRC.

The postcode will need to be the postcode in the special tax site where the eligible employee is expected to spend at least 60% of their working time. This is information the employer should readily hold as it underpins eligibility to the relief and therefore should be possible to provide at the point of claiming the relief.

This requirement will:

- encourage employers to check eligibility at the point of claim, reducing employer errors from the outset;
- support HMRC in assuring validity of claims without generally having to contact the employer, enabling data driven compliance activity.

After the consultation, secondary legislation will be brought forward, with software developers given time to make changes ahead of its implementation.

<https://www.gov.uk/government/consultations/freeport-and-investment-zone-employer-national-insurance-contributions-reliefs>

Suppressed cash sales

Summary – The company had deliberately suppressed cash takings but the Tribunal required the suppression to be recalculated based on the company's claim that between 30% and 40% of total sales were made in cash.

From March 2012 to November 2018, Cheon Fat Limited operated a Chinese restaurant offering an a la carte menu (including set meals), an all-you-can-eat buffet, a lunch menu and take away facility. It was also licenced.

Following an initial covert visit to the restaurant in April 2016, HMRC considered revenue to be at risk and so undertook a number of further visits through May during which they ordered, ate and paid for meals whilst also observing and taking notes of the business activities. The meals were paid for in cash and no VAT receipt was requested as HMRC's aim was to subsequently collect the VAT records to verify whether VAT has been declared on the meals purchased by its officers.

Unannounced visits were made in November 2016 and July 2017, just before closing time, to observe the restaurant's cashing up procedures. As a result of these two visits, and the analysis undertaken of the days on which test purchases were made, HMRC considered that cash sales were being suppressed. Three out of five of the meals bought by HMRC officers in May had been excluded from the records. Further, HMRC observed that there were at least two meal ticket pads in use at any one time but the business chose to declare just one sequence of numbers and even then, only incompletely.

HMRC calculated the undeclared takings based on the expected ratio of cash to credit card sales ratio, using a percentage established at the November 2016 and July 2017 visits and information received from Worldpay about credit card sales.

HMRC considered that the suppressed takings had been for the benefit of the shareholder/directors and had not been correctly recorded in the directors' loan account and so additional corporation tax was due (s.455 CTA 2010).

HMRC also noted that the company did not appear to be accounting for VAT in respect of all of the 10% service charge added to eat-in meals and other more minor calculation errors.

HMRC issued:

- Corporation tax assessments for the years ended 31 March 2013 to 31 March 2016 totalling £247,428 plus penalties of £102,700;
- VAT assessments for the periods 12/12 through to 12/16 totalling £136,709 and related penalties of £53,715.

The penalties were calculated on the basis of deliberate behaviour for both corporation tax and VAT, with full mitigation for helping and giving but no mitigation for telling as the company had denied the suppression of takings throughout.

The company appealed.

Decision

The First Tier Tribunal rejected HMRC's method for calculating the suppressed takings due to errors in HMRC's calculation process.

The Tribunal accepted the company's claim that between 30% and 40% of total sales were made in cash, much more than the 9% declared in the business records for the four-year assessment period. Figures were recalculated accordingly.

The Tribunal agreed that there had been 'considerable cash suppression' and that the director's behaviour could not have been 'anything other than deliberate'.

Cheon Fat Limited v HMRC (TC09094)

Distributions not dividends of a capital nature

Summary – Distributions were dividends of a non-UK resident company and were not dividends of a capital nature meaning they were liable to income tax.

Alexander Beard was a UK resident and a shareholder in Glencore PLC, a publicly listed company incorporated in Jersey and domiciled in Switzerland.

In 2011, when the company restructured, he had acquired his shares.

As a shareholder, he received:

- cash distributions in 2011/12 to 2015/16 paid from the company's share premium account, which were not debited to retained earnings;

- an in-specie distribution of shares in a subsidiary, Lonmin plc, in 2015.

On 8 October 2019, HMRC issued a closure notice assessing Alexander Beard to income tax on these distributions.

Alexander Beard appealed to the First Tier Tribunal arguing that the distributions from the non-UK resident company were of a capital nature, and so under s.402(4) ITTOIA 2005, were not liable to income tax. He argued they were instead liable to capital gains tax.

The First Tier Tribunal found that despite the distributions being paid from the share capital account, they were not a repayment of capital, but rather dividends that were liable to income tax.

The company appealed to the Upper Tribunal.

Decision

The parties agreed that there were two questions to address:

1. Were the distributions “dividends”?
2. If the distributions were “dividends”, were they “dividends of a capital nature” for the purposes of s 402(4) ITTOIA 2005?

Following the decision in *First Nationwide v HMRC*, the Upper Tribunal stated that there was no definition of “dividend” in ITTOIA 2005, and that dividend should be given its ordinary meaning for “English law purposes” and then “look at the foreign law governing the relevant payment”. In this case, it was the Companies (Jersey) Law 1991

The Upper Tribunal agreed with the First Tier Tribunal, who had found that the distributions:

- fell within the meaning of a dividend as a matter of ordinary usage for English law purposes;
- fulfilled almost exactly the example description provided in *First Nationwide*;
- were paid out of share premium account by the same mechanism as would be used for paying a dividend out of trading profits (Part 17 CJL 1991).

Further, the Upper Tribunal agreed with the First Tier Tribunal’s conclusion that there was nothing either in the Jersey legislation or the manner in which the payments were made to indicate that the distributions could not be treated as fulfilling the English law definition of a dividend.

Having found that the distributions were dividends, the Upper Tribunal moved on to consider whether the dividends were of capital nature under s.402(4) ITTOIA 2005 and concluded that they were not. Referring once more to the *First Nationwide* case, the Tribunal found that under Jersey law payments made under Part 17 CJL 1991 could only be treated as an income distribution.

The appeal was dismissed.

Alexander Beard v HMRC [2024] UKUT 00073 (TCC)

Input tax disallowed

Summary – The company failed to demonstrate a direct and immediate link between the expenses incurred and the taxable supplies that the business was making or intended to make.

Passion Incorporated Limited provided consultancy, advertising and marketing services.

In April 2019, having previously filed dormant accounts, the company applied to register for VAT with effect from 1 May 2019.

In November 2019 HMRC initiated a standard check of the company's VAT return for the period 7/19.

When requested documentation was not supplied, HMRC issued a reminder and requested similar records for the period ending 10/19, with additional tax periods added as supporting evidence for input tax claims was not supplied.

In August 2020 HMRC issued a Schedule 36 Information Notice for copies of VAT reports showing individual purchases and sales for the following periods: 10/19, 01/20, 04/20, and where not previously supplied copies of purchase invoices for the VAT claimed as input tax for 07/19, 10/19, 01/20 and 04/20.

On 30 November 2020 HMRC outlined its view of the information provided for the VAT periods 07/19, 10/19, 01/20, 04/20 and 07/20 which included an explanation that to recover input tax on costs it was necessary to demonstrate a direct and immediate link to the taxable supplies that the business was making or intended to make. Further information was requested.

In Spring 2021 HMRC issued:

- decisions disallowing input VAT for seven VAT periods (07/19 through to 1/21); and
- a 'best judgement' assessment for 10/19 to recover VAT that had already been repaid to the company.

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

HMRC argued that based on their experience, the expenditure incurred related to items normally associated with personal rather than business usage such as personal healthcare, subscriptions, taxis, restaurant meals, hotel expenses, club membership and entertainment. The company had been unable to provide adequate supporting evidence to prove otherwise.

Decision

The First tier Tribunal concluded that the key reason for disallowing most of the input tax claimed was due to HMRC being unable to determine whether the expenditure giving rise to the input tax was incurred for the purposes of the company's business as evidence was lacking.

Further reasons for the disallowance included:

- invoices not being addressed to the company;
- double counting of invoices; and

- claims for expenditure in relation to which no VAT had been incurred (for example a charitable donation and purchases made at Heathrow airport).

The First Tier Tribunal found that HMRC had acted fairly and applied the legislation correctly. The onus was on the company to demonstrate the link existed between the expenditure incurred and its taxable supplies, which the company had failed to do.

The company's appeal was dismissed.

Passion Incorporated Limited v HMRC (TC09064)

Four-day period best judgment assessment

Summary – With no other evidence provided, HMRC's best judgement assessments, based on a four-day period, were upheld.

Martin and Ellena Byrne traded through a partnership. The business had no till. Cash and card sales were handwritten in Challenge duplicate books from which customers were given receipts.

HMRC selected their ladies' fashion business for a VAT enquiry as available merchant acquirer data showed that takings were only 111% of the turnover declared in its VAT returns.

In June 2016, HMRC carried out an unannounced visit to the business premises and obtained the Challenge receipt book on the premises at the time of the visit which covered the four days from Monday 13 June 2016 to Thursday 16 June 2016.

Having analysed the receipt book, HMRC identified that cash sales for this period were 28% of total sales but that these had not been recorded in the VAT returns. When asked, the partnership was only able to supply Challenge receipt books covering the period 27 May 2016 to 16 July 2016, claiming the rest had been destroyed in a flood.

Following further exchanges between the parties, HMRC issued a VAT assessment for the amount of undeclared cash takings by assuming that throughout the entire period to which the assessment related (03/12 to 09/17), cash takings were 28% of overall sales.

Later, HMRC revised the assessment downwards, with cash takings calculated 22.4% of overall sales, rather than 28% as one of the sums was found to be a card payment.

The Byrnes accepted that they had not declared their cash takings but appealed the percentage used by HMRC. They argued that the cash sales for the four-day period used to calculate the assessment included two, abnormally large sales, which distorted the final assessment and that the appropriate percentage was in fact 12%.

Decision

The First Tier Tribunal was satisfied that HMRC had acted in good faith and sought to apply a reasonable methodology to determine the assessment raised.

The First Tier Tribunal stated that it was for the partnership to 'establish a more reliable figure' than HMRC's assessment.

It was not disputed that the figure of 22.4% for cash sales correctly reflected the information from the review period but the partnership failed to identify any other:

- period that could be used as the basis for the assessment;
- methodology for making the 'best judgement assessment.

The First Tier Tribunal accepted that two items had a significant effect on the cash percentage figure arrived at by HMRC but no evidence was provided to enable the Tribunal to conclude that these items necessarily distorted the accuracy of the percentage arrived at, or that removing them would necessarily lead to a more accurate figure.

Finding that the taxpayers had not discharged their burden of establishing by evidence a more reliable figure than the figure in the HMRC assessment, the appeal was dismissed.

Martin and Ellena Byrne trading as Eva (TC9054)

Time of supply and VAT groups

Summary – VAT was due on performance related fees as the companies concerned were no longer part of the same VAT group at the time of supply.

Silverfleet Capital Ltd supplied investment management services in relation to a with-profits fund to The Prudential Assurance Company Limited. Both companies were part of the same VAT registration group until 2007 when, following a management buy-out, Silverfleet Capital Ltd left the VAT group.

As part of the agreement, performance fees were payable to Silverfleet Capital Ltd if certain targets were met. These targets were met but only after Silverfleet Capital Ltd had left the VAT group.

The issue to decide was whether VAT was chargeable on the fees:

- The Prudential Assurance Company Limited believed the fees were consideration for services carried out when the companies were members of the same VAT group and so no VAT was chargeable (s.43 VATA 1994);
- HMRC argued that the services were a continuous supply of services, meaning VAT was chargeable as the related invoice and payment had occurred after Silverfleet Capital Ltd had left the VAT group (SI 1995/2518, reg 90(1)).

The First Tier Tax Tribunal had found in the taxpayer's favour while the Upper Tribunal had reversed the decision, finding in HMRC's favour.

The Prudential Assurance Company Limited appealed to the Court of Appeal.

Decision

The Court of Appeal concluded that the correct approach to adopt was to identify when the supply was made under the time of supply rules before moving on to consider whether the companies were still members of the same VAT group at that time.

As a continuous supply of services, the time of supply was when the invoice was raised or paid. By that time, Silverfleet Capital Ltd was no longer a member of the VAT group, meaning that VAT was due on the supply.

The appeal was dismissed.

The Prudential Assurance Company Limited v HMRC [2024] EWCA Civ 300

Vehicle black box devices

Summary – The taxpayer remained the owner of the black boxes and did not make any taxable supplies that would entitle it to recover the input VAT incurred on the provision and fitting of devices.

WTGIL Limited was known as Ingenie Limited at the time of the events in this case.

Ingenie Services Limited, a member of the Ingenie Limited VAT group, supplied telematics devices known as 'black boxes', which were installed in cars as part of insurance policies underwritten by a third party. Collected data from the box was provided to both the policyholder and the insurer. The box was intended to enable the policyholder to improve their driving and so obtain cheaper car insurance.

The group claimed that the provision and fitting of these devices were taxable supplies made by Ingenie Services Limited to policyholders. The company made a repayment claim totalling around £2 million seeking to recover related input tax.

HMRC denied the claim on the basis that the commission paid by the insurers to Ingenie Services Limited was consideration for the exempt supply of insurance intermediary services, meaning that the input tax was irrecoverable.

The case was dismissed by the First Tier Tribunal who found that there was no supply of goods or consideration given for the supply of services by Ingenie Services Limited to the policyholder relating to the devices.

The group appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that there was no supply of goods for consideration as Ingenie Services Limited remained the owner of the black boxes as they were fitted as a condition of the insurance policy and could not be disposed of by the policyholder.

The Tribunal decided that there was a supply of services being the installation of the device. However, there was no direct link between the services provided and any consideration paid by the policy holder.

Finally, the Tribunal found that Ingenie Services Limited had not made a deemed supply for the purposes of Article 16 and paragraph 5 Schedule 4 VATA 1994.

The appeal was dismissed.

WTGIL Limited v HMRC [2024] UKUT 77 (TCC)

Financial hardship and lack of evidence

Summary – A company's hardship claim was not supported by suitable documentary or oral evidence and so the hardship application was dismissed.

SC Business Gateway Ltd bought luxury goods in the UK and exported them to customers in Asia.

HMRC issued a best judgement assessment totalling just over £270,000 following their decision to disallow input tax claimed.

Normally, to be able to appeal, a taxpayer must either pay the assessment in full or deposit the amount owed to HMRC. However, this rule can be overridden where the payment 'would cause the appellant to suffer hardship' (s.84(3B) VATA 1994). Where hardship is granted, nothing needs to be paid until a decision is reached.

In this case, SC Business Gateway Ltd claimed hardship but this was denied by HMRC. The issue to decide was whether the company had discharged its burden of proof to show that it would suffer hardship if required to pay or deposit the amount of VAT due under the Assessment.

Decision

The First Tier Tribunal confirmed that the issue was whether, having considered all of the relevant information including any loan facility that might be available, the payment would cause financial hardship. A director simply stating that they cannot afford to pay was not enough.

The First Tier Tribunal considered the evidence provided, finding that the evidence relied on in the appeal was "thin on the ground". The company produced bank statements but with no transactions and failed to provide any company accounts or details of other bank accounts. The Tribunal had been made aware of two other bank accounts (Royal Bank of Scotland and the Bank of China) but was told that these accounts had been frozen in relation to anti-money laundering rules. No further information relating to these accounts was supplied.

Having considered all of the documentary and oral evidence, the Tribunal found that the company had failed to discharge the burden of proof in respect of the issue of hardship and the application was dismissed.

SC Business Gateway Ltd v HMRC (TC09075)