

## Personal tax round up

(Lecture P1161 – 16.36 minutes)

### BBC presenters and IR35

*Summary - On a split decision, the work done by three BBC presenters was held to fall foul of the IR35 rules so tax and NIC were due on payments made to them by their personal service companies.*

Joanna Gosling, Tim Willcox and David Eades worked for the BBC through their personal service companies: Paya Ltd, Tim Willcox Ltd, and Allday Media Ltd. HMRC challenged the companies, arguing that the presenters' earnings for 2006/07 to 2013/14 were caught by the IR35 rules, making the companies responsible for tax and National insurance on those earnings.

Interestingly, prior to setting up their companies in 2003 and 2004, Tim Willcox and Joanna Gosling had worked as freelancers for the BBC, and David Eades had been an employee for a number of years before taking voluntary redundancy. It seems that around 2003 or 2004, news presenters were given little choice; they could either go on to the BBC payroll as employees or provide their services through a personal service company.

Each of the three personal service companies entered into a number of contracts with the BBC to provide the services of the presenters. During the tax years concerned, all three presenters undertook some other work to varying degrees. Interestingly, in 2014 all three presenters ceased working through their personal service companies to become employees of the BBC.

The appeal followed the normal pattern of events whereby the Tribunal looked at mutuality, control and other provisions within the contracts to see if they were consistent with them being contracts of service. The decision, however, was not clear cut.

#### *Decision*

The First Tier Tribunal concluded that the BBC was looking to shift the employment tax risk to the presenters through their personal service companies. The individuals had little choice but to contract with the BBC through personal service companies as the BBC considered that this was the only acceptable way of contracting with the presenters to reduce their tax risk. The only alternative was to accept a substantial pay cut and become an employee.

Considering a hypothetical contract, Judge Morgan concluded that IR35 applied to most of the contracts:

- **Mutuality of obligation:** Even though the presenters had the option to refuse to work on some dates, all three presenters were required to work for a minimum number of days if asked to do so, with the BBC being required to pay for that minimum number of days, regardless of whether work was actually provided. This was held to be a sufficient mutuality of obligation;

- Control: Before taking on other client work, the presenters needed to obtain the BBC's consent before accepting. Additionally, the BBC had ultimate control over the productions, with limited autonomy allowed when the presenters were presenting and interviewing. This was seen to be evidence of employment.

Interestingly, the second judge agreed with the finding of facts, but disagreed with final conclusion reached by Judge Morgan. He concluded that there was no guarantee that their contracts would be renewed, there was a significant degree of flexibility to their work pattern that allowed them to refuse work and use their journalism skills elsewhere; although the editorial guidelines provided a framework as to what needed doing the news readers did have a significant amount of autonomy as to how they worked. In addition the newsreaders had no holiday pay, sick pay or pension provision.

The final decision rested with Judge Morgan's casting vote with the final decision going in HMRC's favour. However, the judges agreed that the presenters and their advisers had acted in good faith, and had not been careless in their decision to disapply the IR35 rules. This meant that the enquiry period was limited to four years, and so some of the determinations were invalid as they were issued out of time.

Point to note: If these presenters had been investigated today, the new off-payroll rules contained in Chapter 10 ITEPA 2003 would have applied. This would have resulted in the BBC picking up the bill. With the BBC giving the presenters little choice over the use of their personal service companies, some might say that this would have been a fairer outcome.

*Paya Ltd, Tim Willcox Ltd, Allday Media Ltd v HMRC (TC07377)*

**STOP PRESS:** Christa Ackroyd, the Look North presenter, has failed in her appeal to have her deemed employment status under the IR35 legislation overturned. The Upper Tribunal has found that the First Tier Tribunal had not erred in law when they concluded that the BBC had the ultimate right of control over her actions. We will provide a detailed summary of this case in next month's release.

## **GP's money – salary or compensation?**

*Summary – Payments made by South Kent Coast CCG to the taxpayer's practice, for his services, constituted a salary and not compensation for the cost of engaging a locum.*

Bruce Cawdron practiced as a GP and was the sole shareholder and director of Warehorne Consultants Limited that traded as the Martello Medical Practice. Prior to April 2013, he was the sole GP practicing from this practice, working five days each week for the practice.

In late 2012 he was appointed as a GP member of the South Kent Coast CCG Board with the appointment running from 1 April 2013 to 31 March 2015 with him agreeing to work one day a week. However, he left the role early on 31 May 2014. During this time his Practice received payments totalling £51,519.80 from the South Kent Coast Clinical Commissioning Group ("CCG").

The issue to be decided was how the sum paid of £51,519.80 was to be treated for tax:

- Dr Cawdron argued that the payments were made by the board to the Martello Medical Practice and were made to compensate the practice for the cost of engaging a locum one day a week when he worked for the South Kent Coast CCG;

- HMRC considered that the contract was between the South Kent Coast CCG and Dr Cawdron and that the payments were remuneration for his services.

### *Decision*

The First Tier Tribunal found that the contract was between South Kent Coast CCG and Dr Cawdron as an individual. Martello Medical Practice was not a party to the contract. Dr Cawdron was paid monthly in arrears for the work he carried out as an office holder and should be taxed as employment income.

As far as South Kent Coast CCG were concerned, the fee paid related only to the time Dr Cawdron spent working for them, and that it was unrelated to the costs of employing a locum. The contract made no reference to compensation for the loss of engaging a locum.

The Tribunal accepted that the cost to the practice of providing medical services five days a week had become more expensive when Dr Cawdron had started working a day a week for the board. It did not matter that Dr Cawdron requested for his payments to be made to the Martello Medical Practice rather than his personal bank account. This did not change the nature of the contract, nor the nature of the payments. The Tribunal agreed with HMRC that the amounts were the income of Dr Cawdron and, as advised on the P60, should have been included on his personal tax return. The appeal was dismissed.

*Bruce Cawdron v HMRC (TC07295)*

## **Entrepreneurs' relief and trading**

*Summary – Entrepreneurs' relief was available when the company was liquidated as it had been trading for a number of years after the issue of its last invoice. The company was seeking new business for the purpose of a trade that it was preparing to carry on.*

The Potters owned all the shares in Gatebright Ltd, which had traded successfully on the London Metal Exchange with Neil Potter being an 'introducing broker' and dealer.

Following the financial crash in 2008 the company:

- sought to safeguard its reserves by purchasing investment bonds paying £35,000 of interest annually from 2009 to 2015;
- issued its last invoice in March 2009, after which the Potters continued to attempt to revive the company's trade, but without success.

Gatebright Ltd was eventually put in voluntary liquidation in November 2015, resulting in a capital gain arising on the deemed disposal of their shares, against which the Potters claimed entrepreneurs' relief.

HMRC disallowed the claim, putting forward two arguments:

1. Gatebright Ltd had ceased trading. Under s169 TCGA 1992, to be eligible for entrepreneurs' relief, Gatebright Ltd needed to have been a trading company throughout a period of one year, ending either on the date of the disposal (in November 2015) or on any other date in the previous three years; or

2. The company was not a trading company. The investment in bonds meant that the company's activities had become, to a substantial extent, investment activities and not trading activities.

### *Decision*

The First-tier Tribunal said the key question was whether Gatebright Ltd was a trading company after March 2009, when it issued its last invoice. The Tribunal concluded that the company was trying to find new business to be able to continue its old trade, once the market had improved. During this time, Mr Potter was telephoning and meeting contacts, trying to find business, but he was unable to make any deals. The Tribunal concluded that in November 2012 it was still reasonable to believe that they would ultimately find new business. There were still attempts to do deals until June 2014 when activity decreased.

The First Tier Tribunal highlighted that holding bonds and earning interest seemed to imply investment activities but they stated that, having invested in bonds, the company could not do anything else with those funds until the bonds had matured in 2015.

The Tribunal concluded that the company was not carrying out investment activities. There was no time or money spent on investment activities. Its activities did not include, to a substantial extent, activities other than trading. Indeed, its activities were entirely directed at reviving its trade.

The taxpayers' appeal was allowed.

*Jacqueline and Neil Potter v HMRC (TC07348)*

## **Goodwill or land disposal**

The Leeds Cricket, Football & Athletic Company Ltd (Leeds CFA) owned the freehold to Headingley cricket ground (the Property) that it leased to Yorkshire County Cricket Club (YCCC) in order that YCCC could play cricket there. In December 2005 Leeds CFA sold the Property to YCCC.

On 30 December 2005 Leeds CFA entered into a contract with YCCC for the sale and purchase of freehold property at Headingley Cricket Stadium. The question before the FTT was whether the sale was a disposal of:

- land with attached income streams that would be treated as a capital gain; or
- a business with attached goodwill.

Although the ground prior to the sale was leased to YCCC, Leeds CFA maintained the right to carry out hospitality, catering and advertising in the ground. This included selling corporate hospitality packages, selling advertising on the boards around the ground and providing meals and refreshments to visitors to the stadium on cricket days. The case called these activities the "cricket business". On the sale of the ground to YCCC, Leeds CFA provided details of customer lists and transferred third party agreements to YCCC and the catering business was licensed back by YCCC to Leeds CFA.

HMRC argued that these activities were ancillary to the land and could not exist without having the land and also that it was a passive income stream arising from the land which did not require anything to be done by Leeds CFA.

### *Decision*

The First Tier Tribunal dismissed both arguments on the facts provided in that Leeds CFA did have to organise activities to support the cricket business and this business could exist without the land. It was not land with income streams attached.

The next question was whether the business had goodwill attached to it. The FTT referred to the summary of goodwill in *Balloon Promotions Ltd and others v HMRC* [2006] SpC 524 and highlighted the client base and reputation which had been built up by the cricket business over the years. They concluded that the business did have goodwill attached to it.

The last point to be raised was whether the business and associated goodwill was transferred with land. HMRC's main arguments focussed on the business not actually being transferred as Leeds CFA had licensed the catering business back and prior to the sale they had sub-contracted the hospitality functions out to another entity. HMRC therefore said that Leeds CFA had not actually transferred the cricket business.

The First Tier Tribunal dismissed these arguments stating that Leeds CFA was still engaged in those businesses but were employing standard business approaches to their operation. The Tribunal concluded that the Cricket Business, with attached goodwill, was transferred together with the Ground.

The appeal was allowed.

*The Leeds Cricket Football & Athletic Company Limited v HMRC (TC07362)*

*Adapted from case summary provided by Joanne Houghton*

## **Mistaken belief and employer's error**

*Summary – Relying on unqualified third parties was not a reasonable excuse for failing to submit a tax return on time but receiving no mail from HMRC through no fault of his own, meant that the taxpayer had special circumstances.*

Janis Locmelis had poor English and was not familiar with the UK tax system, relying on a friend to do his returns. He ceased self-employment in 2014/15 when he became an employee and provided details to a secretary to complete an online form notifying HMRC that he was no longer self employed. Mistakenly, he believed that no further action regarding his former self-employment was needed. He thought his self-employed status would close automatically when his employer started to pay taxes.

In September 2015, he advised HMRC of his new address. He claimed that he had not received anything from HMRC requiring a tax return to be submitted nor had he received reminders that he was late.

Consequently, Janis Locmelis filed his 2014/15 return late resulting in penalties being charged by HMRC. He did not dispute that his paper return had been filed late on 17 January 2019; he had tried to sort matters out as soon as he found out that the return was late.

On investigating, it was clear that correspondence from November 2015 to October 2018 had been sent in error to his old address due to his employer's incorrect updating of his address on HMRC's systems when completing a PAYE form.

### *Decision*

The First Tier Tribunal accepted that Janis Locmelis had kept HMRC up to date with his address. The delays in filing had arisen because of his:

- incorrect belief that he did not need to complete a tax return
- employer's incorrect updating of his address on HMRC's systems.

The First-tier Tribunal stated that a reasonable taxpayer would have checked the position with either a qualified adviser or directly with HMRC. Relying on unqualified third parties for help was not enough to amount to a reasonable excuse for the late returns. Although a genuine mistake, his incorrect belief was a genuine mistake but the legislation did not provide shelter for mistakes.

The Tribunal acknowledged that, through no fault of his own, he received no mail from HMRC, and so was not aware of the problem and could not correct the position. In their view, this amounted to special circumstances and so the penalties were quashed.

The appeal was allowed.

*Janis Locmelis v HMRC (TC07300)*

## **12 years of assessments cancelled**

*Summary – Inferences used were so unreasonable that 12 years of assessments were cancelled.*

HMRC claimed have made a discovery that the taxpayer had failed to declare trading profits from his second-hand car business for 2004/05 to 2015/16. They relied upon information from Worldpay (the payment processing company) showing a heading "Waltham Cars," with Sebastian Cussens described as the "principal".

When Sebastian Cussens failed to answer questions from HMRC at the start of its investigation, or at any other time prior to the hearing, HMRC inferred that Sebastian Cussens was a second hand car trader. Based on estimated sales for 2015/16, and with an assumed profit of 50%, HMRC raised 12 years of assessments plus penalties totalling some £340,000.

Sebastian Cussens appealed. His 81- year old father explained at the appeal that his son had permanent ill health that prevented him working. He received enhanced employment and support allowance from the DWP which is paid to persons who are unfit to work due to physical or mental impairments. He also explained that all vehicle trading took place through his company, Waltham Builders Ltd, and that vehicles were purchased at auction and sold on at a minimum profit.

## *Decision*

The First Tier Tribunal identified that they should follow a two-stage process:

1. Consider if the assessment was made according to the best judgment of the assessing officer. If not, the assessment fails and stage 2 does not arise;
2. Consider whether the amount of the assessment should be reduced by reference to further evidence available to the tribunal.

The First-tier Tribunal concluded that Sebastian Cussens 'was less than co-operative' and failed to produce adequate documentation on which HMRC could reply prior to appeal.

However, the Tribunal was concerned with how HMRC's had handled the case. In particular, they were unable to find that Sebastian Cussens had bought and sold second-hand cars and believed that HMRC had simply "plucked from the air" the 50% profit margin. They believed that HMRC issued the assessments to frighten Sebastian Cussens to engage properly in the review. The First Tier Tribunal formed the opinion that the assessments raised were 'so wild, extravagant and unreasonable that they were not raised for the purpose of making good to the Crown a loss of tax and so were not authorised by s29 TMA.' They were invalid as best judgment had not been used.

The appeal against the assessment and their related penalties was allowed.

The Tribunal also concluded that it was not for them to try to re-work these assessments. It is for HMRC to decide if they want to revisit the situation, making any appropriate adjustment for Sebastian Cussens' medical condition.

Sebastian Cussens was also criticised for failing to deal with the HMRC correspondence or explain his ill health prior to the appeal. If HMRC decided to revisit the matter, he was advised 'not to behave ostrich-like and to bury his head in the sand any further, but to respond, to the best of his ability'.

*Sebastian Cussens v HMRC (TC07337)*