

# Personal tax round up

(Lecture P1156 – 18.40 minutes)

## Travel expenses and commuting

*Summary – Travel to and from each site was ordinary commuting within s338 and so was not deductible from his employment income.*

Paul Novak submitted self assessment tax returns for 2012/13 to 2015/16. HMRC considered that certain travel expenses were not deductible and issued the discovery assessments for the two earlier years and closure notices for the two later years.

Paul Nowak maintained he was entitled to deduct these travel expenses from his earnings under s338 ITEPA 2003, which allows an employee to claim travel expenses for journeys direct from home to a temporary place of work, but not in the case of ordinary commuting. Thus the issue in this appeal is whether the travel expenses claimed by Paul Nowak related to ordinary commuting.

During each of the relevant tax years Paul Nowak lived in Pontefract and for at least part of each year worked for Weir Engineering Services Ltd. He was employed to work with electrical motors at various nuclear power stations throughout the country. He was employed in such roles over a period of some 5 years.

He was separately contracted by Weir Engineering Services Ltd to work at a specific power station. Letters confirmed “offers of temporary employment” showing commencement dates and the site at which he would work. It was possible to identify the end date of each contract from P14s provided by Weir Engineering Services Ltd when he left each employment. However, the P14s suggested that Paul Nowak had further contracts where no written offers of employment were available as he worked at some sites on the basis of an oral agreement.

Weir Engineering Services Ltd paid Paul Nowak a mileage allowance for travel from home to and from each site at the start and end of each contract. Every second day off, he was also paid a mileage allowance to travel home and back to the site. The mileage allowance paid was 23p/mile. Paul Nowak contends that he is entitled to claim deduction for the difference between the mileage allowance paid and the 45p/mile that is HMRC’s “approved amount”.

HMRC argued that Paul Nowak’s worked at each site under separate contracts of employment and, as such, each site was a permanent workplace within s339 ITEPA 2003 at the time he was working there. Thus his travel from home to the site lodgings was therefore ordinary commuting.

Paul Nowak appealed arguing that the sites were not permanent workplaces.

## *Decision*

The First Tier Tribunal concluded that the only evidence to suggest that each site was a temporary workplace was the fact that Weir Engineering Services Ltd paid lodging allowances and mileage allowances without deduction of tax. That was not enough to satisfy the Tribunal that the sites were temporary workplaces.

The Tribunal concluded that Paul Nowak was employed by Weir Engineering Services Ltd under a series of separate contracts of employment. Each contract required the him to work at a particular power station that, for the purposes of each employment was a permanent workplace. In relation to each employment, the site was a place that he regularly attended in the performance of his duties for that employment. It was the base from which his duties were performed. As such, his travel to and from each site was ordinary commuting within s338 and so he was not entitled to a deduction for the travel expenses he has claimed.

Although not subject of this appeal, the tax assessed related to claims for different types of deductible expenditure and included student loan repayments, which HMRC said ought to have been included in Paul Nowak's self assessment returns, and small amounts that may relate to accountancy fees. At the request of the appellant, the Tribunal agreed that this appeal should remain open in the event that he might wish to challenge the amount said to be due by way of student loan repayment or his entitlement to deduct sums for accountancy fees. Any application to rely on further grounds of appeal should be made within 28 days of the date of release of the Tribunal's decision.

The appeal was dismissed.

*Paul Nowak v HMRC (TC07307)*

## **Loyalty bonus payments**

*Summary – Payments of bonuses by an investment platform were 'annual payments' and that basic rate tax should have been deducted at source.*

Hargreaves Lansdown Asset Management Ltd provides a platform for the distribution to investors of investment products offered by different fund providers, as well as administration services to investors.

In 2013, HMRC announced that financial intermediaries making specified payments to investors should deduct basic rate tax at source:

- HMRC considered that Hargreaves Lansdown Asset Management Ltd was required to deduct and account for income tax on loyalty bonuses paid to individuals who invested in funds through their platform because these payments were such 'annual payments';
- Hargreaves Lansdown Asset Management Ltd considered that this did not apply to the loyalty bonuses it paid to investors because these were a discount against management charges.

An annual payment has four characteristics:

1. it is payable under a legal obligation;
2. it recurs or is capable of recurrence;
3. it constitutes income in the hands of the recipient; and
4. it represents pure income profit to the recipient.

Both parties agreed that the bonuses paid constituted income in the hands of the recipient and Hargreaves Lansdown Asset Management Ltd had not challenged that it was payable under a legal obligation.

The First Tier Tribunal held that the loyalty bonuses were payable under a legal obligation and were recurrent or capable of recurrence. However, the payments did not represent pure income profit so they were not annual payments and so allowed Hargreaves Lansdown Asset Management Ltd's appeal. HMRC appealed arguing that the First Tier Tribunal had decided wrongly on condition 4 that the bonus was merely a cost reduction.

Hargreaves Lansdown Asset Management Ltd counter appealed, arguing the First Tier Tribunal was wrong on condition 2 and that the bonus payment was not capable of recurrence. They argued that each month's bonus was a "one-off" payment.

#### *Decision*

The Upper Tribunal stated that whether the bonus payments represented pure income profits should be determined by asking the key question as to whether the investor received the loyalty bonus without having to do anything in return, or whether the investor had to pay the annual management charge, so that the bonus reduced the expense the investor was obliged to bear. They concluded that the term 'loyalty bonus' was the correct description — it rewarded loyalty. In this case, the investor received a further income distribution from his investment as a result of remaining in the fund. The judges therefore concluded the loyalty bonus was pure income profit. The First-tier Tribunal had erred in its approach by failing to base its decision on the contractual arrangements so the Upper Tribunal remade the decision on this point.

Having considered the terms and conditions as well as the commercial position, the Upper Tribunal concluded that the bonus payments were capable of recurrence. The loyalty bonus was paid monthly under a single contractual arrangement that did not renew each month.

HMRC's appeal was allowed.

*CRC v Hargreaves Lansdown Asset Management Ltd [2019] UKUT 0246 (TCC)*

*Adapted from case summary in Taxation (22 August 2019)*

## **Transfer of assets abroad (Lecture P1156 – 18.40 minutes)**

*Summary - The transfer of assets abroad provisions did not apply and, in any event, infringed the principle of free movement of capital.*

In 2005/16 and 2006/07 Andreas Rialas was UK resident and ordinarily resident, but domiciled in Cyprus.

Together with Gary Cressman, he founded Argo Capital Management Limited, carrying on a business as an investment adviser. Since each of them owned 50% of the issued share capital, neither had control of the company, but both worked for the company.

From around December 2004, relations between Rialas and Cressman deteriorated and Andreas looked for a way to sell the company. A UK company was found but they did not want to buy from Gary Cressman. So, in order to buy-out Gary Cressman's shares, a shelf company, Farkland Ventures Inc, was incorporated in the British Virgin Islands and transferred to the Rialco trust, Andreas Rialas's family trust, which was governed by Cyprus law. Gary Cressman transferred his holding in Argo to Farkland Ventures Inc, which financed its acquisition with a loan. Following the sale of the Argo shares to Farkland, Argo paid dividends to Farkland of £1,076,936.50, being 50% of the 2005 dividend of £2,153,873 dividend, and £1,659,230, being 50% of the 2006 dividend of £3,318,460. Finally, Andreas Rialas and Farkland Ventures Inc sold Argo Capital Management Limited to Absolute Capital Management Holdings Limited, a UK listed company.

HMRC issued closure notices assessing Andreas Rialas to additional income tax of £430,774.40 and £663,292.00 in respect of 2005/06 and 2006/07. These amounts were calculated as personal income tax on these dividends paid by Argo that HMRC considered were due under s739 ICTA 1988, on the grounds that he was either the transferor, or had procured the transfer, of assets to a person abroad, as a consequence of which dividends on shares in Argo were received by a person abroad and that he had the power to enjoy that income.

### *Decision*

S739-742 ICTA 1988 look to prevent UK residents from using foreign companies or trusts to avoid paying UK taxes. The provisions refer to situations where a UK resident individual undertakes a transfer of assets in favour of a non-resident person such that the income becomes payable to an offshore person/entity but the transferring individual (or transferor) has power to enjoy that income in some way.

The first issue was whether Andreas Rialas was a transferor for the purpose of s739 ICTA 1988. Although he had organised the purchase side of the transaction, he had not dictated to whom Gary Cressman sold his shares. Andreas Rialas was not the transferor or a quasi-transferor of Gary Cressman's shares.

The First Tier Tribunal added that most of the steps had been inserted for commercial reasons to facilitate the buy-out of Mr Cressman and the borrowing of the acquisition amount (the lender preferred to lend to a company incorporated in the BVI);

Although not necessary, the Tribunal went on to consider whether or not the provisions of s739 ICTA 1988 potentially infringe the principle of free movement of capital or are capable of so doing. They stated that if dividends paid by a company are, as a consequence of the legislation in question, treated differently in one Member State from how they would be treated in another Member State then that is a potential infringement of the right to free movement of capital. If Farkland had been established in the UK then any dividends it received from Argo would not have been subject to tax, being the receipt of dividends by one UK company from another UK company. However, because Farkland is resident in Cyprus, any dividends that Farkland receives from Argo would, if s739 applied, be subject to income tax in the hands of Andreas Rialas.

In their view the provisions of s739 did potentially infringe the right to free movement of capital and could not be justified because it was penal in its effect. In this case, it would put the taxpayer in a worse position than he would have been in had he formed Farkland in the UK; s 793 looks through the corporate veil so that he would be taxed on the income of his company, with no deduction for the interest paid by Farkland. The only effective remedy would be to disapply it.

The appeal was allowed.

*Andreas Rialas v HMRC (TC07316)*

## **PPR on two properties**

*Summary – The taxpayer was not entitled to principal private residence relief on the disposal of his properties and so should have returned the relevant gains on his 2006/2007 self-assessment tax return.*

Martin Fitzjohn has been an estate agent since 1993. In 2005, he moved out of the matrimonial home when he and his wife decided that they should have some time living apart to see if this would result in them resolving their matrimonial difficulties. Unfortunately, this ultimately resulted in a permanent separation in 2008 and stressful divorce soon after.

On moving out, he moved to “Regents Court” which he purchased on 31 December 2005 for £82,500. He sold Regents Court on 29 March 2006 for £93,000 making a gain of £10,500. Mr Fitzjohn’s evidence was that he found Regents Court unsuitable – it was a one-bedroom flat – because he wanted to have his children to come and stay with him. He returned a capital gain on Regents Court of £10,500 on his self-assessment tax return for the year 2005/2006. He did not seek to claim that Regents Court was his principal private residence, on the basis that it was only a temporary place to stay.

On 21 April 2006, he purchased another property “Silver Street” for £88,000 which he sold just four months later for £124,995, making a gain of £36,995. Before selling “Silver Street”, on 2 May 2006, he bought another property in Peterborough, “Bringhurst”, for £81,000 that he sold roughly six months later at the end of October, making a gain of £16,000. He did not return the gains in respect of Silver Street or Bringhurst on his tax return for 2006/2007 as he claimed that each property constituted his only or main residence for the purposes of section 222 TCGA.

In his letter to HMRC he explained that:

- Regents Court turned out to be far from ideal living space when he had his three young sons come to stay with him;
- Silver Street proved to be inconvenient in terms of taking his children to school.
- Bringhurst turned out to be a totally unsuitable location for life as the boys;

HMRC denied the PPR relief and so Martin Fitzjohn appealed.

### *Decision*

The Tribunal confirmed that Martin Fitzjohn's disposal of Regents Court was not in dispute in this appeal as that property was simply a temporary stopgap in order to tide him over at the beginning of his separation.

The Tribunal stated that it was clear that Martin Fitzjohn had acquired both his Silver Street and Bringhurst properties at a time when he was hopeful of a reconciliation with his wife. It seemed to them, therefore, that he did not occupy those properties with the necessary expectation of permanence or semi-permanence required for the purposes of the principal private residence exemption.

Additionally, the Tribunal observed that Martin Fitzjohn had owned Silver Street for approximately four months and Bringhurst for six months. They found his explanation for the rapid purchase and sale of both properties unconvincing. As an experienced local estate agent, the Tribunal thought it more likely than not, that Martin Fitzjohn saw the opportunity to make quick profits.

The appeal was dismissed.

*Martin Fitzjohn v HMRC (TC07291)*

## **Lottery loss**

*Summary – The loss suffered by the taxpayer when a loan became irrecoverable was a capital loss as the company had been trading prior to going into administration*

Altala Group Limited, originally called Health Lottery Limited, was incorporated on 17 May 2007. Its aim was to launch an alternative to 'The National Lottery' that held a 97% share of the market in the UK. A concept of a lottery with fixed payouts and the beneficiary being a good cause, namely the National Health Service, was created. Upon commencement of trading Altala Group Limited undertook a share exchange agreement with NHS Lotteries Limited, which had developed the concept of such a lottery but had no funding. Altala Group Limited continued the development of 'The Health Lottery' concept. This was funded by an unsecured loan facility from Barclays Bank for £17.5m for a period of two years, maturing on 26 June 2009. This loan was secured by Credit Suisse. Michael Hunt acquired 22% of the company and through his nominee, the ABC Corporation, gave a guarantee for the loan facility.

The launch was delayed due to difficulties obtaining a gambling licence due to Michael Hunt's past. Due to his previous conviction for fraud, the Gambling Commission had reservations over his suitability as a controller. The company was unable to secure new funding when the first loan ran out and entered administration. The assets were sold to another company, who proceeded to launch the lottery using the marketing materials and infrastructure developed by Altala Group Limited.

Michael Hunt suffered the full loss of £17.5million and sought to claim this as a capital loss, arguing that the company had been trading.

With no gambling licence, HMRC argued that the company was not trading, and that this was supported by the Administrator's report that stated that there had been no actual trade.

### *Decision*

The First Tier Tribunal accepted that the creation of marketing materials and infrastructure used by the subsequent company to launch the lottery were activities in the course of a trade and this was sufficient for it to have commenced trading. The preparation work undertaken was operational activity undertaken with a financial risk, and so trading.

The loan made to Altala Group Limited was a qualifying loan to a trader, and Michael Hunt's payment under the guarantee was a capital loss. The appeal was allowed.

*Michael John Hunt v HMRC (TC07311)*

## **Settlements and entrepreneurs' relief**

*Summary – Settlement beneficiaries were entitled to entrepreneurs' relief on the disposal of shares by the settlements, even though they had only held their interests for less than 12 months.*

On 30 July 2015, Ludovic, Rollo and Bruno Skinner were granted interests in possession in three separate settlements. The following month, Quentin Skinner gave 55,000 D ordinary shares in DPAS Limited to the three Settlements. The beneficiaries, his children, had each held 32,250 C class shares granting full voting rights since 2011. Each child also held shares that accounted for 5.78% of the Company's ordinary share capital in their own right. As such, DPAS Ltd was a "personal company" for each of them. On 1 December 2015, less than four months later, the settlements sold the shares with the taxpayers claiming Entrepreneurs' Relief.

On 1 June 2018 HMRC concluded that "Entrepreneur's Relief is not due in this case as the beneficiary...had not held an interest in possession in the shares held by the trust for the requisite 12 month period."

Section 169J TCGA 1992 provides that a trustee disposing of shares will qualify for entrepreneurs' relief if conditions A and B are satisfied.

Condition A is that there must be a "qualifying beneficiary". This was not in dispute.

Condition B, as defined by s.169(4), is that throughout a period of 12 months ending not earlier than three years prior to the disposal of the shares:

- The company is either a trading company or holding company of a trading group and the *qualifying beneficiary's* personal company. Again this was not in dispute as the beneficiaries satisfied the 5% of the ordinary share capital /voting power of the company;
- The *qualifying beneficiary* is an officer or employee of the company or (if the company is a member of a group of companies) of one or more companies in the group.

HMRC argued that the references to the “qualifying beneficiary” in Condition B meant that Condition A also had to be met during the same period. As the beneficiaries had only held an interest in possession in the trusts since July 2015, entrepreneurs’ relief should not be available to the trustees.

The taxpayers appealed.

#### *Decision*

The First Tier Tribunal stated that, in their view, the focus of s169J(4)(a) is not on the “qualifying beneficiary” at all but rather on “the company”.

The Tribunal concluded that when Parliament introduced entrepreneurs’ relief the Explanatory Notes had stated that the requirements set out in Condition B were by reference to the qualifying beneficiary already identified by Condition A. If not, why was there a need for Condition A? Parliament’s intention in imposing Condition B was to require an “entrepreneurial connection” between the Company and the underlying beneficiary and that this condition had been satisfied.

They stated that:

“The possessive reference to the “qualifying beneficiary’s” is simply identifying whose personal company it is i.e. it must be the personal company of someone who is ‘a qualifying beneficiary’.”

In the Tribunal’s view it would be incorrect to conclude that the ‘qualifying beneficiary’ had to have the attributes for a period of one year during the three-year window. On a careful reading of the words used in s.169J(4), the Tribunal rejected HMRC’s construction of that statutory provision.

The appeal was allowed.

*The Quentin Skinner 2005 Settlement L & Ors v HMRC (TC07312)*



## Claim for SDLT refund

*Summary – The property bought, which included extensive grounds, was not a mixed-use property and so the repayment claim was not allowed.*

David and Sally Hyman bought a property known as “The Farmhouse”, near St Albans on 23 October 2015 for £1,515,000. The property was bought with over 3.5 acres of land. On the date of purchase, they submitted an SDLT return and paid SDLT of £95,550, which was the correct amount of tax if the property was wholly residential.

Outside the garden, was a large barn in a bad state of repair. It was structurally unsound, had rotten timbers and holes in the roof and walls and birds nested in it. It would require planning permission to convert it to residential use. In addition there was a meadow and a bridleway separated from the main garden by hedges.

On 5 September 2017, their agent wrote to HMRC claiming a repayment of £34,950 SDLT on the basis that the purchase had been misclassified as a residential purchase, when it was in fact a mixed-use property as it included non-residential elements and so a lower amount was due as the 10% and 15% bands do not apply.

Following an enquiry, HMRC issued a closure notice on 26 March 2018 stating that there was no evidence to support a mixed use claim and that the claim was amended to show that no refund was due. HMRC argued that “grounds” are simply the land surrounding a house which are available as an amenity for the dwelling and the use (or non-use) to which the land is put is not relevant. HMRC acknowledged that the barn could not be used for residential purposes but contended that it fell within section 116(1)(b) as “a building or structure on such land”.

The Hymans appealed.

### *Decision*

The Tribunal concluded that for SDLT purposes, “residential property” means a building that is used as a dwelling and land that is or forms part of the garden or grounds of the dwelling including a building on such land.

In their view “grounds” has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house that is occupied with the house and is available to the owners of the house for them to use.

The Tribunal concluded that the meadow and bridleway were part of the grounds of the Farmhouse within section 116(1)(b) and that the barn was a building or structure on that land.

Accordingly, the whole of the property owned by Mr and Mrs Hyman was residential property for the purposes of SDLT and the tax was correctly paid on that basis.

The appeal was dismissed

*Mr David Hyman and Mrs Sally Hyman v HMRC (TC07271)*