

Business tax round up

(Lecture B1211 – 20.56 minutes)

CJRS and the Employment Allowance

In June and July 2020 we included short articles on how the Coronavirus Job Retention Scheme and Employment Allowance could interact and concluded that we needed HMRC to confirm the position, as the goal posts seemed to be moving.

Initially we reported that a claim for the Employment Allowance could be deferred to later in the year, once the CJRS had ended. This would ensure that the maximum CJRS grant and employment allowance were claimed. At that time, the ICAEW's Tax Faculty supported this treatment but stated that they were waiting for confirmation from HMRC that this was acceptable practice.

In July we reported that HMRC were saying that attempting to get relief for the same NIC costs twice was a fraud and may result in claims being investigated.

But it seems that the position has changed once more, reverting back to our original view. HMRC has now confirmed to the ICAEW's Tax Faculty that employers can defer their Employment Allowance as we had originally suggested.

The ICAEW's Tax Faculty has now received HMRC's guidance on this point. On ICAEW's website dated 17th August 2020 it states:

“The employer is allowed to wait and claim the EA later in the year. There should be no worry about claiming relief for the same employer's NIC twice, provided that for the time after the date when the EA claim is made there is at least £4,000 of secondary class 1 NIC payable. It is very important to make sure the EA is not set against employer's NIC that has been claimed under the CJRS.”

The website also states that:

“The Tax Faculty understands that where necessary, software developers are modifying their payroll software accordingly.”

<https://www.icaew.com/insights/tax-news/2020/aug-2020/employment-allowance-and-the-cjrs>

LLP member: employee or self-employed?

Summary – Payments made by an LLP to the taxpayer were made to him as a member and not an employee, so he was liable to pay Class 4 NICs.

Peter Wilson qualified as a Chartered Accountant in Australia and later as a Chartered Accountant in the UK. He was a partner of Arthur Young Australia and over the years worked as a tax adviser for accounting firms in Australia, the US and UK.

He joined Haines Watts and at that time Haines Watts did not have a separate international tax department. It was agreed that Haines Watts would take over the relationships with his old accounting clients and provide all administrative assistance, staff, furniture, services etc. while Peter Wilson concentrated on building the international tax business.

It was agreed that he would receive "first charge drawings of £15,000 per month based on a minimum requirement of 1000 recoverable hours at £400 per hour as well as a number of other benefits. Specialist tax staff would be recruited to support the growth of the international tax work and he would receive 25% of the profits from that work (after his first charge and the cost of his other benefits). He enjoyed substantial voting rights as a member of the LLP although he was not entitled to vote on certain matters, including the admission of new members.

The LLP Agreement clearly identified three different categories of Member. The Managing Member, the Management Members and the Client Members. Peter Wilson fell into this last category. He claimed that payments from the LLP were made to him as an employee rather than under the partnership profit sharing arrangement as member.

Decision

The First Tier Tribunal stated that for Peter Wilson's appeal to succeed, he needed to show that he could be an employee of the LLP for tax purposes despite being a member of the LLP, and that the payments made to him were in relation to employment by Haines Watts and not in relation to his membership of Haines Watts.

The Tribunal considered the documents signed by him when he joined the firm. These clearly showed that the intention was to appoint him as an LLP member and the Tribunal concluded that the payments were made to him as partner.

Further, the Tribunal noted that he had submitted tax returns in 2011/12 and 2012/13 on the basis of receiving income/profit from his interest in the partnership. The Tribunal concluded that, as a highly qualified tax adviser, this action undermined his claim that he was an employee.

Peter Wilson v HMRC (TC07716)

Yard repair or replacement

Summary – Expenditure incurred on resurfacing a yard was revenue rather than capital in nature, even though it included a new drainage channel.

Steadfast Manufacturing & Storage Limited leased a factory and yard. The yard had not been resurfaced since before the site was acquired, and the surface was in poor condition. Some areas were unstable and unsuitable for use by forklift trucks, although they were used when necessary to turn the trailers for articulated lorries. As these areas were used less often than other areas of the yard, weeds grew through the surface area such that in overhead photographs the areas appear green rather than paved.

Historically, the yard was repaired twice a year by patching with gravel. The forklift trucks in particular would quickly dig into this material with their tyres. As this patching was becoming less effective it gave rise to health and safety concerns and the company decided that the yard should be resurfaced.

The work was undertaken as a single project and, as well as resurfacing, a drainage channel was added between the factory and the re-surfaced area to stop water from running across the yard, and to allow an expansion joint for the concrete. The cost of this channel was only £740. Overall, there was no increase in size of the useable area and no increase in the loadbearing capacity of the yard. The total cost of the works was approximately £74,000.

The issue was whether the expenditure amounted to a replacement (capital expenditure and disallowed) or a repair (revenue expenditure and so allowable).

Decision

The First Tier Tribunal concluded that there was no improvement in the yard compared to its original condition, and that the works only returned the yard to its previous standard. There was no increase in the useable area compared to the original. There also was no evidence of any increase in the load bearing capacity of the yard.

HMRC argued that the expenditure was capital because after the repairs had been done, there would be no need for further repairs for up to 20 years. The Tribunal dismissed this argument stating that prevention of the need for future repairs simply meant that the job had been done well in the first place. If HMRC were correct, most repairs would be treated as capital, which is clearly not the case. The work restored the yard to its original state and did not bring something new into existence. The additional drainage channel did not alter this. It was a minor addition to the works and there was no evidence that it made a substantial difference to the yard or the factory.

The expenditure incurred on restoring the yard should be treated as a revenue expense.

Steadfast Manufacturing & Storage Limited v HMRC (TC07770)

Failed R&D relief claim

Summary – A company failed to provide sufficient evidence to support its claim for R&D relief.

AHK Recruitment Limited provided human resources services and systems. In its Corporation Tax Returns for the periods ending 31 December 2014 and 31 December 2015, the company claimed R&D relief under s1044 CTA 2009 and, on the basis of that relief, R&D tax credits under s1055 CTA 2009. The claim related to a project that sought to develop a technological system capable of predicting applicant suitability for a job. The system looked to build an Artificial Intelligence system that could make recruitment related decisions to a human standard.

HMRC refused the claim arguing that evidence to support the claim provided by the company was inadequate. Even if any R&D activity was conducted, the company had not proved the quantum of the claim; evidence relating to sub-contractor costs was inadequate as it did not prove that the work undertaken by the sub-contractor related to the project.

Decision

The First Tier Tribunal confirmed that AHK Recruitment Limited needed to prove it had undertaken a project to achieve an advance in science or technology and, as part of that project, it had undertaken activities to resolve a scientific or technological uncertainty. The Tribunal concluded that AHK Recruitment Limited had failed to prove that it undertook such qualifying R&D.

Even if the company did carry out qualifying R&D it had failed to prove that the costs included in its R&D claim related to R&D activities.

The First Tier Tribunal concluded that that the company had neither provided sufficient documentary evidence nor supported its claim with satisfactory evidence from a competent professional who was contemporaneously involved in the project at the time.

AHK Recruitment Limited v HMRC (TC07718)

Input tax claim disallowed

Summary – An input tax claim, where a property had been opted to tax, was denied. The taxpayers were not letting the property as the occupants had no obligation to pay rent.

In 2008 Colin And Susan Slaymark bought an industrial unit/warehouse in Eastbourne, on which they opted to tax.

During ownership, four companies occupied the property: Fender Limited, Adkat Distributions Limited, Hotel Leisure Limited and South East Refurbs Limited. None of these companies paid any rent.

Some seven years later, the property was sold for £1.5 million plus VAT of £300,000. The couple's final VAT return included the £300,000 of output VAT less input tax of £68,541.

HMRC disallowed most of the input tax, allowing only the amount relating to the solicitors and estate agent's fees on the sale of the property.

The couple appealed.

Decision

The First Tier Tribunal considered whether the corporate tenants were required to pay rent, and, if not, whether Colin and Susan Slaymark expected them to pay rent. The Tribunal found that there was no obligation for any of the four companies to pay rent, nor did the couple expect that rent would be paid. They were not carrying on the economic activity of letting the property.

As for the expenses, the Tribunal agreed with HMRC. The fees relating to the property sale were allowed (legal and estate agent fees). However, the majority of the fees were disallowed as some of the expenses were unrelated to the property, while other expenses could not be proven.

The First Tier Tribunal dismissed the appeal.

Colin And Susan Slaymark v HMRC (TC07709)

Essay writing services

Summary – The Company was supplying essay writing services to customers as principal, rather than acting as the agent of the writers.

All Answers Limited operates an internet-based business where customers order academic work such as essays, dissertations or pieces of coursework in return for a fee. The company uses, but does not employ, writers and shares the fee paid by the customer with the writer, with All Answers Limited typically retaining two thirds of that fee. The writers are teachers, lecturers and PhD students. At no point is the writer's identity made available to the customer or vice versa.

HMRC argued that All Answers Limited had made a single standard-rated supply of the academic work to a customer and so should account for VAT on the full fee paid by the customer. The amount paid to the writer was a separate supply.

All Answers Limited argued that it was acting as the writer's agent in relation to the supply of the academic work. Output VAT was accountable on the two thirds of the fee that belonged to them for their commission element. The supply of the academic work was made by the writer to the customer and so the company was not obliged to account for VAT in respect of that supply.

The First Tier Tribunal disliked the company's business, describing it as thriving "upon providing essays, dissertations and coursework to cheats". The Tribunal found in HMRC's favour stating that when they stood back and considered the commercial and economic picture there was only one supply to the client and that that supply was made by All Answers Limited.

The company appealed to the Upper Tribunal.

Decision

The Upper Tribunal concluded that there was a legal relationship between All Answers Limited and a customer under which All Answers Limited, and only All Answers Limited, assumed liability for the obligation to provide academic papers. In return for All Answers Limited assuming such liability, a customer paid All Answers Limited a sum of money. The terms of that legal relationship were consistent with the commercial and economic reality of what happened. The supply of the academic work was made by All Answers Limited to a customer and so VAT was accountable on the full fee paid. It followed that, when All Answers Limited paid over the writer's share of that fee, All Answers Limited was paying consideration to the writer for a separate supply made by the writer to All Answers Limited, consisting of the service of preparing that academic work.

The appeal was dismissed.

All Answers Limited v HMRC [2020] UKUT 0236 (TCC)

Career coaching for international students

Summary - Career coaching services provided to Chinese students studying in the UK were consulting services rather than educational supplies. The supplies were standard rated until July 2016, from which date they became outside the scope of VAT.

Mandarin Consulting Limited provides career coaching to help Chinese students gain job and internship opportunities in major international organisations. Prior to July 2016, Mandarin Consulting Limited had contracted with the students but from that date, the company began contracting with their parents.

There were two key issues to decide in this case.

1. Were the supplies being made consultancy services or should they be treated as educational activities?
2. If the services were consultancy services, where was the place of supply as this determined the VAT treatment?

Mandarin Consulting Limited argued that their supplies were consultancy services and that those supplies were outside the scope of UK VAT as the recipients of the supplies did not have their usual residence in the UK. Their principal argument was that the supplies were made to the student's parents on the basis that they paid for the services and so were the "economic" purchaser of the services. If it was found that the supplies were made to the student candidates, the company argued that these too were usually resident outside the UK; the candidates were in the UK only for the temporary purpose of education. Thus, regardless of whether the recipients of the services were the candidates or the parents, Mandarin Consulting Limited argued that the supplies were outside the scope of VAT.

HMRC raised two VAT assessments for the under-declaration of output tax of £800,000 between the VAT periods of 03/16 to 06/17 and of just over £600,000 in the VAT periods 12/13 to 12/15. The company appealed

Decision

The candidates (or from July 2016, their parents) sought specialist advice from the company on job applications and interviews. These were not educational activities but rather they were consulting services. There was no set curriculum or course of study and no institutional framework within which the company's coaching was supplied. Instead, the coaching supplied to each candidate was tailor-made to suit the requirements of the individual candidate. The Tribunal concluded that the company supplied consulting services and not educational activities.

For consulting services, the place of supply is where the customer belongs. The Tribunal stated that the contractual arrangements, although not conclusive, should be the starting point and would be conclusive in deciding the place of supply unless the contractual arrangements were inconsistent with the underlying economic and commercial realities of the arrangements.

From July 2016, the company entered into contracts with the parents to coach their children. The Tribunal stated that from this time, the parents had a direct contractual right to require the company to deliver what was promised under these contracts. There was no doubt that the parents were outside the UK, and so the services provided to them were outside the scope of VAT.

Prior to July 2016, the services were supplied to the candidates through a contract with the candidates but the cost was usually borne by their parents. The Tribunal concluded that the company supplied its services directly to the candidates and not to the parents. The Tribunal stated that usual residence does not include temporary residence for a specific and definite period of time, such as attendance at a university degree course. Of far more relevance was where was a person's occupational and personal ties. Although there could have been an argument that the candidate's usual place of residence was outside the UK, the Tribunal observed that the company had no system for checking or verifying their usual place of residence. In fact the company was unaware of the importance of asking for that information in the first place. The First Tier Tribunal found that Mandarin Consulting Limited had failed to obtain sufficient evidence to show that the candidates' usual place of residence was outside the UK. The place of supply for services provided prior to July 2016 was therefore the UK, making them standard-rated up to this date.

Mandarin Consulting Limited v HMRC (TC07714)

No need to register

Summary – Based on new evidence and extrapolating figures in a more logical way, the taxpayer proved that she had not exceeded the VAT registration threshold.

Mrs Nguyen runs a nail bar. Following a number of unannounced visits by HMRC and a period of self-investigation for a week in which Mrs Nguyen was asked to record the takings from each customer, HMRC concluded that her takings had been suppressed by 50%. HMRC issued an assessment for £90,979 in respect of the period 2012/13 to 2016/17. They stated that they believed that her business should have been registered since January 2013.

Mrs Nguyen appealed, disputing HMRC's takings figures and argued that she was below the VAT registration threshold. At the hearing, she produced new evidence, including CCTV recordings taken since the start of 2019, showing the number of clients and how long each treatment typically took. Further, there were letters from clients supporting treatment times and cost as well as banking records and till summaries since April 2018. The hearing was postponed so that HMRC could review the new evidence.

Decision

As the business was still being run on the same basis, the First Tier Tribunal accepted the new evidence, despite the fact that it related to a period falling outside the assessment period.

The First Tier Tribunal concluded that on average there were ten customers a day over a six-day week and that each customer spent about £25. In total that gave projected takings of around £76,500. In 2013, the VAT registration threshold was £77,000, (higher in later years) The First Tier Tribunal concluded that the nail bar business had always traded below the registration threshold and the appeal was allowed.

Ly Nguyen v HMRC (TC07705)

Houseboat – building or boat?

Summary – Prohibition in the planning permission meant that the construction of a houseboat was not the 'construction of a building designed as a dwelling' and the DIY refund scheme did not apply.

On 30 May 1990, Edward Burrell obtained planning permission and then built his houseboat on a piece of land by creating a steel structure on rails. A concrete foundation was laid onto the steel structure for stability and a crane used to lift the structure before placing it on water, where it remained.

On completion, Edward Burrell submitted a claim for a VAT refund under the DIY Housebuilders Scheme. He argued that the houseboat was designed as a dwelling and was not being used, and could not be used for any other purpose. His home was never a vessel and at no stage could it have been used as a vessel. It had always looked like a dwelling. It consisted of self-contained living accommodation. Note 16, Group 5 of Schedule 8 did not apply as the works did not include the conversion, reconstruction or alteration of an existing building, or the enlargement of or extension to an existing building, or the construction of an annexe. In summary, it was a home with a concrete foundation base.

HMRC disagreed arguing that the construction of the houseboat was not the construction of a building as required under s.35(1A) (a) VATA 1994. Further, the planning consent that was granted related to the creation of a mooring and an email from the planning officer confirmed that no permanent structures or buildings on the land were permitted.

Edward Burrell appealed

Decision

The Tribunal found that the planning permission could not be interpreted to mean planning permission to construct a building. The permission made reference to the construction of a boat but also stated that 'No permanent structures or buildings placed on the land are permitted.'

The final nail in the coffin for Edward Burrell came in the Post-Construction Inspection Report when the marine surveyor used the words 'vessel' and 'awaiting launch' to describe the structure as follows:

A purpose built static houseboat with steel hull and timber superstructure.

For stability purposes the vessel has been ballasted with 6.5 tons mass poured concrete.

The vessel was build [sic] ashore on a slip way and is now awaiting launch"

These words did not imply a permanent structure such as a building.

The construction of a houseboat did not meet the 'construction of a building designed as a dwelling' test and so did not qualify for the DIY Housebuilders scheme.

The appeal was dismissed.

Edward Burrell v HMRC TC07766