

## Personal tax update

**(Lecture P1211 – 22.13 minutes)**

### Sports radio presenter

*Summary – Under a hypothetical contract the taxpayer would be treated as an employee. The First Tier Tribunal had erred in its findings on mutuality of obligation and IR35 applied.*

Kickabout Productions Limited is the personal service company of Paul Hawksbee, a sports radio presenter and scriptwriter. The company entered into contracts with Talksport Limited to provide Paul Hawksbee's services on the "Hawksbee & Jacobs Show", a three-hour radio programme broadcast every weekday from 1pm to 4pm.

HMRC sought to claim income tax and national insurance totalling £143,000 on the basis that, under the IR35 rules, Paul Hawksbee was an employee.

By the time of the First Tier Tribunal hearing, Hawksbee and Jacobs had been presenting the show for 18 years and for the three years under appeal, the income that Paul Hawksbee received from these shows represented roughly 90% of his total income. Further, he did not work as a radio presenter for anyone other than Talksport. Throughout the contracts, he was paid a flat fee per show, but had no right to holiday pay, sick pay or employer pension contributions and could not provide a substitute.

The First Tier Tribunal concluded that the arrangement did not fall foul of IR35. However, this was a split decision, decided based on Judge Scott's casting vote. The judges disagreed over mutuality of obligation; the obligation on Talksport to provide work, and the obligation on Paul Hawksbee to be supplied to perform the tasks requested. Both judges agreed that mutuality of obligation was present but Judge Scott considered that mutuality of obligation was not a strong indicator of employment in this case.

HMRC appealed to the Upper Tribunal.

#### *Decision*

The Upper Tribunal disagreed with the First Tier decision. Under the contracts, Talksport did have an obligation to provide work for Paul Hawksbee, and Kickabout Productions Limited had to make Paul Hawksbee available for that work. Mutuality of obligation was present.

The Upper Tribunal concluded that TalkSport had little control over how Paul Hawksbee carried out his work, but Talksport did have control over the tasks that he performed, as well as when and where he performed those tasks. There was sufficient control by Talksport to indicate an employment contract.

The Upper Tribunal went on to consider the other factors in this case and concluded that, taking all of the relevant factors into account, when viewed as a whole, they were not inconsistent with the hypothetical contracts being contracts of employment and as such IR35 rules applied.

*HMRC v Kickabout Productions Limited [2020] UKUT 0216 (TCC)*

## **Cars or vans**

*Summary – For a vehicle to be treated as a van, it must be primarily suited to the conveyance of goods. Where there is no primary purpose, the vehicle is taxed as a car.*

In June 2019 we reported on the Upper Tribunal's decision on the treatment of three types of vehicle supplied by Coca-Cola to its employees:

- Kombi 1 and Kombi 2 were vans that were acquired with a second row of seats already fitted but which were removable;
- The Vivaro was a van that was modified to add a second row of two extra removable seats, with some storage space to the side.

Agreeing with the First Tier Tribunal, the Upper Tribunal concluded that if a vehicle is marginally more suited to carrying goods then it is a goods vehicle and found:

- The Kombi vehicles were cars as they could be equally used for passengers and goods;
- The Vivaro was slightly more suited for goods and so was classed as a van.

## *Decision*

The Court of Appeal concluded that for a vehicle to be treated as a goods vehicle, and so classified as a van, it had to be predominately or primarily suited to the conveyance of goods. Where a multi-purpose vehicle had no such primary suitability, it could not be a van and should be taxed as a car.

On this basis, the Court of Appeal found that none of the vehicles were goods vehicles, but rather they were all cars.

*Noel Payne and others v HMRC [2020] EWCA Civ 889*

## **Construction sites and temporary workplace**

*Summary – Subsistence and travel expenses at a number of construction sites were disallowed, as there were no substantial changes in travel time between sites. The sites should be viewed as one workplace, at which the employee had worked for more than 24 months.*

Narinder Sambhi lived in Birmingham and since 2007 he had worked for companies in the Lend Lease Construction group. For a number of years he was required to work at sites around Birmingham but from September 2013, he worked in London, living there from Monday to Friday each week. During this time he lived in Ilford and Walthamstow but most of his work was either in south or central London.

His employer reimbursed his travel and subsistence costs, and deducted PAYE and national insurance from these payments.

Narinder Sambhi believed that each site qualified as a temporary workplace and so he claimed relief for his travel and subsistence. He had not worked at any of the sites individually, for more than two years.

HMRC disallowed the claims in his self-assessment tax returns totalling £20,000 in 2015/16 and 2016/17 arguing that his work at a number of sites in Greater London should be viewed as one site and in total that work had exceeded two years.

### *Decision*

The First Tier Tribunal stated that the only issue to address in this case was whether s339(7) ITEPA 2003 applied. When determining where a temporary workplace is, this section ignores any modification of the place at which duties are performed if it does not, or would not, have any substantial effect on the employee's journey, or expenses of travelling, to and from the place where they are performed.

The First Tier Tribunal looked at the journey times to each site from his accommodation, concluding that as no travel time differed by more than half an hour from another, and that the cost varied by no more than £14, the change of worksites was not substantial. His work at various sites in Greater London should be treated as one workplace that he had been working at since 2013. He had worked too long at this workplace for it to be considered temporary.

The appeal was dismissed.

*Narinder Sambhi v HMRC (TC07717)*

## **Bonus payments to LLP members**

*Summary – Bonus payments, made to former employees who had become members of an LLP, should be treated as earnings.*

Charles Tyrwhitt LLP sells shirts and other items of clothing. The LLP operated a bonus system for its employees called the Long Term Incentive Plan. Under the scheme, bonus payments were made but only once certain conditions had been met.

Five employees received bonuses under the scheme but at a time when they had become LLP members. The issue was whether the bonus payments were:

- fixed amounts of partnership profits so taxable as self-employed income; or
- deferred remuneration in respect of their earlier periods of employment.

HMRC argued the latter and sought to collect Class 1 primary and secondary National Insurance Contributions as earnings of employed earners.

The taxpayers claimed that as members of an LLP they could not receive employment income from an LLP. The accrued bonus payments remained contingent and provisional until all requirements for payment had been satisfied and this only happened after the employees had become members; no prior entitlement had arisen. As they were members of the LLP at the time of payment, they could only receive the payments as a share of trading profits.

### *Decision*

The First Tier Tribunal concluded that the bonus payments were not made solely because each individual was an LLP member. They were made because each LLP member had complied with all of the conditions of a scheme open only to employees. The bonus payments should be treated as earnings received from employment.

In a postscript, the Tribunal stated that there might have been a shorter route to reach the same conclusion, which they explained as follows:

- The remuneration of an employee of an LLP is a contractual obligation between the LLP in its capacity as a legal person and each employee;
- The profit shares of members of the LLP are a matter between the members;
- When the five employees became LLP members, the parties did not agree that the five individuals would surrender their contractual rights against the LLP to a prospective bonus, in return for equivalent fixed amounts of additional profit share;
- In the absence of that, the payments must have been made in satisfaction of the LLP's contractual obligations under the bonus agreements, so part of the terms of employment.

*Charles Tyrwhitt LLP v HMRC (TC07756)*

## **PPR and the disposal of three properties**

*Summary – Insufficient evidence was provided to show that three properties were owned with the required degree of permanence to qualify for PPR relief.*

Between 2013 and 2015, Aqeela Hashmi bought and sold at least five properties, three of which were the subject of this appeal:

- The first property was bought in March 2013 for £125,000, listed for sale on 10 May 2013 and sold on 18 September 2013 for £165,000 – she lived there for 6 months;
- The second property was bought on 11 November 2013 for £161,000, listed for sale on 14 February 2014 and sold on 6 June 2014 for £249,999 – she lived there for 7 months;
- The third property was bought on 16 September 2014 for £209,000, listed for sale on 3 October 2014 and sold on 10 July 2015 for £315,000 – she lived there for 10 months.

Initially she lived at 132 Shaggy Calf Lane and during the entire period from March 2013 to July 2015 she continued to use 132 Shaggy Calf Lane as her address for various financial matters and remained on the electoral register at this address. Between each sale and purchase she returned to live at this address.

HMRC claimed that throughout the three tax years, 2013/14, 2014/15 and 2015/16, Mrs Hashmi's principal private residence had been 132 Shaggy Calf Lane. HMRC raised assessments in each of the three years to collect capital gains tax due in respect of the three property sales.

### *Decision*

Mrs Hashmi failed to produce sufficient evidence to convince the First Tier Tribunal that she intended to live in any of the properties with some degree of permanence.

All three properties were listed for sale within short periods from acquisition, after have undergone improvement works. The Tribunal stated that it was clear to them that she was trading in property.

*Aqeela Hashmi v HMRC (TC07715)*

### **No implied trust**

*Summary - The transfer of a property between family members was a disposal as there was no evidence that a trust had been created.*

Asif Bhikhi owned a property. The ground floor was let to a pharmacist and the flats above were let out to residential tenants.

In 2006 Asif Bhikhi was convicted of assisting in illegal immigration and as a result, needed funds to be able to settle a confiscation order. He was not able to obtain a mortgage on the property in his own name and so he transferred the property to a relative's company, with the relative taking out a mortgage to settle the sum due. The plan was that once the business that he ran with his brother was back on its feet, the property would be transferred back.

Although legal title of the property had been transferred, Asif and his brother continued to deal with the property, and collected the rent due from tenants, with the money used to pay the relative's mortgage payments. They paid for any repairs as well as any shortfall in rent to cover the mortgage payments that were due.

In 2016, planning permission was granted for two more flats to be built on top of the property. Asif Bhikhi covered the cost of the new flats and on completion, collected the rent due which was paid into his personal account.

In 2018 the property was transferred back to his company, Bhikhi Property Limited at the same price as the original transfer, even though the market value (with the added flats) was significantly higher. Although the property was then registered as owned by Bhikhi Property Limited, he argued that in reality the property was held for 39 members of their family.

HMRC raised an assessment for CGT on the first transfer. Asif appealed on the grounds that he had retained beneficial ownership of the property, and that the relative's company simply held the property on an implied trust.

### *Decision*

The First Tier Tribunal found that no trust had existed. There was no reference to a trust in the transfer documents, and Asif Bhikhi had not declared any rental income on his tax returns. Indeed, the recipient company had declared the property on its balance sheet and the rental income had been declared on the company's corporation tax return.

The property transfer was made for consideration, with the company becoming the legal owner. A valid disposal for CGT purposes had taken place.

The appeal was dismissed.

*Asif Bhikhi v HMRC (TC07728)*

### **Multiple dwellings relief**

*Summary – SDLT Multiple Dwellings Relief did not apply as the basement annex was accessed via the main front door and a common hallway.*

On 24 March 2016 David Merchant and Sarah Gater bought a property for £1,920,000. The property was a terraced house with an annex, with its own kitchen, shower room, living room and bathroom. The owners confirmed that the annex was accessed "through the main dwelling front door and along a common hallway".

Initially, David Merchant and Sarah Gater filed the relevant form and paid the SDLT due to HMRC on the basis that the property was a single residential property.

However, just over a year later, they were advised to apply for Multiple Dwellings Relief. On 20 April 2017 they wrote to HMRC to request an amendment to their return and claimed a refund of nearly £65,000.

HMRC opened an enquiry into the amended return and ultimately rejected the claim. There was a dispute over the date the return was amended. Although the First Tribunal found that it was not when the taxpayers first wrote to amend the return, but rather on receipt of their second letter that included the contract for sale. A valid amendment must be accompanied by the contract, so the later date was the date of amendment. Although this made the claim out of time, HMRC accepted the late claim as a valid claim but disputed the Multiple Dwellings Relief to which the claim related.

David Merchant and Sarah Gater appealed, arguing that they were eligible for the relief. Further, they argued that HMRC's closure notice was not valid as rejection of the claim for Multiple Dwellings Relief was not stated in either their closure notice or the letter referred to in the closure notice.

### *Decision*

The First Tier Tribunal concluded that, although the annex had a separate kitchen, shower room, living room and bathroom, it was not suitable for use as a single dwelling as it shared a common front door and hallway.

Further, the First Tier Tribunal found that the closure notice was valid even though it did not state that the claim for Multiple Dwellings Relief was rejected. Adopting the reasoning set out in Archer [2018] STC 38, a notice is not ineffective for want of form where it is substantially in conformity with the legislation and its intended effect is reasonably ascertainable.

*David Merchant and Sarah Gater v HMRC (TC07783)*

## **Failure to operate PAYE**

*Summary - A company failed to keep appropriate employee records and to operate PAYE correctly. Low National Insurance Contributions could not be explained by unpaid work carried out by the company's shareholder-director.*

Planet Double Glazing Limited was a small company that manufactured and fitted double-glazed windows, doors and fittings. The company was incorporated in May 2009 and Mr Singh Johal was the sole shareholder and director.

HMRC opened an enquiry into the company's PAYE records on 6 January 2015 and requested various pieces of information. HMRC established that the company had no employment contracts, paid its employees in cash and did not maintain records of employee costs. There were no underlying records such as work sheets or deductions sheets to show who was employed at what time, the hours worked by employees, or what amounts were paid to employees in the relevant tax years.

The company started to operate a PAYE scheme in March 2013 but failed to operate it correctly. The company did not inform HMRC when employees started work and did not obtain any tax codes to apply to employees' wages. They incorrectly applied the standard code for basic rate tax with a personal allowance when they should have used the OT code with no personal allowance.

There were five full-time employees working for the company in addition to Mr Singh Johal and his wife, each of whom was earning more than £12,000 per annum, above both the income tax personal allowance and the lower earnings threshold for NICs. However, the PAYE summaries produced to show the payments and deductions made for employees in each relevant year did not reflect these employees.

For tax years 2011/2012 to 2014/2015, HMRC imposed assessments and penalties totalling £59,000 on the company for failing to comply with its PAYE and NIC reporting and payment obligations. HMRC made its assessments based on the limited information available and the presumption that, going forward, the business would continue with the same level of turnover and employee numbers.

The company argued that the PAYE and NIC appeared low for the period as Mr Singh Johal devoted a large amount of unpaid time working for the company and that this explained the low payroll costs compared to turnover. HMRC's assessments were too high because they did not take this into account.

## *Decision*

The evidence provided did not support Mr Singh Johal's argument that he was doing the bulk of the company's manufacturing on an unpaid basis and so keeping the company's costs down. In fact evidence showed that he had no experience in manufacturing.

Given this, as well as the poor employee records that were kept, and the proven inability to correctly operate the PAYE system, it was reasonable for HMRC to assume the company had employed staff for which the company had not operated PAYE.

The First Tier Tribunal dismissed the appeal and upheld the assessments and penalties.

*Planet Double Glazing Limited v HMRC (TC07764)*

## **Employment intermediary returns**

*Summary – The Company submitted intermediary returns late to comply with HMRC's request, and not because it knew that there was a legal obligation to do so.*

Fastklean Limited provides cleaners to corporate clients. HMRC believed that the company was an employment intermediary that should have filed intermediary returns.

An employment intermediary is a person who makes arrangements for an individual to work for a third person. Under s716B ITEPA 2003, where PAYE has not been operated, such intermediaries are required to provide HMRC with certain information relating to payments made to those workers. The information to be provided must be included in a return in a form prescribed by HMRC as specified in the PAYE Regulations. The intermediary is required to submit the return no later than the month end date of the relevant tax quarter.

Having sought legal advice, the company was told that the intermediary return provisions did not apply to them due to the manner in which their cleaners provided services: namely that the cleaners were not subject to, or subject to the right of, supervision, direction or control by any person (s44 ITEPA 2003).

Despite Counsel's advice that returns were not needed, in order to comply with HMRC's request to bring their tax affairs in order, on 18 February 2018 the company submitted returns for seven periods from July 2016 to January 2018.

On 5 March 2018, HMRC imposed late filing penalties against the company under s98 TMA 1970. The penalty being charged based on the number of offences: £250 for the first offence, £500 for a second offence and £1,000 for a third and later offences.

Fastklean Limited appealed, arguing that it did not consider the returns were required.

### **Decision**

The First Tier Tribunal stated that, as the company had not provided evidence of the specific working arrangements, it had not met the criteria to disapply the requirement to file returns.

The First Tier Tribunal acknowledged that the company's director had no tax expertise and was reliant on advisers to comply with what was required by law. It was reasonable for the director to rely on the tax advice given. The Tribunal accepted that the director had submitted the returns to resolve the matter, rather than because the company was obliged to do so.

Fastklean Limited's appeal was allowed.

*Fastklean Limited v HMRC (TC07773)*