

Personal tax round up – December 2024 (Lecture P1466 – 15 58 minutes)

CJRS scheme – follow the rules

Summary – As variable rate employees, the reference salary used to calculate CJRS entitlement could not be increased and further, credits were not available where the company had claimed less than it was entitled to.

Lucky Eyes Limited was a qualifying employer for the purposes of the CJRS and made claims totalling £40,250 under the scheme in respect of payments made to five furloughed employees.

The company made monthly claims between May 2020 and September 2021. Two employees retired towards the end of 2020, and while no further claims were made in respect of these employees, the salary used for claims relating to two of the other employees increased after January 2021, as they took on the retirees' work. Overall, the company's claims did not change significantly.

There was no evidence of any contracts between Lucky Eyes Limited and its employees stating that they were entitled to an "annual salary".

Later, HMRC issued assessments in respect of the two tax years affected, to collect what were considered to be excess payments under the CJRS scheme.

The company appealed to the First Tier Tribunal arguing that the policy objective of the CJRS was to support businesses through the pandemic and that the claims should be allowed on the increased salaries of the two employees who took on additional work after their colleagues had retired. The level of support offered to Lucky Eyes under the CJRS was not materially increased in overall terms as a result of this change.

A second issue arose in the course of the hearing, which was whether appropriate credit had been given in HMRC's computation for cases where Lucky Eyes Limited had claimed an amount which was less than the amount to which it was entitled. The company sought to set off those amounts against overclaims in other months. HMRC argued that credit could be given within a monthly claim but not by setting an amount underclaimed in one month against an amount overclaimed in another.

Decision

On the first issue, it did not matter that the company's activity level and over claim was broadly the same before and after the two of the employees retired. What mattered was whether the employees who were eligible for the CJRS payments were paid as "fixed rate employees" or "variable rate employees", which then determined the employees "reference salary" for CJRS purposes.

With no evidence provided to prove that under their "contract" they were paid an annual salary, HMRC were correct that each employee's reference salary was determined by reference to the rules for variable rate employees. For such employees, the CJRS did not allow any increase in the reference salary to reflect increased payments made by the company after March 2020.

The First Tier Tribunal did sympathise with the company's set off argument but found that the legislation required each month to be considered independently and no set off was allowed.

The appeal was dismissed.

Lucky Eyes Limited v HMRC (TC09298)

'Host employer' provisions

Summary – Aramark Limited was liable to account for employer's NIC under the 'host employer' provisions, as the company exercised day-to-day control of the workers.

Aramark Limited was a UK company which was part of a group headed by a US corporation. It provided catering and hospitality services to offshore installations in the North Sea and, as part of its contracts, was required to supply personnel, goods and equipment including food and housekeeping materials. From 2004, it did this using resources supplied to it by a non-UK group member, Aramark US Offshore Services LLC. Under the agreement between the two entities, the employees it had used previously were transferred to the offshore entity, with the intention being to eliminate the cost of secondary class 1 National Insurance.

HMRC considered that the taxpayer was liable to Class 1 National Insurance by virtue of the host employer provisions in Social Security (Categorisation of Earners) Regulations SI 1978/1689, Sch 3 para 9 (as they applied before 6 April 2014).

Decision

The First Tier Tribunal stated the purpose of the host employer provisions was to impose a secondary National Insurance liability where the host 'stands in the shoes of an employer in terms of the substantive day-to-day control of a worker and where that worker is working in the host's business but contractually employed by a foreign employer'. This would 'catch' those who artificially sought to place contractual employment outside Great Britain without affecting the daily operations of the workers.

The First Tier Tribunal stated that day-to-day control was not the same as the 'ultimate control' needed to establish an employment relationship. If it were the same test, the host employer would be the actual employer and the host employer provisions would be 'irrelevant'.

Here, the First Tier Tribunal concluded that the offshore entity, while not a 'sham', was 'little more than a contractual shell'. Its decisions were limited to human resource and some financial decisions taken on the basis of recommendations by the taxpayer. It did not exercise any substantive day-to-day control over the workers – for example, it did not supervise their work. Instead, this was done by a unit manager by reference to procedures set out in the taxpayer's offshore operating manual.

The First Tier Tribunal found that Aramark Limited exercised day-to-day control of the workers. The class 1 secondary National Insurance was therefore payable.

The appeal was dismissed.

Aramark Limited v HMRC (TC09290)

Adapted from the case summary in Taxation (3 October 2024)

Dividends due and payable

Summary - An interim dividend was 'paid' for income tax purposes in 2016/17 when it was received by the shareholder, at a time when he was non-UK resident.

Peter and Nicholas Gould were the principal shareholders and directors in Regis Group (Holdings) Limited, with the remaining shares held by a family settlement of which they were joint life tenants.

The company had expanded its business from the UK to the United States, establishing an office in Dallas. While Nicholas Gould remained resident in the UK, Peter Gould worked in the United States and in 2015, having been living in Jamaica, he relocated, buying the property that he had been renting. He remained tax resident in the UK in 2015/16 but by 2016/17 was non-UK resident.

With surplus cash from property disposals on 31 March 2016 the board of directors resolved to pay an interim dividend of £40 million, with £20 million being payable to each of the brothers as result of the trustees of the settlement directing the company to pay its share directly to the brothers.

Nicholas Gould received his dividend on 5 April 2016 and so was taxable in 2015/16, so avoiding the increased dividend tax rate in 2016/17.

Peter Gould received his dividend on 16 December 2016, which he claimed fell into 2016/17, when he was non-UK resident and therefore, in his mind, not subject to UK tax.

Following an enquiry, HMRC issued a closure notice on the basis that Peter Gould's interim dividend was taxable in 2015/16, at the same time as his brother. HMRC argued that:

- A dividend is taxable in the tax year in which it becomes a debt that is due and payable;
- The company's articles of association required shareholders holding the same class of shares to be treated equally. This meant that once the company had paid the dividend to his brother, the company became indebted to pay the dividend to Peter Gould, who could enforce that debt immediately.

The First Tier Tribunal found in Peter Gould's favour, finding that the principle of equal treatment of shareholders contained in the articles did not give Peter Gould an enforceable debt in 2015/16.

In case they were wrong, the Tribunal went on to accept the alternative arguments that had been raised by the taxpayer in the event that an enforceable debt had been created:

- The principle in *re Duomatic Limited* [1969] 2 Ch 365 was engaged. All the shareholders had agreed to vary the articles of association so that the directors were permitted to pay dividends at different times without creating a debt;
- Prior to the directors resolving to pay the interim dividend, Peter Gould waived his right to enforce payment of the dividend when the dividend was paid to his brother. That waiver was supported by consideration and was therefore binding on Peter Gould and the company.

HMRC appealed to the Upper Tribunal.

Decision

The Upper Tribunal found that the First Tier Tribunal had erred in law as Peter Gould did have an enforceable debt when Regis paid the dividend to his brother in 2015/16.

However, the Upper Tribunal found that this was not a material error in law as there was an informal agreement between the shareholders, meaning that the principle in *re Duomatic Limited* [1969] 2 Ch 365 was engaged. All the shareholders had agreed to vary the articles of association so that the directors were permitted to pay dividends at different times without creating an enforceable debt

The First Tier Tribunal had also been entitled to find that Peter Gould's waiver of the right to enforce the debt was agreed before the directors resolved to pay the interim dividend. He agreed to waive his

right to enforce payment of a dividend until after 5 April 2016 provided the company agreed to pay the interim dividend.

The appeal was dismissed.

HMRC v Peter Gould [2024] UKUT 00285 (TCC)

Fixed protection 2014 revoked

Summary – The pension contribution made by the taxpayer’s former employer after the cut-off date for Fixed Protection, meant that HMRC had correctly revoked their Fixed Protection 2014 certificate.

Steven Lefort intended to retire on 30 December 2013 but his employment was extended to 28 February 2014. He made his final employee contribution to his self-invested personal pension (SIPP) on 14 March 2014.

He obtained a fixed protection 2014 certificate in respect of the pension lifetime allowance, granting him protection from 6 April 2014.

However, his employer made its final contribution to his SIPP on 5 May 2014 – after the cut-off date of 5 April 2014 and, as a result, HMRC revoked the fixed protection 2014 certificate.

Steven Lefort appealed claiming he had no control over the payment made by his employer and that HMRC should have exercised discretion in his favour.

Decision

The First Tier Tribunal considered the evidence in detail and concluded that the employer's contribution was made after the deadline and that it remained in his SIPP. Consequently, HMRC was correct to revoke the certificate.

Steven Lefort also asked the First Tier Tribunal to make a rescission order on the basis the contribution had been made by mistake. Agreeing with HMRC, had such an error been made, it was for the employer to bring and there was no evidence that it planned to do so. In any event, the First Tier Tribunal did not have jurisdiction to grant rescission; that was for the High Court or Upper Tribunal.

The appeal was dismissed.

Steven Anthony Lefort v HMRC (TC09322)

Adapted from the case summary in Taxation 31 October

Travel and subsistence discovery

Summary – HMRC did not make a valid discovery in respect of overclaimed travel and subsistence expenses and so the taxpayer’s appeal was allowed.

Julian Lowe was employed in the water industry and undertook extensive business mileage and subsistence expenses on such items as dining and hotels. He paid the expenses, completed an expense claim form and was then reimbursed by his employer.

He appointed a tax agent, who prepared his tax return based on his expense claims, highlighting whether or not there were expenses which were not tax deductible.

Suspecting that he was claiming expenses that were not deductible, HMRC opened an enquiry, discovering that some of the expenses related to a consulting business that Julian Lowe was trying to set up.

As a result, in April 2023, HMRC raised discovery assessments covering the tax years 2017/18 through to 2020/21, denying certain deductions on the basis that the taxpayer and his agent had acted carelessly by making incorrect expense claims, providing no material either to HMRC to justify his claims. Further, the taxpayer did not keep adequate records and did not check the return's produced by his agent.

Julian Lowe appealed.

Decision

The First Tier Tribunal stated that it is for HMRC to demonstrate that, on the balance of probabilities, a valid discovery has been made.

The Tribunal found that, based on one telephone conversation in February 2023, HMRC proceeded from the opening enquiry letter to the issue of the assessments. Although the opening enquiry letter indicated that the taxpayer should provide supporting evidence for their claims, HMRC did not wait until it was so provided or make any attempt to obtain that evidence, before issuing the assessments.

It was not clear whether the assessing officer was also the officer who made the discovery. The only reason that the First Tier Tribunal thought the assessing officer might also be the officer who made the discovery was based on their experience that the discovery officer usually provides a witness statement and the only statement provided by HMRC was one made by the assessing officer.

However, this statement made no reference to an officer making a discovery nor the date on which it was made. As the HMRC officer did not attend the hearing, this could not be clarified and further, the taxpayer was not given the opportunity to challenge HMRC's 'discovery'.

The First Tier Tribunal found that an enquiry was opened on 8 February 2023 and that on 11 April 2023 the assessing officer wrote to Julian Lowe advising that the officer would be issuing the assessments which were issued on the same date.

No evidence was provided by HMRC to support the expenses being denied and as stated above, no mention was made of the making of a discovery nor the basis on which it was made.

Without HMRC's supporting oral evidence, the Tribunal was not prepared to accept that the assessing officer's witness statement was any evidence that a discovery was made.

With no discovery made, it did not matter if the taxpayer and his agent had acted carelessly.

The appeal was allowed.

Julian Lowe v HMRC (TC09285)

Reliance on advisers

Summary - Reliance on an adviser was not a reasonable excuse for failing to comply with an information notice, and penalties were upheld without mitigation.

David Hill and David McCracken were scheme administrators for two pension schemes which were operated on their behalf by Liddell Dunbar Ltd, a firm which later went into liquidation.

In January 2018, HMRC issued information notices to both scheme administrators. The firm advising the scheme administrators, Independent Tax, informed them that, as the pension scheme had been wound up there 'should be no need to respond' to the information notices.

An HMRC review was requested, which upheld the information notices, subject to variation of some of the content. No appeal was made against the information notices at that stage.

HMRC issued £300 failure to comply penalty notices to the scheme administrators, followed in February 2019, by daily penalties. HMRC wrote to the advisers, copying in David Hill and David McCracken, outlining that as no appeal had been made in regard to the information notices, these were now settled and penalties applied.

Daily penalties were initially charged at £30 a day, but this was later increased to £60 a day. By December 2019, penalties had reached over £20,000 for each of the appellants. Appeals were made against the penalties on the basis of reasonable excuse, and, in the alternative, mitigation of the penalties requested.

Decision

Under FA 2008 Sch 36 para 45, liability for a penalty can be set aside where the individual has a reasonable excuse.

Under para 45(2)(b), this includes reliance on a third party, subject to the caveat that 'where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction'.

Clients are not expected to be tax experts, but they are expected to read official information and ask appropriate questions. In this case, neither of them had read the information notices, which were addressed to them personally, nor had they queried with their advisers why they were being addressed as pension scheme administrators, when these appointments were apparently made without their knowledge.

Under FA 2008 Sch 36 para 48(4)(b) on appeal, the tribunal may substitute for the HMRC decision another decision that HMRC had power to make. For HMRC it was contended that this gave the tribunal only supervisory jurisdiction, and it could only remake the decision if HMRC's original decision was flawed. The First Tier Tribunal firmly rejected this view, stating that it had full appellate jurisdiction. Notwithstanding, in this particular case, the First Tier Tribunal considered that the quantum of the penalties was not excessive.

David Hill and David McCracken v HMRC (TC09293)