

Business tax update (Lecture B1371 – 19.03 minutes)

Lineker avoids IR35

Summary – Gary Lineker had signed contracts for his work acting as principal for his partnership. As he had contracted directly, he was not caught by IR35.

Gary Lineker provided his services to the BBC and BT Sport through Gary Lineker Media, in partnership with his wife at the time, Danielle Bux.

Danielle Bux was entitled to a fixed sum of £30,000 each year.

For 2013/14 to 2017/18, he filed Self Assessment tax returns, including partnership pages reporting his partnerships profits on which he paid income tax and class 4 National Insurance.

HMRC sought to charge PAYE and NIC on the basis that the work fell within the Intermediaries legislation.

The couple appealed.

Decision

The First Tier found that IR35 could apply to a partnership as s.49(3) ITEPA 2003 states that rules include “a partnership or unincorporated body of which the worker is a member.” This is further confirmed in s.52 ITEPA 2003 and by s.164 ITTOIA 2005 that details 'special rules for partnerships' when calculating the profits to be treated as employment payments under the intermediaries legislation.

The Tribunal confirmed that Gary Lineker Media was a valid partnership but went on to consider s.49(1)(b) ITEPA 2003 which states that the intermediaries legislation does not apply where the services are provided under a contract signed directly between the client and the worker.

The Tribunal found that in each case the broadcaster concerned had contracted with the partnership for the services of Mr Lineker and that the contracts were signed by Gary Lineker, rather than Danielle Bux. S.5 Partnership Act 1890 gives the partners the power to bind the firm, each partner acting as principal and as agent. As a matter of law, when Gary Lineker signed the contracts for the provision of his services, he did so as principal thereby contracting directly with the BBC and BT Sport. The intermediaries legislation could not apply.

The judge went on to say that had the contracts been signed only by Danielle Bux acting as principal on behalf of the partnership, Gary Lineker would not have contracted directly and IR35 would have applied. His services would have been provided not under a contract directly between the BBC/BT Sport and Gary Lineker.

The appeal was allowed.

Gary Lineker And Danielle Bux (T/A Gary Lineker Media) v HMRC (TC08774)

Intermediaries legislation applied

Summary – The First Tier Tribunal were correct to find that under a hypothetical contract Eamonn Holmes was employed by ITV and IR35 applied.

Red White and Green Limited is the personal service company of Eamonn Holmes who is a journalist and broadcaster. During the period 2011 to 2015, he worked as a presenter on many projects including as a presenter of 'This Morning' for ITV and 'Sunrise' for Sky News.

This appeal concerned his work for ITV and covered the tax years 2011/12 to 2014/15.

HMRC issued determinations and notices on the basis that the intermediaries legislation applied. These were upheld by the First Tier Tribunal.

Red White and Green Limited appealed to the Upper Tribunal arguing that the First Tier Tribunal erred in its decision both in relation to control and when considering the whole picture.

Too much weight had been given to "how" the role was carried and not enough focus had been placed on 'what' services were performed. The company argued that editorial control was not the deciding factor. Eamonn Holmes had "considerable autonomy" over the way in which he provided his services and cited various examples including that he could decide when and where he would prepare for the programmes and when he arrived at and left the studios.

Looking at the big picture, the First Tier Tribunal's decision had disregarded certain factors, including that the Tribunal gave no weight to Eamonn Holmes' other activities, in particular the fact that he was in business on his own account.

Decision

In reaching its decision on control, the Upper Tribunal found that control over what is to be done is an important factor but control over how, where and when services are to be performed remains relevant.

The Upper Tribunal found that:

- compliance with the industry regulator was a relevant factor; indeed, in *Kickabout* the Court of Appeal described it as being "highly relevant";
- whilst there was no right of deployment to undertake other roles as such, there were rights to require Eamonn Holmes to carry out promotional work as and when reasonably required and without further payment.
- there was a contractual right for ITV to require Eamonn Holmes to present 'This Morning' on such dates and locations that it notified at its sole discretion.

Those were relevant rights of control. The Upper Tribunal were satisfied that the First Tier Tribunal reached a conclusion which was available to it on the evidence and there is no ground for it to interfere with that conclusion.

The Upper Tribunal confirmed that the First Tier Tribunal had not erred when painting its picture. In their judgment it was clear that the First Tier Tribunal 'took an approach which involved balancing all factors which it considered to be relevant.'

The First Tier Tribunal expressly stated that it was 'taking account of the full range of other activities Mr Holmes carried out' and identified factors which suggested that the ITV contract were not part of his business on his own account.

He did not display any of the characteristics of being in business on his own account as regards his work for ITV. This work gave him 'no real ability to increase his profits from his work, save by doing a good job and having his contract renewed; he did not have any real economic risk or risk of bad debts'.

The appeal was dismissed.

Red White And Green Limited v HMRC [2023] UKUT 00083 (TCC)

Share activity not trading

Summary – Buying and selling shares was not a trade which meant that losses from that activity could not be offset against other income.

Nicholas Henderson was a partner in a professional firm. He had been buying and selling shares for a number of years in his personal capacity, which were treated as capital transactions but in the 2013 and 2014 tax years he did not undertake any activity.

Having inherited a substantial sum of money, he gave notice to the partnership, went on 'garden leave' from 1 December 2015 and finally retired on 31 January 2016. He placed most of his inherited money in a discretionary investment account, where the investment decisions were made by fund managers with no input from him. The returns from these investments were not part of this appeal.

He started making execution-only share transactions at some point between receiving his inheritance and handing in his notice to the partnership. It is the returns from these investments which are the subject of this appeal.

He was not a registered or regulated trader and did not buy or sell shares on behalf of third parties. He held shares for between a few days and several months. Shares were not always sold in the same blocks as purchased.

He made a loss in 2015/16 and 2016/17. He claimed loss relief on the basis that the activity was carried on in a non-active capacity as he could not demonstrate that he had spent more than 10 hours per week on average across the tax year on the activity. The sideways loss relief claims had therefore been restricted to £25,000 in accordance with s74A ITA 2007.

By May 2017, he had decided that the income from his share transactions was not enough to support his outgoings and so he took up a new employment. By 5 April 2018 he had sold all but three of the shareholdings.

HMRC denied his loss relief claims stating that his activities did not amount to a trade or, if it was a trade, it was not carried on commercially.

Nicholas Henderson appealed.

Decision

The First Tier Tribunal stated that while the badges of trade had limitations, the relevant badges could 'nevertheless provide a useful framework within which to consider the circumstances' (Eclipse Film Partners No 35 LLP [2015] STC 1429).

The First Tier Tribunal concluded that:

- while not conclusive, trading on average one trade per week was indicative that the activity was not trading;
- the one to two hours a day that he spent on his share activity, fitted around other activities, was more in line with him managing an investment portfolio;
- he had no clear plan for the activity, and what he did was not carried out in an organised way as would be expected if he were running a business;
- someone who was undertaking as a serious trading activity would have made changes to the activity when faced with accumulating losses. He failed to do this.

Standing back, and looking at the overall picture, the First Tier Tribunal concluded that Nicholas Henderson was not trading. He was managing a portfolio of personal investments for growth rather than income.

Nicholas Henderson v HMRC (TC08755)

Supplies closely related to education

Summary – Supplies made in relation to a training restaurant were exempt while those relating to a hair and beauty salon and performing arts centre were liable to VAT.

Fareham College was a further and higher education college that operated a training restaurant, a hair and beauty salon and a performing arts centre from which services were provided to the public. These were staffed by students to help them gain practical work experience as part of their courses.

During the period 1 May 2011 to 30 April 2015, the college accounted for output tax on these supplies. However, on 30 July 2015 the college sought a repayment of nearly £70,000 of output tax paid. The college argued that these supplies were closely related to the provision of their exempt training making them exempt under to Item 4 Group 6 Schedule 9 VATA 1994.

HMRC disagreed, arguing that the basic purpose of the supplies was to obtain additional income through transactions that were in direct competition with other commercial businesses. Consequently, the VAT exemption did not apply. Fareham College appealed.

Decision

The First Tier Tribunal found that Item 4 should be interpreted in line with Article 134(b) of the Principal VAT Directive. This excludes supplies from exemption where the purpose is to obtain income through transactions in direct competition with those of commercial enterprises subject to VAT.

The First Tier Tribunal found that the main purpose of the restaurant was not to obtain additional income but rather to provide work experience for students in a realistic working environment. Indeed, it operated at a loss. Consequently, these supplies were VAT exempt.

However, with insufficient evidence supplied, the First Tier Tribunal was not convinced that the basic purpose of the college's supplies from the hair and beauty salons as well as performing arts centre was not to obtain additional income in direct competition with other commercial enterprises that were subject to VAT.

No evidence was submitted in relation to the performing arts centre and the evidence supporting the hair and beauty salons was inconclusive. These supplies did not fall within the VAT exemption.

Fareham College v HMRC (TC08740)

Invoicing after leaving a group

Summary – Services supplied whilst a company was a member of a VAT group, but invoiced and paid after it had ceased to be a member, were liable to VAT.

At a time when both companies were a member of the same VAT group, The Prudential Assurance Company Limited received investment management services from Silverfleet Capital Ltd, who was entitled to a performance-related fee.

In 2007, Silverfleet Capital Ltd left the VAT group and ceased providing these services.

In 2014 and 2015, the benchmarks for performance related fees relating to these earlier services were reached, which triggered the invoicing of a £9 million fee, after the company had left the group.

HMRC argued that there was a continuous supply of services with delivery taking place while the companies were part of a VAT group, but with invoices issued and payments made after the supplier had left the group. Consequently, VAT was chargeable on the fee when invoiced and paid.

The Prudential Assurance Company Limited disagreed, arguing that the services were only supplied when the two companies were part of the same VAT group, meaning that the fees were outside the scope of VAT.

The First Tier Tribunal had ruled in favour of The Prudential Assurance Company Limited and so HMRC appealed to the Upper Tribunal.

Decision

Having reviewed the case law, the Upper Tribunal concluded that this particular point had not been litigated before. The Upper Tribunal found that the time of supply deeming provisions had to take priority over the VAT grouping deeming provisions in this context. The Tribunal found that a continuous supply of services took place when the parties were no longer members of the same VAT group. As a result, the supply took place when the services were invoiced, not when they were provided, which was after Silverfleet Capital Ltd had left the VAT group and VAT was chargeable.

HMRC v The Prudential Assurance Company Limited [2023] UKUT 54 (TCC)

Driving sessions for under 17s

Summary – The company's supplies did not include the right of admission to a circus, funfair or something similar and so the temporary reduced VAT rate introduced during COVID did not apply.

In 2009, when The Young Driver Training Limited originally registered for VAT, the company's business was described on the VAT1 as "Other Personal Services not elsewhere classified- Provision of driving lessons off the highway for under 17-year-olds." These lessons were carried out on private land, such as large car parks and exhibition centre grounds.

In order to assist the hospitality sector during COVID, a temporary 5% VAT rate for admissions to tourist attractions and cultural events was introduced. The company changed the wording on its website to read 'driving experiences for under 17-year-olds' and at the same time the company submitted a VAT484 changing its trade classification. From this time, it charged VAT to customers at the 5% rate.

HMRC disagreed and issued an assessment treating the supplies as standard rated.

The company appealed.

Decision

The First Tier Tribunal stated that to apply the reduced rate of VAT the supplies needed to fall within Group 16, Part II, Sch 7A VATA 1994 by meeting two criteria:

1. The supply must be of a 'right of admission';
2. The venue or event must fall within the list provided in Group 16 or be of sufficient similarity.

The First Tier Tribunal found that the supplies were not just for the 'right of admission' because they also included the use of a vehicle with supervised tuition. The main supply was driving tuition, albeit, not to pass the official driving test. The child was being taught 'how to operate the clutch (if manual transmission), brake, accelerator, steering and gearbox (manual or automatic) to enable them to safely and competently drive the vehicle under supervision. The experience was advertised as teaching teens to become safer drivers, giving them a head start when it comes to learning to drive. Further they would get 'plenty of teaching and fun behind the wheel.'

The event and venues stated in Group 16 are:

"shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas and exhibitions and similar cultural events and facilities".

The company argued that the lessons were similar to those provided by circus or funfair. The First Tier Tribunal disagreed that the experience was similar to a dodgems ride and stated that:

"Both a circus and a fair offer a range of attractions and amusements and a customer who has purchased an entrance ticket is able to freely wander around to view all the available attractions. This can be contrasted with what the Appellant offers: a specific pre-booked Experience in a fenced off area."

Finally, fiscal neutrality was not relevant because the supplies made by amusement parks and fairs were very different from those provided by The Young Driver Training Limited. Customers expected supervised tuition; they were not just paying for admission to enter the premises of a circus or fair.

The Young Driver Training Limited v HMRC (TC08748)