

Personal tax update

(Lecture P1276 – 21.00 minutes)

IR35 decision overturned but still waiting

Summary – Based on the evidence provided, the First Tier Tribunal was not entitled to make the findings that they did in relation to notice periods and working hours. We await the Court of Appeal decision in Professional Games Match Officials Limited on mutuality of obligation before a final decision is made.

George Mantides is a urologist who works through his personal service company, George Mantides Limited. He provided locum services to two hospitals in 2013: the Royal Berkshire Hospital and the Medway Maritime Hospital.

The First Tier Tribunal considered hypothetical contracts with both hospitals concluding that under a contract directly between:

- Medway Maritime Hospital and George Mantides, he would not be regarded as an employee of the hospital;
- Royal Berkshire Hospital and George Mantides, he would be regarded as an employee of the hospital, primarily on the basis of mutuality of obligation.

HMRC sought permission to appeal the Medway Maritime Hospital decision but this was declined as HMRC's submission was late.

On the taxpayers appeal to the Upper Tribunal on the Royal Berkshire Hospital element of the decision, the company argued that there was no proper basis on which the Tribunal could find that the contract would be terminable early on at least one week's notice on either side, or that the hospital would provide 10 half-day sessions a week for George Mantides. His services as a locum at the Royal Berkshire Hospital were supplied through a company called DRC Locums Limited with the First Tier Tribunal recording that "The contractual documentation of the arrangements was... remarkably thin". George Mantides Limited argued that the First Tier Tribunal had erred in law. Consequently, the First Tier Tribunal had reached the wrong decision. The hypothetical contract would not be one of employment.

Decision

The Upper Tribunal found that the First Tier Tribunal had insufficient evidence to reach their conclusion. It was not clear as to the nature of the contractual arrangements between George Mantides, DRC Locums Limited and Royal Berkshire Hospital. The only contractual documents available were two Locum Booking Confirmations that referred to DRC Locums Limited's standard terms and conditions which were not given in evidence. There was no reference in the Locum Booking Confirmations to either a notice period or to any obligation on DRC Locums Limited or Royal Berkshire Hospital to provide George Mantides with work. The Tribunal found that the one week notice period appeared to have been based more on assumptions and what might have been agreed rather than on evidence as to what actually was agreed between the parties. Further, the obligation to make reasonable endeavours to provide George Mantides with work was based on a "mutual understanding" but the Upper Tribunal did not see any evidence to support this finding.

The final question was whether or not these incorrect findings were significant enough to overturn the First Tier Tribunal decision. The parties agreed that this decision should be made at a later hearing, once the outcome of the Professional Game Match Officials Limited [2020] UKUT 147 (TCC) case is made public by the Court of Appeal. As you will see below, the Court of Appeal released their findings in this case on 17 September but have referred the case back to the First Tier Tribunal and so the final decision in the George Mantides Limited v HMRC case will have to wait a while longer.

George Mantides Limited v HMRC [2021] UKUT 0205 (TCC)

Football referee dispute still undecided

Summary – Both the First Tier and Upper Tribunals erred in law when considering whether the mutuality of obligation and control tests resulted in referees being engaged under contracts of employment. The Court of Appeal has referred the case back to the First Tier Tribunal.

Professional Game Match Officials Limited engaged part-time referees under an overarching contract that covered the entire football season as well as individual contracts for each game, whereby referees were only paid if they officiated at a match.

Referees had control of what went on during the game, subject to FA regulations. At all other times, Professional Game Match Officials Limited had various rules and regulations that needed to be followed including a strict fitness and training regime, match day procedures and a requirement to sign a code of conduct.

HMRC issued determinations on the basis that referees' payments were employment income, liable to PAYE and NICs.

On appeal, the First Tier and Upper Tribunal found the referees to be self-employed, concluding that under the overarching contract, outside the individual match engagements, there was no mutuality of obligation.

HMRC appealed to the Court of Appeal.

Decision

The Court of Appeal found that, by looking at whether there was mutuality of obligation in the overarching contract between the referees and the companies, both the First Tier and Upper Tribunals had applied the wrong legal tests. Instead, they should have applied the mutuality of obligation and control tests to each individual match engagement under which the referees officiated and were paid.

The Court found that both Tribunals erred in law when finding that the ability of each side to pull out before a game negated mutuality of obligation. It was immaterial that the contract could be terminated before it was performed.

The Court of Appeal also decided that the First Tier Tribunal had not applied the correct tests when considering control. For example, the Court of Appeal found that the First Tier Tribunal's decision in finding that the coaching system for referees was irrelevant to control was not correct.

Further, the Court identified a number of areas, rejected by the First Tier, suggesting that control was present including that the company had the power to promote or demote referees, the referees were expected to abide by a fitness and training protocol and the referees were required to sign and comply with the Code of Conduct. There were many 'control' features, particularly within the terms of the overarching contract.

The Court of Appeal has referred the case back to the First Tier Tribunal, who will now have to revisit the evidence and decide whether there was mutuality of obligation and control.

HMRC v Professional Game Match Officials Limited [2021] EWCA Civ 1370

Grant of options not employment related

Summary – Share options granted by an employer were not granted by reason of employment, nor were the deeming provisions triggered.

In 2006, Vermilion Holdings Ltd granted Marcus Noble share options as part of an equity fund raising exercise. These were in effect payment for advisory services instead of a fee. In 2007, the company was in financial difficulty so the 2006 option agreements were novated and new, less valuable, options issued to Mr Noble, who was appointed its chairman.

The issue was whether the 2007 options were employment-related securities within s.471 ITEPA 2003, as contended by HMRC.

The First Tier Tribunal had found that the options granted to the company's director was not employment-related securities. It was granted as a replacement for the first options and not by reason of employment.

The Upper Tribunal overturned the decision stating that the second options were granted on condition that Marcus Noble became a director, the first options having been cancelled.

Vermilion Holdings Ltd appealed.

Decision

Lord Malcolm, in the Court of Session, said the statutory provisions should be applied in 'a purposive fashion and adopting a realistic view of the facts'. The company did not grant the options to Marcus Noble because he was a director — it was not a 'fringe benefit' of his employment. Taking a realistic view of the facts, when he received the options, he did not acquire something he did not have already. Indeed, it resulted in the 'diminution of his entitlement'. It followed that s.471(1) ITEPA 2003 did not apply.

On the deeming provision in s 471(3), Lord Malcolm said this should not be categorised as a separate and distinct route to taxation which was available even if it had been established that s 471(1) did not apply. It was subordinate to s 471(1) and its application should be limited if and when it was invoked in respect of securities which were known to be unrelated to employment or where that had been established by a tribunal.

Lord Doherty agreed that there was no real link between the employment and the right or opportunity to acquire the replacement options and that 'it would be anomalous, absurd and unjust' if that right or opportunity were treated as having been made available by the employer. Therefore the facts of the case did not trigger the deeming provision in s 471(3).

The company's appeal was allowed although Lord Carloway disagreed stating:

"Mr Noble became an employee of the appellants on 16 March 2007. On 2 July 2007 the appellants granted him a right to acquire an option. That option was thereby one which was made available by Mr Noble's employers. It was thereby deemed to be available by reason of his employment with the appellants. That is exactly what a deeming provision is designed to achieve. There is no injustice, absurdity or anomaly in this."

Further, he added that this was "simply affording the wording of the deeming provision its plain and ordinary meaning in the statutory context. On this basis the appeal ought to be refused."

Vermilion Holdings Ltd v HMRC [2021] CSIH 45

Adapted from the case summary in Taxation (9 September 2021)

Undeclared rental income and dividends

Summary – In all but two years, the taxpayer failed to provide sufficient, consistent evidence to convince the Tribunal that bank credits were not undeclared rental and dividend income.

HMRC issued Mohammed Shariff with income tax assessments for all tax years from 2001/02 to 2016/17. The assessments raised related to rental and dividend income and were calculated based largely on credits taken from his bank statements.

Mohammed Shariff accepted that he had failed to notify his liability to income tax in those years but challenged the quantum of the tax payable. He appealed to the First Tier Tribunal.

Decision

The First Tier Tribunal found Mohammed Shariff's evidence to be inconsistent and frequently vague. S.12B TMA requires a taxpayer to maintain all such records as may be required for the purpose of enabling them to deliver a correct and complete return for the year or period of assessment. Mohammed Shariff failed to comply with this requirement. There was little reason given as to why he had been unable to provide much of the information sought by HMRC and why answers provided by him were frequently inconsistent or incomplete. For example, he claimed that credits on his bank statements included amounts received by him when collecting rent as the agent for other landlords. However, he could not identify corresponding payments out to the landlord in relation to those properties. Further, he was not able to produce any reconciliation statements showing how much was paid or owed to the landlords for whom he acted as agent.

Instead of assessing Mohammed Shariff's income on the basis of the receipts, HMRC had relied upon Mohammed Shariff's expenses as a basis to imply corresponding income. The First Tier Tribunal were satisfied that HMRC's approach was "fair". Mr Shariff had not provided evidence to show that his expenses were funded from savings or from other sources such as gifts or loans. On that basis, it was reasonable to infer that the expenditure must have been funded from income. The Tribunal noted that other approaches could have validly been taken, for example starting with the evidence of receipts/credits and estimating a reasonable deduction for allowable expenses, but in fact that may well have produced a higher figure.

Mohammed Shariff's appeal was dismissed in all but two tax years.

1. In 2001/02, HMRC assessed him as having had income of £37,500 equal to half the deposit paid for his house which he bought jointly with his wife, on the basis that the money had not been shown to have come from savings or another non-income source. However, the evidence provided was held to be consistent and credible. Prior to the purchase, he had been working as a computer consultant for some years. At this time he and his wife had been living with his parents and were therefore in a good position to save money, which he then to pay the house deposit.
2. In 2015/16, HMRC had included £24,444 of income. This was on the basis that Mohammed Shariff and his brother each held 50% of the shares in MS2 Solutions Ltd and his brother had declared a dividend of that amount on his tax return. Although no dividend waiver documentation was produced, it was clear from the company's accounts that the total dividend paid was £27,000. The difference was taken by HMRC to reflect the 1/10th credit applied by his brother in his tax return. The First Tier found that, in light of the evidence provided at the hearing, the dividend paid by MS2 Solutions Ltd in the tax year 2015/16 was paid only to his brother.

Mohammed Shariff v HMRC (TC08202)

No PPR available

Summary – Gains arising on the sale of building plots sold from the grounds of a Grade 1 listed mansion house did not qualify for Principal Private Residence relief. The plots had been appropriated to trading stock so crystallising chargeable gains.

Heather Whyte bought the Bunny Hall Estate in 2001 which included Bunny Hall, a Grade I listed mansion house that was unoccupied and extremely dilapidated. The purchase was partially funded by her husband who was a property developer. Heather Whyte's family moved into a renovated flat within Bunny Hall.

The Bunny Hall Estate included 17 acres of grounds that were completely overgrown and had not been touched for decades. They included walled and terraced areas of formal gardens, informal grassed and wooded areas, lawns, and fenced grass paddocks.

The couple knew that to be able to renovate the Hall, significant funds would be needed. Before buying the Estate, plans were already in place to sell off part of the land for housing. English Heritage approved the sale of a number of plots and between 2003 and 2006, Heather Whyte sold five plots to her husband and a sixth to a 'known' third party. At the time of sale, all of the plots had utilities in place and groundwork for the properties to be built had already commenced.

Heather Whyte reported gains on her tax returns in the relevant years and claimed Principal Private Residence relief (PPR) against these gains, claiming that the plots of land were part of her garden or grounds.

HMRC rejected the PPR claims arguing that the plot sales were either:

- trading transactions liable to income tax; or
- capital transactions liable to CGT but without PPR.

She argued that this was not a trade, as it was a one-off transaction and the plots of land had been in her sole name prior to sale for over two years.

Decision

The First Tier Tribunal found that Bunny Hall was originally acquired by Heather Whyte as a capital asset.

Having considered the Badges of Trade, the Tribunal concluded that Heather Whyte had been trading. She had worked with her husband developing properties and had bought this property with the intention of selling development plots on at a profit. The land had been divided into six plots for sale which had been cleared, utilities had been installed and an access road constructed. All of these actions made the plots easier to sell.

The Tribunal concluded that in 2003, when plans for the six plots were submitted to the Council, they were appropriated to trading stock. Gains liable to CGT arose on the plots at this time but PPR relief was denied as the partially developed land was not part of the garden or grounds of Bunny Hall.

The profit generated after this time was liable to income tax.

Heather Whyte v HMRC (TC08215)