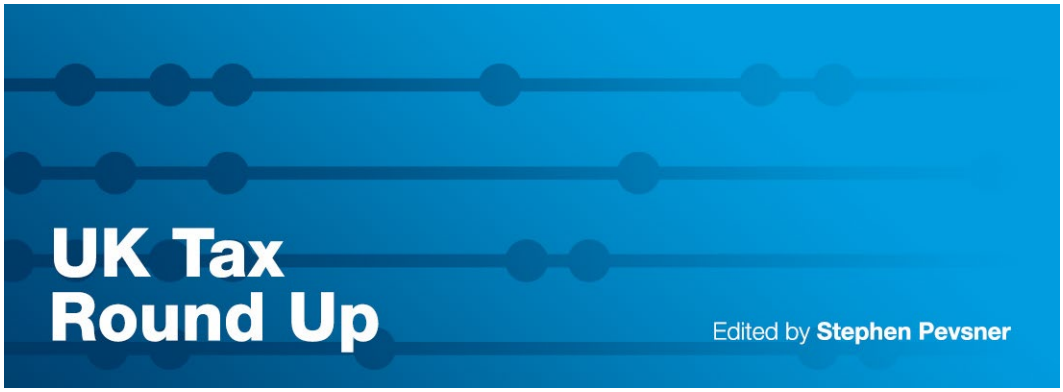
Proskauer



January 2024

For more information, please contact:

Stephen Pevsner
Partner
t: +44.20.7280.2041
spevsner@proskauer.com

Robert E. Gaut
Partner
t: +44.20.7280.2064
rgaut@proskauer.com

Richard Miller
Partner
t: +44.20.7280.2028
rmiller@proskauer.com

Frazer Money
Partner
t: +44.20.7280.2223
fmoney@proskauer.com

Catherine Sear
Partner
t: +44.20.7280.2061
csear@proskauer.com

Welcome to January's edition of our UK Tax Round Up. It was announced this month that the next UK Budget will take place on 6 March 2024. HMRC also published responses on its permanent establishment consultation. In addition, another IR35 case was reported and a wide range of interesting issues arose in *Keighley*.

UK Case Law Developments

First-tier Tribunal (FTT) finds against Sky Sports presenter Phil Thompson in latest IR35 case

The ex-Liverpool footballer and Sky Sports football pundit Phil Thompson (PT) has come under scrutiny in the latest in a long line of IR35 cases involving television broadcasters heard by the FTT. As readers will know, IR35 is the anti-avoidance legislation which seeks to prevent the avoidance of employment taxes and national insurance by the interposition of intermediate entities between the client and worker.

PT worked for Sky via his personal service company, PD & MJ Limited (PDMJ Limited). The contract provided that he was to work for Sky "on an ad hoc as and when required basis". His opportunities to work as a pundit on other TV channels were restricted. About 80% of PDMJ Limited's income was from Sky (with most of the remainder being from Skybet, a gambling affiliate).

The key question under the IR35 legislation was whether, had PT supplied his services directly to Sky, he would have been treated as an employee. This involves applying the three stage tests in *Atholl House* and *Ready Mixed Concrete*, which the FTT did.

Atholl requires an assessment of the terms of the hypothetical contract that would have been entered into had the individual contracted directly with the client based on the facts and whether that hypothetical contract would have been a contract of employment. *Ready Mixed Concrete* additionally requires that in order for there to be an employment arrangement the employer must have sufficient control over the employee's work and there must be mutuality of obligation between the employee providing work services and the employer providing work and paying for it, and that the other provisions of the contract must be consistent with it being a contract of service.

After applying these tests, the FTT considered that the hypothetical contract met the irreducible minimum requirements of control and mutuality of obligation. The FTT also found that the hypothetical contract would be a contract of service. Relevant to the FTT's decision was that the contract gave Sky considerable rights to control the time and location of PT's performance and restricted PT's third-party arrangements.

More broadly, PT was specifically associated with his punditry on Sky's Soccer Saturday and the work with Sky accounted for 80% of PDMJ Limited's income. These factors distinguished PT's position from that of Stuart Barnes (discussed in our January 2023 Round Up), who worked on Sky as a rugby pundit, but also worked for a wider range of TV stations and other media outlets and evidenced a much greater degree of autonomy than PT.

The case is another useful example of the application of the *Atholl House* and *Ready Mixed Concrete* tests, and a reminder of the often fine distinctions taken by the courts in determining whether an arrangement should be treated as a contract of service or contract for services for IR35 purposes.

FTT consider meaning of deliberate conduct, principle of continuity and meaning of unallowable purpose in *Keighley vs HMRC*

In *Keighley vs HMRC*, the FTT considered several interesting issues arising from an enquiry into the corporation tax return of a company, Primeur Limited (Primeur).

These include (1) the meaning of "deliberate" (as opposed to "careless") behaviour and the significance of that distinction in the context of time limits for assessments for tax and penalties, (2) the presumption of "continuity", and (3) a refresh on the meaning of "unallowable purpose".

Personal expense issue

Keighley was a 50% owner and director of Primeur. He used a company credit card for personal expenditure which was settled by Primeur without any tax or NICs being accounted for.

HMRC issued assessments for unpaid tax and penalties to Keighley and Primeur based on deliberate behaviour for all years from 2001 to 2017.

Keighley and Primeur appealed. Other than in relation to Primeur's appeals against penalty assessments, the FTT found in favour of HMRC.

There are several noteworthy aspects to the FTT's decision.

Firstly, HMRC's assessment going back as far as 2001 relied on the conduct being deliberate (as deliberate behaviour in this context has a 20-year limitation period). Referring to prior case law, the FTT found that a person deliberately shutting their eyes to facts which they would prefer not to know (so-called "blind-eye knowledge") was the same as having actual knowledge. Here, given the significant sums involved and the long period of time, FTT considered that Keighley's actions were clearly deliberately dishonest.

By contrast, the FTT held that the penalties assessed on Primeur should be recalculated based on careless (and not deliberate) behaviour. The size of Primeur and the number of employees meant that the "guiding mind" of the company could not be specifically attributed to Keighley and accordingly his deliberate conduct could not simply be transferred to Primeur. Primeur's accounting systems had fallen into disarray but that was careless; HMRC had failed to show an intention by Primeur to mislead HMRC or to show that it had blind eye knowledge.

Secondly, as an evidential matter HMRC relied on the principle of "continuity". Having ascertained that Keighley had funded personal expenditure on a Primeur credit card as far back as 2013, HMRC could rely on the principle of continuity to assess tax as if the same had occurred prior to that time, with the burden of proof being on the taxpayer. Keighley was unable to evidence that HMRC had over-assessed tax for those years and accordingly HMRC found against him on this point. The burden of proof being with the taxpayer is a useful reminder about the importance of good record keeping.

Loan write-off issue

Keighley was also a shareholder in another company, Valley. Keighley made unsecured loans to Valley. Primeur made loans to Valley secured against property owned by Valley.

Valley later sold the property at a loss. The loan to Keighley was repaid in full. The loan to Primeur was partially repaid with the rest being written off. Primeur claimed tax deductions for the corresponding loan relationship debit.

HMRC argued that the debit was not allowable, which the FTT agreed with on the basis of unallowable purpose. The FTT found that the decision of Primeur not to enforce its security, when there were funds to pay the secured loan in full, was not in the commercial or business interests of Primeur. In particular, the FTT rejected the submission that the unallowable purpose rule should only apply to complicated tax avoidance schemes. Rather, as has long been accepted, any decision taken by company that is clearly not in its commercial interests (even if they may be in the interests of its shareholders) may be considered an unallowable purpose. Accordingly, the debit was disallowed.

HMRC's discovery assessment relied on there being careless behaviour, which extended the limitation period for unpaid tax from four to six years. For these purposes careless behaviour by either the taxpayer or someone acting on behalf of the taxpayer is sufficient.

Primeur argued that it was not careless, having filed on the basis of third party advice obtained by Valley from an accountancy firm on the tax implications of the sale of the property and repayment of the loans. However the FTT found in favour of HMRC in respect of the unpaid tax. Firstly the FTT held that the advice received was careless because it did not consider the unallowable purpose test in the context of Primeur's loan to Valley being secured, unlike the loan from Keighley. Secondly the FTT found that the advisor should be regarded as acting on behalf of Primeur for these purposes notwithstanding that the report was addressed to Valley and there being reliance restrictions in respect of the advice, on the basis that it is commonplace for the parties to the intergroup transactions to all rely on advice provided.

However in assessing penalties the relevant careless behaviour is specifically that of the taxpayer (i.e. Primeur) and does not extend to include, for example, professional advisors or anyone else acting on behalf of the taxpayer. Although the advice received by Primeur was careless, the FTT found that Primeur had not been careless in following that advice. The FTT therefore upheld the appeals against the penalties issued to Primeur.

Other UK Tax Developments

Updated HMRC employment related security (ERS) guidance

HMRC has updated its guidance to advise employers to save copies of all ERS submissions (including ERS annual returns and notifications of tax advantaged options) prior to filing because it is not possible to access a copy of the filing via the ERS online filing system after it has been submitted.

Responses to HMRC consultation on transfer pricing, permanent establishment and diverted profits tax

In June 2023, HMRC launched a wide-ranging consultation to seek views on simplifying and clarifying the tax rules regarding certain cross-border arrangements involving the UK, in particular whether to more closely align UK permanent establishment and UK transfer pricing rules with OECD Model principles. HMRC has now published a summary of responses and outlined its go-forward action plan.

As we previously discussed in our June 2023 Tax Round Up, aligning UK legislation with OECD Model principles in line with the consultation would broaden the UK dependent agent permanent establishment test to include agents who habitually agree contracts which are entered into without modification.

We noted that this could have a significant negative impact for private funds with a non-UK general partner or manager and a UK investment advisor depending on how involved the investment advisor was with negotiating relevant contracts for the fund. This was reflected in the response document's summary of responses. HMRC has confirmed that no changes will be implemented on this point for now, and that any future proposed changes will be subject to a further technical consultation.

The response document confirms that the government will not follow the OECD Model on this point at the moment, but notes that this position will continue to be reviewed. Helpfully, the response document reiterates that the investment manager exemption (IME), which treats UK investment managers as being agents of independent status where the requirements of the IME are satisfied, should be retained.

The response document also provides technical updates on permanent establishment profit attribution methodologies, transfer pricing and diverted profits tax. For more information and the full text of the response document click here.