AAT Tax Update - 30 September 2013

In this week's edition of the tax update we look at:

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2 Company car tax planning scheme fails
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1. Whether a company could deduct sponsorship payments

In **Interfish Ltd v HMRC [2013]** UKUT 336 the issue was whether sponsorship payments intended to improve fortunes of sports club and benefit the taxpayer's trade could be deducted in computing the company's trade.

Over the years 2003, 2005 and 2006 Interfish paid 1.2 million to Plymouth Albion Rugby Football Club (Plymouth Albion) describing the payments as deductible items for advertising and marketing. Interfish is a fishing, fish processing, fish wholesaling (in the UK and internationally) and fish retailing business based in Plymouth. Interfish is both a major employer in Plymouth and a significant business in the south west of England.

In the relevant period Interfish had advertised its South West Seafoods brand on a perimeter hoarding and on players' shirts as did other local companies. It is in addition an agreed fact that Interfish's South West Seafoods logo has been on each page of the club's website. Interfish also used the club for business hospitality.

It was viewed as significant that Interfish lent money to the rugby club and its sponsorship might have made it easier for the company to obtain loan finance by creating local goodwill. Interfish was helped by the goodwill created but the judge at First Tier Tribunal (FTT) found that : "Interfish's purpose in making the payments can best be stated as being to improve the financial position of the Club, in particular by enabling it to enhance its squad of players without incurring a deficit, in order that those involved with the Club would thereby be induced to look favourably on Interfish in ways that would assist Interfish's trade. I find that improving the financial position of the Club in this way was a conscious purpose in the mind of Mr Colam (and therefore the company);"

Mr Colam controlled Interfish. The expenditure of Interfish had a mixed motive and failed the test that the sole purpose was for Interfish's trade. That duality of purpose was a finding of fact that the FTT was competent to make. At Paragraph 41 the upper tribunal records "It is a finding which was plainly open to the FTT to make on the evidence in the case."

The payments were not allowable for tax purposes. At paragraph 46 Justice Birss records: "improving Plymouth Albion's finances was not an unintended consequence of Interfish's payments, it was an intended consequence. Both purposes were in view and therefore the payments were not wholly and exclusively for the purposes of the taxpayer's trade."

2. Company car tax planning scheme fails

In **GR Solutions Ltd v HMRC [2013] UKUT 278**, the Upper Tax Tribunal was asked to consider an appeal where the issue was whether a car benefit arose when the car was originally purchased by the employee who then sold an interest in the car to the employer. The question was whether during the

period of co-ownership a car benefit arose with consequent liability for the employer to pay Class 1A NIC.

The car benefit legislation is to be found at ss114 to 118 ITEPA 2003 and it deems a car made available to an employee by an employer to create a taxable benefit in kind. Many thought that the Vasili case was the high water decision on car benefits and that HMRC would not press the interpretation of the legislation further. The fiscal fiction and grossly unfair results that HMRC's interpretation of the legislation produced should have acted as a deterrent to those thinking of testing the boundaries further.

Mr Hall is a director and employee, and shareholder. Of the Appellant company GR Solutions Ltd. On 17 April 2004 he purchased a BMW X5 motor vehicle with an invoice cost of £53,645. At some time during the company's accounting year ended 31 December 2004, Mr Hall sold a 90% share of the car to the Appellant for £48,636. To use a neutral expression, the car continued to be used by Mr Hall for business and private use. Mr Hall did not keep records of his business and private mileage. He made a 10% contribution towards the running costs of the car and paid to the Appellant 10% of the total fuel costs of the car.

Now pausing at this point one might say that the arrangement was such that Mr Hall made available his car to the company and in return had received a payment from the company proportionate to the company's intended usage. HMRC determined that the Appellant was liable to pay Class 1A national insurance contributions in respect of the car benefit and car fuel benefit in the sum of £19,726.42.

The company argued that as joint owner Mr Hall enjoyed the most extensive possessory right in property law, that his use of the car was accordingly by virtue of his joint interest in the car and that an asset already available for use by a person by virtue of that person's ownership rights cannot be deemed to have been made available to that person by another person who only subsequently acquired a partial ownership right when there had been no discontinuance of ownership by the former person.

In legal terms, co-ownership gives rise to a concurrent right of possession for each co-owner, but an entitlement to possession is always subject, in practical terms, to availability for use. But where a chattel is co-owned, its physical use (as opposed to the legal right to possession of it) is subject to an agreement or understanding between the co-owners, which may be express or tacit. A mere omission by an employer who is a co-owner of a car with an employee to assert its own rights of possession, including a right to use the car, is in the Upper Tribunal's view, sufficient, in the context of s 114 ITEPA, to constitute such a tacit agreement or understanding as to amount to the making available of the car to the employee.

The Upper Tribunal agreed with the FTT that it was immaterial how the co-ownership was brought about. Section 114 ITEPA applies to the state of co-ownership; howsoever it came to be established. It does not matter therefore whether the employer makes the initial outright purchase and transfers a fractional interest to the employee (*Vasili*), the employer and employee purchase jointly or, as in this case, the employee makes the initial purchase and transfers a partial share to the employer. Construing s 114 in accordance with its ordinary meaning, in each case, on each occasion the employee uses the car during the currency of the joint ownership, the employer makes the car available to the employee.

The Upper Tribunal ruled that the Class 1A NIC was due. The expression "made available" should be applied to the point in time at which the vehicle is used, rather than at the point in time at which it is purchased, or the point in time at which a partial property title is transferred from the employer to the employee or from the employee to the employer.

Most sensible people would conclude that the result is desperately unfair and is pressing an interpretation of the law that could never have been intended. But it does capture more tax and NIC and imposes a taxable benefit when common sense indicates that no benefit should be taxed. Tax law was rarely fair and unfair though this undoubtedly is, the interpretation is clear that if the employer has an interest in a car which an employee uses privately, the car benefit rules will apply.

It will take an appeal to the Court of Appeal (or Supreme Court) to overturn this unjust result. There is no equity in taxation and this decision is the law now unless it is overturned or the law is changed.

3. Reminder that National Minimum Wage Rates increase from 1 October 2013

The new rates summarised below will apply from 1 October 2013. For someone working 37.5 hours a week and aged 21 years or over, the annual earnings figure is £12,304.50

Year	21 and over	18 to 20	Under 18	Apprentice*
2013 (from 1 October)	£6.31	£5.03	£3.72	£2.68
2012 (current rate)	**£6.19**	**£4.98**	**£3.68**	**£2.65**

4. HMRC publishes its performance report for the period to March 2013

When you read the statistics within this **16 page report**, it seems HMRC are achieving considerable improvements in all that they do. But the fundamental question is whether HMRC achieve an acceptable level of performance and I think it is telling that the tax agent community is less satisfied. What do you think?

Derek Allen
30 September 2013

The views expressed in these podcasts are Derek Allen's personal views and do not necessarily represent AAT policy or strategy.