Proskauer

UK Tax Round Up

September 2024

Welcome to the September 2024 edition of our UK Tax Round Up. This month has seen decisions on UK tax residence, VAT group eligibility and the Supreme Court's ruling in the long running case involving the employment status of football match officials.

UK Case Law Developments

Taxpayer loses appeal over UK tax residence

In *Kevin McCabe v HMRC*, the Upper Tribunal (UT) has upheld the First-tier Tribunal's (FTT's) 2022 decision that Mr McCabe was resident in the UK.

Mr McCabe is the founder and chief executive of the Scarborough Property Group Plc (Scarborough), a successful property development, property investment and leisure business with operations throughout the UK. Mr McCabe decided in 2006 that he needed to move to Brussels to develop and grow the European business. His move to Brussels was also part of a tax planning strategy intended to ensure that he was not charged to capital gains tax (CGT) under section 10A TCGA 1992 on the gain arising on any future disposal of shares in Scarborough. Section10A required him to be non-resident for at least five full tax years.

Over the course of the next seven years, he rented or bought living and office accommodation in Brussels and incorporated a Belgian personal service company through which he entered into various paid consultancy agreements with Scarborough group members. On 9 July 2007, he sold most of his interest in Scarborough to an Australian listed property group, Valad Property Group, in consideration for loan notes and equity in the purchaser. He also became a non-executive director of certain Valad group companies. He then transferred his remaining ordinary shares in Scarborough to his sons for no consideration on 3 April 2008. Mr McCabe's self-assessment tax returns for tax years 2006/7 and 2007/8 (the relevant period), which included the disposals of his interest in Scarborough, were prepared on the basis that he was not UK resident (or ordinarily resident) during that period. Those returns were amended by HMRC on the basis that Mr McCabe was UK resident during the relevant period.

The FTT had held that Mr McCabe had failed to cease to be UK tax resident. The relevant period predated the current statutory residence tests (which were introduced in April 2013), so the case was decided on the common law on residence that was relevant at the time as well as by applying the “tie breaker” provisions of the 1987 UK/Belgium double tax convention (the DTC).

In particular, the FTT ruled that, in the context of an individual who had been resident in the UK since birth, the changes to the pattern of his life were not such as to constitute a significant loosening of his ties with the UK for the purpose of the residence test. Factors that counted against him in that assessment were his ongoing business relationships in the UK, including headline roles in the business of the Scarborough group, the time which he continued to spend with his family who remained in the UK, the frequency of his attendance at Sheffield United matches and the overall frequency and productivity of his visits to the UK for business, family and social activities.

Mr McCabe appealed that decision on the basis that his full time work abroad indicated that he had a made a distinct break in the pattern of his life in the UK, and that the FTT had erred in (a) the its application of the common law test of residence, (b) finding that Mr McCabe had a permanent home available to him in the UK and (c) finding that Mr McCabe had his “centre of vital interests” (COVI) in the UK for the purposes of the “tie breaker” provisions of the DTC rather than reaching a conclusion that his COVI was in Belgium or, alternatively, could not be determined.

The UT rejected the appeal on all grounds. Although the case is of somewhat historical interest given that the statutory residence test would now have to be applied to determine Mr McCabe’s tax residence, two points of current interest came out of the decision. First, the fact that someone has left the UK to take up an employment abroad made it “likely” that they had made a distinct break and loosened their ties with the UK, and was an important factor, but will not be a rebuttable presumption or bright line indicator of non-residence under the old rules. In fact, the UT found that, on the facts, it would not have been possible to describe Mr McCabe as having worked full time abroad during the relevant period given the amount of work he continued to carry out in the UK during that time.

The other technical point examined, which is still relevant, was how the “tie breaker” provisions of the DTC worked in Mr McCabe’s situation. The first test to be examined under that provision is that the taxpayer “is deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests)”. The UT confirmed that the FTT was correct in applying that test first in a strict “waterfall” before moving on to other parts of the DTC tie breaker. It also found that the findings of fact by the FTT and its reasoning on the fact pattern should not be disturbed. In particular, Mr McCabe’s former UK family home (owned by his wife since 2004) was found to be a permanent home “available” to Mr McCabe even though he did not spend a night there. He had visited it when in the country and it was found that his wife would have given him permission to sleep there had he wanted to do so.

The current statutory test of residence requires the application of a series of factual tests to determine a person’s residence for UK purposes by reference to the number of “ties” that they retain in the UK. That said, the new tests are generally numerical and measurable and this case shows how the old residence common law tests can result in significant uncertainty and (in Mr McCabe’s case) prolonged and costly disputes.

Overseas company had no UK fixed establishment and not eligible to join UK VAT group

In *Barclays Service Corporation v HMRC*, Barclays Execution Services Ltd (BESL), acting as the representative member of a VAT group, had applied to HMRC for Barclays Service Corporation (BSC) to join that VAT group. BESL was a wholly owned, direct subsidiary of Barclays plc. BSC was a Delaware corporation that was a wholly owned, indirect subsidiary of Barclays Bank plc which was a wholly owned, direct subsidiary of Barclays plc. As such, BESL and BSC were both under the common indirect ownership of Barclays plc.

BSC had a UK branch that was registered with Companies House as a UK establishment of BSC. The Companies House website stated that the date of registration was 26 July 2017. The UK branch was involved in the monitoring and updating of intragroup agreements between BSC and the individual legal entities to which BSC provides services.

The application for BSC to join the UK VAT group was submitted on1 December 2017. HMRC had rejected the application on two grounds:

1. BSC was not eligible to be treated as a member of the VAT group in accordance with section 43A(1) VATA 1994 because it was neither established nor had a fixed establishment for VAT purposes in the UK; and
2. alternatively, if BSC did have a fixed establishment in the UK, it was nevertheless necessary to refuse the application for the protection of the revenue within the meaning of section 43B(5)(c) VATA.

The case turned on the facts and what resources BCS actually had in place in the UK on the date of the application. The FTT found, because of the lack of human and technical resources available to it on 1 December 2017, that BSC's UK branch could not have been a fixed establishment of BSC for VAT purposes on that date. BSC had entered into employment agreements with four individuals but the evidence considered by the FTT showed that they had not actually begun work until later in December.

On the second issue, section 43B(5)(c) VATA provides that HMRC may refuse an application for a company to be treated as a member of an existing VAT group under if that refusal is "necessary for the protection of the revenue." However, the application can only be refused if HMRC "could not reasonably have been satisfied that there were [other] grounds for refusing the application" (section 84(4A) VATA).

The FTT examined the European and UK law on this point and concluded that the normal aims and consequences of VAT grouping is to provide a freedom to structure a business in a way that best meets its commercial needs while ensuring it is taxed in the same way as a single company organised on a divisional basis. It therefore followed that, had the FTT found that as of 1 December 2017 BSC's UK branch did have had the necessary human and technical resources to be a fixed establishment of BSC, the VAT savings on its admission to the VAT group (which would have been very significant) would be those that fell within the normal consequences of VAT grouping.

The case is interesting for two reasons. First, it emphasises the need to ensure that the facts are robust and evidenced clearly before an application for VAT grouping is submitted. Merely having contracts in place is not enough if there are not people in place to perform the activities. Second, and more importantly, the FTT firmly rejected the attempt by HMRC to rely on the “protection of the revenue” argument in a case like this where, although significant amounts of VAT might have been at stake, the VAT saving was simply a natural consequence of the VAT grouping rules applied to the commercial arrangement. There was no loss to the revenue beyond the normal consequences of the VAT grouping.

Work offered and done for payment considered sufficient to evidence mutuality of obligation - Commissioners for His Majesty's Revenue and Customs (Respondent) v Professional Game Match Officials Ltd (Appellant) [2024] UKSC 29

In *Professional Game Match Officials Ltd v HMRC*, the Supreme Court considered the long running saga of whether football referees were self employed or employees of Professional Game Match Officials Ltd (PGMOL). We have previously commented on the earlier hearings in the case in the *UK Tax Round Ups* of September 2018 (FTT), May 2020 (UT), and September 2021 (Court of Appeal).

PGMOL provides referees and other match officials for major football competitions (including the Championship and the FA Cup. The referees enter into an umbrella agreement with PGMOL that does not commit either PGMOL to appoint the referees to any particular games or the referees to agree to officiate at them. PGMOL and the referees then enter into specific contracts for each game that PGMOL appoints the referees to and which the referees agree to officiate at. The referees in question (the NGRs) only work part time as match officials and tended to have other jobs as well. The previous decisions had considered whether the individual contracts for specific games were or were not contracts of employment.

As set out in our previous summaries, and as a reminder, the contracts were set up as follows. The relationship between PGMOL and the NGRs was governed by two contracts. The first was an overarching agreement (or umbrella contract) under which the referees were, effectively, on PGMOL's list and available to officiate at matches. The umbrella contract contained terms about how the NGRs should maintain their fitness, required fitness tests, recommended fitness programmes and the provision of coaches to the NGRs. Under the umbrella contract, the NGRs could inform PGMOL of dates on which they were and were not available to officiate matches. The second, individual contract was the contract entered into when PGMOL asked an individual to officiate at a particular match. PGMOL operated an online match booking system through which it would allocate matches to NGRs. The NGRs could then accept or reject any allocation and, if they accepted, could then reject it prior to match day with no penalty other than loss of the match fee. PGMOL generally allocated matches to the NGRs on the Monday before the following weekend's matches.

The Court of Appeal ("CA") had stated that both the FTT and the UT had erred in law on the question of mutuality of obligation as it related to the individual contracts and that the FTT erred in law on the question of control. The CA agreed with both the FTT and the UT that the umbrella contract did not have the required mutuality of obligation and so could not, itself, create an employment relationship between PGMOL and the NGRs. On mutuality of obligation, however, the CA said both the FTT and the UT had erred in law in deciding that the individual contracts did not contain sufficient mutuality of obligation because the NGRs could withdraw from an appointment at any time, and said that (a) whether the individual contracts had mutuality of obligation was unrelated to any decision on the umbrella contracts and (b) each individual contract and the engagement under it could still give rise to a contract of employment "if work which has in fact been offered is in fact done for payment". The CA had remitted the decision back to the FTT. PGMOL had appealed the CA's decision that there was sufficient mutuality of obligation or control in the individual contracts.

HMRC argued to the SC that the presence of a contract (or two contracts) between PGMOL and the NGRs was sufficient to satisfy the mutuality of obligation requirement. PGMOL claimed that there was not mutuality of obligation of the sort required for there to be an employment relationship under either the umbrella contract or the individual contracts because, even when PGMOL had offered a particular engagement to an NGR and the NGR had accepted it, the referee could still notify PGMOL that he or she could not officiate the match and PGMOL would find an alternative referee.

Before the tribunals below and the Court of Appeal, the key issues were whether two key elements for the establishment of an employment contract were present: (i) the mutual obligations of the employee (to provide personal service) and the employer (to pay for those services) and (ii) a sufficient degree of control by the employer over the employee. The FTT found in favour of PGMOL, holding that neither contract was a contract of employment because: (i) there was insufficient mutuality of obligation between PGMOL and the NGRs and (ii) PGMOL had insufficient control over the NGRs under the contracts. Although the UT held that the FTT had misapplied the law on control, it dismissed HMRC's appeal on the basis that there was insufficient mutuality of obligation. The CA allowed HMRC's appeal as regards mutuality of obligation and control and remitted the case to the FTT to reconsider the question of employment based on the other circumstances surrounding the contracts and the arrangement between PGMOL and the NGRs.

The SC unanimously dismissed PGMOL's appeal, holding that the minimum requirements of mutuality of obligation and control necessary for a contract of employment between the NGRs and PGMOL were satisfied in relation to the individual contracts. In particular, the SC endorsed the CA's finding that that the combination of contractual obligations imposed on referees as to their general conduct during an engagement from the time the match was accepted to the time when the match report was submitted, and as to their conduct during the match, was capable of giving PGMOL a sufficient framework of control to meet the control test for employment purposes The SC remitted the case to the FTT for it to decide whether, in the light of all relevant circumstances, the individual contracts were contracts of employment accepting that they contained sufficient mutuality of obligation and control to mean that they could, in principle, be contracts of employment.

If nothing else, the case (and the earlier decisions) shows how fiendishly difficult it can be to determine whether a particular arrangement does or does not create an employment relationship, as has been shown in recent years in the number of cases relating to IR35 that have similarly resulted in different decisions from the various courts. Unfortunately, because each case is so fact specific, it is difficult to take useful principles from one to another and it might be time for thought to be given to constructing a clearer basis for assessing employment or self-employment for tax purposes, or changing the tax system so that the distinction is not so important.

International Tax Developments

CJEU rules against Apple in state aid case concerning Irish tax structures

On 10 September, the European Court of Justice (CJEU) issued its final judgment in the long running dispute between Apple and the European Commission (EC) concerning Apple's Irish structures and whether the Republic of Ireland had granted illegal state aid to Apple in two rulings on its structuring issued in 1991 and 2007.

In a lengthy judgment, the CJEU affirmed the EC's conclusion that two subsidiaries of the Apple group, Apple Sales International and Apple Operations Europe Ltd received tax advantages in Ireland that constituted unlawful state aid in an amount exceeding EUR 13 billion. As a result of this judgment, the Irish tax authorities are now obliged to recover this amount from Apple.

This judgment follows a number of other recent cases in which the CJEU has overturned previous EC decisions that unlawful state aid had been granted.

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