A FEW POINTS OF INTEREST

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Zero rating evidence

The recent case of *Junjie Liu and Zhe Li v HMRC* [2022] UKFTT 44 (TC), concerned the Appellants' entitlement to zero rate exports of goods. The case illustrates the point that evidence can be "clear" (as the legislative scheme requires for zero rating to be possible) even where there are inconsistencies and contradictions within it. HMRC argued that they were not entitled to zero-rate the exports, not because the exports had not occurred, but simply because the Appellants had not provided sufficient evidence under VAT Notice 703. In particular' HMRC placed great weight on what they claimed were mistakes and inconsistencies in the documentation – mistakes which they claimed prevented zero rating.

The Tribunal, however, rejected HMRC's somewhat arbitrary view. The Tribunal accepted that, relying on *HMRC v Arkeley Limited (in liquidation)* [2013] UKUT 393, the evidence under VAT Notice 703 could be a patchwork of different sources of official, commercial and supplementary evidence. In particular, there was no requirement for every piece of evidence to be correct, as long as the exports were clearly identified from the evidence *taken as a whole*. The Tribunal took a pragmatic view in discounting incorrect details on postage forms and further in holding that there was no need for invoices to be VAT invoices for them to be valid supplementary evidence. The case is contrasted with a number of other decisions going the other way. As with the case below, this case demonstrates the critical importance of properly prepared and clearly laid out evidence.

When is expenditure subsidised

In *Quinn (London) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKFTT 0437 (TC), the FTT considered when expenditure (in this case R&D expenditure) is "subsidised". The definition which applies treats expenditure as "subsidised" when it is "met directly or indirectly by another person". The concept of expenditure being "met directly or indirectly" by another person also appears in various other provisions of the tax code – in s50 TCGA 1992, in s532 CAA 2001, and in s172 and s603 ITTOA 2005, as well as paragraph 8 Schedule 3 Oil Taxation Act 1975.

HMRC argued that because the expenditure was being incurred by the Appellant in the course of carrying out a contract (of construction) under which it was being paid for the construction works, the expenditure on the R&D which Quinn incurred while performing the contrast (in finding innovative solutions to construction problems) was being "met" by the customer.

If HMRC were correct, it would mean that expenditure incurred before a contract was entered into would not be subsidised but expenditure incurred during the course of a contract would be – unless the contract was loss-making, in which case there would be no subsidy. It is worth noting that Quinn was engaged to build buildings, not undertake R&D.

The Tribunal accepted that the expenditure in question was not subsidised on the facts. The fact that the expenditure being "met" by a third party was one limb of a statutory provision, with other limbs referring to expenditure being met by state aid or by a grant, as well as the heading and defined terms ("subsidised expenditure") informed the proper construction of the relevant provision (s1138 CTA 2009). The words also had to be read in the context of the SME scheme as a whole and should not be read in such a way that the scheme is rendered unworkable. This was sufficient for the tribunal to conclude that expenditure being "met" by a third party, even "indirectly", still required a clear link between the price paid by the third party and the expenditure borne in respect of R&D. The Tribunal accepted that, as a matter of statutory construction, where Parliament uses the same words in different places in the tax legislation, it should be assumed to have intended the words to mean the same thing unless there is a clear reason to the contrary. Before Quinn, there had been no substantial judicial treatment of s1138(1)(c), but the Tribunal was able to draw on cases which dealt with the same words in the Capital Allowances Acts as "helpful and informative". By the same token, the case will have relevance in considering the similarly drafted statutory provisions mentioned above.

The decision demonstrates the importance of being able to present all relevant evidence to HMRC when making claims under the SME scheme. The burden of proof is on the company to establish that their expenditure qualifies under the scheme, and, if they are not able to provide the relevant contracts, they may not be able to rebut arguments from HMRC that the expenditure was subsidised (or alternatively that the R&D was subcontracted – another argument HMRC have been raising), such that the relief should be denied. *Quinn* can be contrasted with another appeal that concerned the SME scheme, *Hadee Engineering Co Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 0497 (TC), in which the appellants were unable to provide the evidence to demonstrate that certain expenditure was not subsidised or subcontracted. Taxpayers, and especially those claiming under the SME scheme, must be sure to always retain the appropriate records in case of a challenge by HMRC further down the line.

Another set aside decision

In *Abadir v. Credit Suisse Trust Ltd* (case number PT-2021-000157), the Claimant sought to set aside a transfer into a trust of $16.8 million (then worth approximately £8.85 million). This transfer had been based on incorrect tax advice given by Credit Suisse the consequences of which were that a supposedly tax efficient structure had left the Claimant with a tax bill of over £4.6 million. The Supreme Court had restated the circumstances in which a transfer could be set aside for mistake in *Pitt v Holt* [2013] UKSC 26 and the applicable principles were then considered in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) and in *Bainbridge & Anor v Bainbridge* [2016] EWHC 898 (Ch).

Bainbridge was considered in GTIC Review Volume XIV Number 1 at 59. Here the Court confirmed that when a transfer is set aside for mistake, it is treated, as a matter of general law, as if it had never happened at all. (It is *void ab initio*.) The court also noted that, absent any special legislation to the contrary, there is no reason that this analysis should not also apply as a matter of tax law. This meant that the Claimants could not only set aside the resulting tax charges, but they could also benefit from rollover relief on disposals by the trustees which were related back to them; this was on the basis that the settlors were treated as making the disposals of property which had in fact been made by the trustees and, since they were trading, rollover relief applied.

In *Abadir* the Court held that advice had been sought from Credit Suisse who had confirmed that the structure was tax efficient. This advice was relied upon in setting up the Trust and in making contributions. This was a mistaken belief which justified the transfer being set aside. *Abadir* is of note in that most of the trust property had already been distributed and the reason for the application was, clearly enough and understandably so, solely tax. Nevertheless the claim succeeded.