FIELD COURT TAX CHAMBERS
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TAX BRIEF

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WELCOME

After a little gap when I have been contributing to the FCTC Digest I have decided to bring back Tax Brief. I've not been suffering from writer's block[1] I can assure you.

Details of FCTC Digest can be found at the end of this edition of Tax Brief.

As always, please let me have any comments and feedback. I very much welcome this.

[1] Writer's Block: apparently J K Rowling, Ian Rankin and Alexander McCall-Smith, all of whom are writers, live in the same part of Edinburgh which they now call "Writer's Block". Well, it made me smile!

HMRC v A TAXPAYER – EXCEPTIONAL CIRCUMSTANCES AND THE STATUTORY RESIDENCE TEST

SPEED READ

The taxpayer has lost her appeal in the Upper Tribunal as to the meaning of "exceptional circumstances" in the statutory residence test. She had hoped that an additional six days spent in the UK with her suicidal sister might have been sufficient to be exceptional. After all, her sister was contemplating suicide and her sister's home was extremely unkempt. One might have assumed that those facts amounted to exceptional circumstances. The Upper Tribunal decided that those were not exceptional circumstances.

Let us hope that the taxpayer appeals to the Court of Appeal.

Overview

In this anonymised case the taxpayer was a woman with a twin sister living in the United Kingdom. The taxpayer left the United Kingdom on 4th April 2015 and moved to Ireland. In the next year she received shares from her husband and then dividends of approximately £8m. The question was whether in that later tax year (2015-2016) she was UK tax resident. (No doubt leaving late in a tax year and then receiving a gift of shares followed by a large dividend soon afterwards "looked bad".)

The case turned on whether an extra six days which she spent in the United Kingdom (looking after her sister) could be ignored under the exceptional circumstances test. If they could not be so ignored then she would have breached the 45-day test and would therefore be UK tax resident for 2015-2016. This would mean that she would pay tax on the £8m. dividends giving rise to a tax charge of £3,142,550.58.

Two visits

The taxpayer made two relevant visits to the United Kingdom. One was in December 2015 and lasted for two days and the other was in February 2016 and lasted for four days. To win her case the taxpayer had to show that her time spent in the United Kingdom during these two visits fell within the exceptional circumstances exception. Otherwise she would be UK tax resident as the six days took her over the 45-day limit which applied to her.

The main case – risk of suicide

The taxpayer had run two separate cases in the First-tier Tribunal. The first of these related to her concern that her sister (who had attempted to take her life previously) was a suicide risk. The taxpayer's sister suffered from alcoholism and depression and, as mentioned, had threatened suicide on more than one occasion. The taxpayer's contentions, in the First-tier Tribunal, in relation to this main case had been that she was in the United Kingdom to look after her sister for fear that the sister would indeed take her own life. The First-tier Tribunal had found that the evidence in relation to this main case was not sufficient to amount to "exceptional circumstances". Specifically, they were not satisfied that on the balance of probabilities she had come to and remained in the United Kingdom in December 2015 and February 2016 because her twin sister had threatened to commit suicide.

Crucially, the taxpayer did not cross-appeal the First-tier Tribunal's finding in relation to the main case and this made the appeal to the Upper Tribunal more difficult.

The secondary case – the need to provide care for her sister and her sister's children

The secondary case was that during both visits the taxpayer had found a dysfunctional household in which her twin sister was drunk and incapable of caring for herself or her children. The taxpayer's sister and the children were unkempt and in need of care. The house was filthy. There was nobody else who could provide the care needed.

The First-tier Tribunal had accepted this secondary case as producing "exceptional circumstances" for the purposes of the statutory residence test. They therefore found in the taxpayer's favour on the basis that she was not UK tax resident for the year 2015-2016. HMRC, however, appealed to the Upper Tribunal.

- 6 days in the United Kingdom
- Worried about her sister's suicide threat (lost in the FTT and did not cross appeal)
- Worried about the dreadful living conditions of her sister and her sister's children (won in the FTT but HMRC appealed to the UT where the taxpayer lost)

The appeal to the Upper Tribunal

The taxpayer had not put in a respondent's notice in relation to the main case (by way of cross appeal) and therefore the Upper Tribunal considered only the secondary case. Specifically, this secondary case was that the taxpayer had been "unable to leave the UK and forced to stay until such time as her sister was in a place of safety and appropriate care arranged for her two children".

Unlike the First-tier Tribunal the Upper Tribunal took a more literal approach to the exceptional circumstances test as set out in the legislation. In essence, the Upper Tribunal took the view that the conclusion reached by the First-tier Tribunal (in relation to the secondary case) was implausible and an error of law. Given that the main case had not been cross appealed that was the end of the matter.

The Upper Tribunal voiced the following particular concerns:-

(a) the First-tier Tribunal had not believed the taxpayer in relation to the primary case; so why did they believe her in relation to the secondary case?;

(b) the exceptional circumstances test is objective;

(c) by using the words "exceptional circumstances" (and at the risk of stating the obvious) the circumstances must be exceptional and caring for a twin sister and her children was regarded as not exceptional. In any event, the exceptional circumstances had to prevent the taxpayer from leaving the United Kingdom and that requirement must not be glossed over or ignored.

(d) the word "prevent" is a "strong word". Mere moral obligations to stay are not exceptional circumstances;

(e) the exceptional circumstances test has to be applied on a day-by-day basis. It is not sufficient to say that for one day the circumstances applied therefore they must apply for the other days;

(f) in the particular case there was an inconsistency because the taxpayer had not challenged the First-tier Tribunal's view that the primary case was not proved. Logically, therefore, (said the Upper Tribunal) if the First-tier Tribunal were sceptical about the main case (*risk of suicide*) then they should have been equally sceptical about the secondary case (*need to provide care*). The fact that the First-tier Tribunal had not been sceptical about the secondary case was (according to the Upper Tribunal) an error of law in effect, or at least a significant mistake resulting in an error of law;

(g) alcoholism and depression are not uncommon or unusual illnesses and therefore could not amount to exceptional circumstances; and

Alcoholism and depression are not exceptional circumstances!

(h) the First-tier Tribunal had failed to make findings that on each day *both* the need to care for the sister *and* the need to care for the children were outside the taxpayer's control. In addition, the First-tier Tribunal had not made findings to show that the need to care for the sister and the need to care for her children prevented the taxpayer leaving on all of the days in question.

If spending no more than 6 days in the UK to help to prevent a suicidal woman from taking her life and as a good sister to look after her and her children when they were dire straits is not exceptional – what on earth is?

Observation

This is a very insensitive decision and I find it rather depressing. In my view the statutory residence test was meant to codify the previous common law test and my own view is that the particular circumstances where an individual is in the United Kingdom for a short period of time to tend to a sister who is contemplating suicide and to look after her sister and her sister's children who are in a very bad way is something that would not have resulted in UK tax residence under the old common law test.

The decision of the Upper Tribunal is, in my view, crying out for an old-fashioned judgement of Solomon[2] approach, since we need an outcome that is compassionate and kind-hearted.

It is also strange, in my opinion, that the findings of fact by the First-tier Tribunal were consistently challenged by the Upper Tribunal even though, of course, the Upper Tribunal judges did not see the witnesses giving evidence. Usually, appeal judges are reluctant to criticise, in the way that the Upper Tribunal have done, the approach to fact-finding adopted by the first instance judges. This seems to me odd.

The Upper Tribunal strays dangerously into questioning the facts found by the FTT.

[2] Solomon, King David's son, was required to decide which of two women was the mother of a baby when each of them claimed parenthood. Both had recently given birth, but one's child had died. The story is recounted in the Old Testament (1 Kings 3: 16-28). Solomon pronounced that the child should be cut in two, so that each mother should have half. The real mother, unable to bear her son being killed, immediately offered it to the other woman, to save the child's life; whereas the other agreed to the proposal. The false mother was thus exposed and Solomon returned the living child to its real mother. In other words, Solomon's judgement showed his real wisdom and from this we have the expression "judgement of Solomon".

After all, the First-tier Tribunal had the benefit of hearing the taxpayer's evidence and seeing her give evidence. Whereas, of course, the Upper Tribunal did not have this benefit.

Further, the Upper Tribunal criticised the fact that the sister had not given evidence at first instance. To my way of thinking, however, it is hard-hearted, to say the least, to criticise the sister for not giving evidence. After all, we know that she had been contemplating suicide and for her to appear before a tribunal would have been a very stressful experience which would have been difficult for somebody in her position.

How can a sister be criticised for not giving evidence in the very stressful environment of a tribunal when the sister is suffering from suicidal tendencies? For shame!

Somewhat harsh findings

There was also criticism from the Upper Tribunal judges on the basis that the taxpayer had failed to keep good records of what she did on each of the six days that she was in the United Kingdom. This seems particularly unfair given that she was in the United Kingdom because of her concern that her sister was going to take her own life (and she had threatened to do this on a number of occasions before) and because she was alarmed at the filthy state of the house and the effect it had upon her sister and her sister's children. Does anyone really believe that detailed records should have been kept by the taxpayer in these circumstances. To my way of thinking it would have looked odd had the taxpayer kept detailed records rather than spending all of her time tending to her sister's needs and those of her sister's family.

Remember folks when you are travelling in an emergency to prevent your sister from taking her own life that you should keep full records so that if the matter goes to court you can produce these records in a legally acceptable fashion. Oh and do them on a day-by-day basis as well.

The judges, nevertheless, say that an individual in this situation should keep good records!

The legislation – the sufficient UK ties test

In the circumstances the issue turned upon FA 2013 Schedule 45 paragraph 18 as to days spent.

Paragraph 18 reads as follows:-

"*Sufficient UK ties*

18 The Table below shows how many UK ties are sufficient in a case where P was resident in the UK for one or more of the 3 tax years preceding year X –

Days spent by P in the UK in year X	**Number of ties that are sufficient [to make P UK tax resident]**
More than 15 but not more than 45	At least 4
More than 45 but not more than 90	At least 3

In the situation under review the taxpayer had three ties namely family, accommodation and 90 days. She had also been resident in the United Kingdom for at least one of the three previous tax years.

In accordance with the table above (para.18) she was therefore:-

(a) resident in the UK for 2015/16 if she spent 46 days or more in the United Kingdom; and

(b) non-resident if the number of days was 45 days or fewer.

She had, as a matter of fact, spent 50 days in the United Kingdom but she contended that six of those days should be relieved from the day count because of "exceptional circumstances".

Legislation – the exceptional circumstances test

The legislation is found at FA 2013 Schedule 45 paragraph 22:-

> "(1) If P is present in the UK at the end of a day, that day counts as a day spent by P in the UK.
>
> (2) But it does not do so in the following two cases.
>
> (3) The first case is where –
>
> (a) P only arrives in the UK as a passenger on that day,
>
> (b) P leaves the UK the next day; and
>
> (c) between arrival and departure, P does not engage in activities that are to a substantial extent unrelated to P's passage through the UK.
>
> (4) The second case is where –
>
> (a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control that prevent P from leaving the UK, and
>
> (b) P intends to leave the UK as soon as those circumstances permit.
>
> (5) Examples of circumstances that may be "exceptional" are –
>
> (a) national or local emergencies such as war, civil unrest or natural disasters, and
>
> (b) a sudden or life-threatening illness or injury."

The conclusions to draw

At the end of the Upper Tribunal decision they list their analysis of how and when the exceptional circumstances rule is engaged:-

(1) consider separately each of the days for which the taxpayer is claiming to have met the requirements (found in FA 2013, Schedule 45, para.22(4)).

(2) For each of those days:

(a) Establish the facts which the taxpayer asserts relate to each of the five elements ((i) to (v)) of the statutory test, the burden being on the taxpayer, namely that:

(i) the circumstances were exceptional;

(ii) the circumstances were beyond the taxpayer's control;

(iii) the taxpayer would not have been present in the UK at the end of that day but for those circumstances;

(iv) the circumstances prevented the taxpayer from leaving the UK; and

(v) the taxpayer intended to leave the UK as soon as those circumstances permitted.

(b) Establish the facts which the taxpayer asserts show that the circumstances changed so as to allow the taxpayer to leave the UK after the end of the relevant day or days; this will shed light on whether the taxpayer was previously prevented from leaving by the exceptional circumstances.

(c) Consider which facts are objectively proven, either by documents or credible oral evidence, or by both.

(d) In the light of those proven facts, decide whether each of the statutory requirements has been satisfied.

This needs to be appealed

With any luck, the Upper Tribunal's decision will be appealed to the Court of Appeal where we will get a kinder, more sensitive "judgement of Solomon" type outcome.

HMRC CRACKS DOWN ON 'DAY COUNTING' SUPER RICH

SPEED READ

Following on from the article about exceptional circumstances it is worth noting that HMRC have recently sent letters to around 5,000 people who may have broken the statutory residence test during the coronavirus outbreak. More particularly, HMRC are cracking down on what some people call "super-rich day counters" whom HMRC suspect stayed too long in the United Kingdom during the pandemic.

Apparently HMRC are asking people if they could have booked a flight home or be repatriated when the UK was in lockdown and the individuals will have to produce evidence to show that they were prevented from so returning.

Limitations of exceptional circumstances

It is to be noted that the exceptional circumstances rules apply only in relation to the specific day count in the United Kingdom.

I have had a situation where an individual was obliged to stay in the United States for emergency medical treatment and not return to his home country of India. As a result a visit that he had made to the United Kingdom before he flew to New York resulted in his spending more days in the United Kingdom than India after all. He had been obliged to stay in New York because he was undergoing emergency treatment in New York and the coronavirus risk meant that he spent less time in India.

As a result his country tie became that of the United Kingdom instead of India. HMRC were not prepared to apply a concessionary approach in these circumstances. The hope had been that they would accept that there were "exceptional circumstances" explaining why the taxpayer had been obliged to stay in New York for much longer than anticipated (to avoid possible death at the time of the most serious concerns about the coronavirus). HMRC's approach is of course in line with the strict statutory rule but the client found it a harsh decision. As mentioned, he was obliged to stay in New York following a very

serious medical operation because he was advised that there was a real risk to his life had he returned to India more quickly than he did rather than staying in New York.

IR35 AND GARY LINEKER: NOW TO BE HEARD BY THE UPPER TRIBUNAL

SPEED READ

HMRC have recently appealed the First-tier Tribunal (FTT) decision in the *Gary Lineker* case. Cutting a long story short, Gary Lineker won his case at first instance on the basis that in order for the IR35 legislation to apply there could not be a contract directly between the client (here the BBC and BT Sport) and the worker (here Gary Lineker). Owing to the vagaries of partnership law, the "intermediary" which was involved here could be effectively ignored in the IR35 test. This was by reference to the rules concerning general partnerships included in the Partnership Act 1891 s.5 (coupled with the case of *Memec plc*).

Specifically, the fact that Gary Lineker himself signed the contracted personally on behalf of the partnership meant that for IR35 purposes the intermediary was "sidestepped" and therefore the intermediaries legislation did not apply. There *was* a direct contract between the BBC/BT Sports and Gary Lineker; so the IR35 legislation could not apply.

Given that Gary Lineker paid his tax in full and had done from the outset and given that he never wished to take advantage of any anti-avoidance rules this is a very harsh case for HMRC to be taking.

Analysis

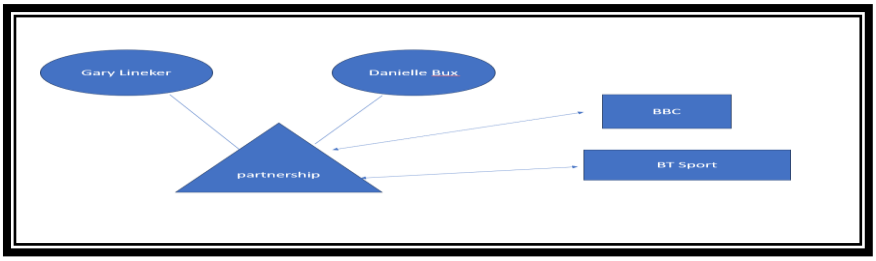
Who would be a sports commentator?

The cases involving Gary Lineker, Stuart Barnes (a rugby commentator) and Adrian Chiles (who famously was the face of ITV Sport for quite some time) having been won by the taxpayer in each case have now all been appealed to the Upper Tribunal.

In this report I focus on the *Gary Lineker* case.

Gary Lineker set up a general partnership together with his then wife (Danielle Bux) called "Gary Lineker Media". That general partnership entered into two separate contracts with the BBC and one with BT Sport to provide his services for various specified periods of time.

In addition, separate contracts were entered into between the partnership on the one hand and the broadcaster on the other. Tellingly (and this "saved him" at first instance anyway) Gary Lineker signed each of the contracts with the broadcasters, albeit as a partner. The fact that he signed as a partner did not matter. The position at partnership law was as if he had personally contracted with the broadcasters and on this basis the IR35 legislation could not apply.



The relevant "IR35" legislation is found in ITEPA 2003 Part 2, Chapter 3 and the particular legislation which is relevant is s.49 which reads as follows:-

> "**49 Engagements to which this Chapter applies**
>
> This Chapter applies where-
>
> (a) an individual ("the worker") personally performs, or is under an obligation to perform, services for another person ("the client")
>
> …
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that –
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> …
>
> (iii) the reference in subsection (1)(b) to a "third party" includes a partnership."

The First-tier Tribunal held that the Gary Lineker Media, being a general partnership, satisfied all the requirements of partnership law and as such was capable of being an intermediary.

However, all of the contracts between Gary Lineker Media and on the one hand and the broadcaster on the other were signed by him.

Taking account of the relevant partnership legislation and the relevant partnership case law the First-tier Tribunal came to the conclusion that Gary Lineker was in effect signing the contracts *in his own right* and not on behalf of the partnership.

The relevant legislation is s.5 of the Partnership Act 1890 which reads as follows:-

> "**Power of partner to bind the firm**
>
> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

In addition, the case of *Memec* (*Memec Plc v Inland Revenue Commissioners* [1998] STC 754) is relevant. At page 784 Peter Gibson LJ summarised the terms of the 1890 Act by saying:-

> "The relevant characteristics of an ordinary English partnership are these: (1) the partnership is not a legal entity; (2) the partners carry on the business of the partnership in common with a view to profit (see s 1(1) of the Partnership Act 1890 (the 1890 Act)); (3) each does so both as principal and (see s 5 of the 1890 Act) as agent for each other, binding the firm and his partners in all matters within his authority; (4) every partner is liable jointly with the other partners for all debts and obligations of the firm (see s 9 of the 1890 Act); and (5) the

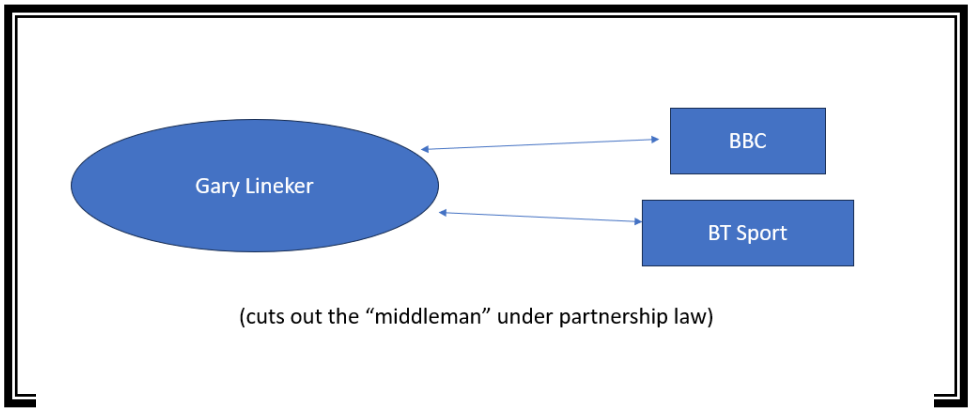
> partners own the business, having a beneficial interest, in the form of an undivided share in the partnership assets (see *MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898 at 900, [1990] 2 AC 239 at 249 per Lord Oliver), including any profits of the business."

Putting everything together:-

(a) the "intermediaries legislation" ("the IR35 legislation") was capable of applying in the situation under review save for one point;

(b) that one point that was given the quirks of partnership law the fact that Gary Lineker signed all of the contracts in his own name meant that there was a direct contract between him and the two broadcasters and the intermediary partnership could be ignored (it was not a party to any direct contract in effect).

Since there was a direct contract rather than one signed by a third party for itself (an intermediary such as a partnership) it followed that the "IR35" rule was not engaged. So Gary Lineker won at first instance.



To be fair to Gary Lineker, it is worth noting that he had never intended to avoid tax and it is clear from his tax returns that he just wanted to carry on paying all the tax in the same way that he had been when he was an individual directly employed by broadcasters. It seems that he was coerced into adopting a structure of this nature particularly by the BBC and it is certainly my experience that the BBC were very keen if they possibly could to have an intermediary arrangement with "their" commentators in order that the BBC could reduce its own national insurance exposure.

The question then arises as to why HMRC are bothering with this given that Gary Lineker has paid the full amount of tax that he would have paid anyway.

It seems likely that HMRC simply wished to collect additional national insurance which otherwise is not due.

This is important because at one time in the case it was argued that if Gary Lineker lost there would have been an element of double taxation but it seems this is not the case and the following extract from the First-tier Tribunal decision show this:

> "73. The question of double taxation was addressed by Parliament when enacting the intermediaries legislation and the following statutory provisions, which were originally contained in Schedule 12 to the Finance Act 2000, ensure that there is no double taxation when a partnership applies the intermediaries legislation.
>
> (1) Section 56(2) and (3) ITEPA provides that the individual worker is treated as if employed by the

> partnership and as having received the deemed employment payment as taxable earnings;
>
> (2) The deemed employment payment is treated, under s 56(6) ITEPA, as received by the worker in his personal capacity and not treated as general income of the partnership, ie the deemed employment payment is effectively ring-fenced for the worker;
>
> (3) In calculating the profits of the partnership, a deduction is allowed for the deemed employment payment and the amount of employer's NICs paid by the partnership under s 163 ITTOIA;
>
> (4) Specific provision is made under s 164 ITTOIA for how that deduction is calculated where the intermediary is a partnership;
>
> 74. The combined effect of these provisions is that if a partnership applies the Intermediaries Legislation to arrangements under which it supplies the personal services of one of its partners to a client, it will have to operate PAYE in respect of the deemed employment payment and can take a deduction when calculating its profits, with the effect that its profits are reduced. The partners do not pay tax or Class 4 NICs on the deemed employment payment and there is therefore no double taxation."

Next step

So the next step is that there will be an Upper Tribunal hearing (probably some time next year). Whilst it is difficult to judge my guess is that HMRC might well win it (in extra time – only joking). The concern is that when Gary Lineker was signing the contracts he was doing it as a partner on behalf of a partnership and it seems to me unlikely that the draftsperson could ever have intended that in that situation the intermediaries legislation would be sidestepped. On the other hand, given that Gary Lineker has avoided no tax personally that would be a very harsh outcome and hopefully the Upper Tribunal would steer clear of such a result.

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THANK YOU

Thank you to Stephanie Talbot for producing Tax Brief.

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