Neutral Citation: [2022] UKFTT 164 (TC)

Case Number: TC08491

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/05776

INCOME TAX – whether earnings of a diver within Section 15 ITTOIA 2005 can be regarded as earnings of a partnership – no – appeal dismissed

Heard on: 13 April 2022
Judgment date: 17 May 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

JEREMY LOWE

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr A J Buchsbaum of Wilds Limited, Chartered Accountants

For the Respondents: Ms Marianne Tutin, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against Closure Notices for the tax years 2013/14 to 2017/18 with the exception of 2016/17. HMRC have not issued a Closure Notice in respect of the appellant's tax return for 2016/17 and thus there is no appeal.

2. The appeal was heard jointly with the appeal of another individual, Mr Adrian Corrigall. For some of the facts the appeals are slightly different so this decision only deals with the appellant's appeal. A separate decision is given in relation to Mr Corrigall.

The hearing

3. Neither appellant attended the hearing having decided that they did not wish to give evidence due to their work commitments. That is their choice, these are their appeals. We had Skeleton Arguments for both parties and appended to the appellant's Skeleton Argument were 11 pages of apparent extracts from Hansard. Unfortunately those did not carry the actual references so neither HMRC nor the Tribunal were able to identify in what capacity the individuals concerned were speaking and in relation to which Bill before Parliament. The evidential value is therefore limited.

4. At the outset of the hearing, having noted the references to Hansard, I drew the attention of the parties to Mr Justice Marcus Smith and Judge Hetherington's decision in *Christianuyi Limited & Others v HMRC* ("Christianuyi")[1]. I annex at Appendix 1 the particular paragraphs which I consider to be relevant.

5. We had an Authorities Bundle extending to 248 pages and a Hearing Bundle extending to 462 pages.

Factual background

6. The appellant is a mixed gas and air diver supervisor. During the relevant tax years, the appellant was employed by Subsea 7 Crewing Services Pte Limited ("Subsea"). He carried out diving work both in the UK (including the UK continental shelf) and outside the UK. The appellant had initially disputed that he was an employee of Subsea, but by email dated 5 November 2021, his representative confirmed that that was no longer in dispute.

7. In each of the relevant tax years the appellant treated the UK employment income received from Subsea as trading income of a partnership with his spouse.

8. The appellant then reported 50% of that income on his tax return as his share of the profits of the partnership. The remaining profit share was shown on his spouse's tax return.

9. HMRC opened enquiries into the appellant's returns and issued Closure Notices. The Closure Notices were issued to give effect to HMRC's conclusion that 100% of the UK employment income should be treated as income of the appellant.

10. The appellant appeals against the following Closures Notices, namely:-

Tax year	Date	Additional tax
2013/14	19 April 2017	£25,287.12
2014/15	19 April 2017	£26,376.82

[1] 2018 UKUT 10 (TCC)

2015/16	19 April 2017	£29,908.93
2017/18	15 October 2020	£33,549.85

The contract of employment

11. The appellant was initially employed by Subsea under a contract with a stated effective date of 1 January 2013 ("the 2013 contract") although it also stated that his continuous service had commenced on 1 February 2012. It was described as a "Principal Statement of Employment", the appellant was described as "the employee" and his job title was "Mixed Gas Diving Supervisor". He was entitled to a basic annual salary of £126,079.80 on the basis of working for 165 Contract Days with 18 days of paid annual leave. If he worked in excess of those days, he was entitled to be paid an Excess Day rate.

12. From 3 August 2016 the appellant was employed by Subsea under a contract described as a "Day Rate Worker Agreement" ("the 2016 contract"). His job title was "Shift Supervisor Diving" and his day rate was £871.85 inclusive of paid annual leave entitlement.

13. Both contracts set out his personal obligations such as his minimum commitment, working hours and work location and rights such as entitlement to breaks, annual leave and sick pay.

The Law

14. It was not in dispute between the parties that the appellant's income falls within the scope of section 15 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). However the parties do not agree as to the effect of that section.

15. Section 15 ITTOIA provides:-

> (1) This section applies if –
>
> (a) a person performs the duties of employment as a diver or diving supervisor in the United Kingdom or in any area designated by Order in Council under section 1(7) of the Continental Shelf Act 1964 (c29),
>
> (b) the duties consist wholly or mainly of seabed diving activities, and
>
> (c) any employment income from the employment would otherwise be chargeable to tax under Part 2 of ITEPA 2003.
>
> (2) The performance of the duties of employment is instead treated for income tax purposes as the carrying on of a trade in the United Kingdom.
>
> (3) For the purposes of this section the following are seabed activities –
>
> (a) taking part as a diver in diving operations concerned with the exploration or exploitation of the sea bed, its subsoil and their natural resources, and
>
> (b) acting as a diving supervisor in relation to any such diving operations.

16. As paragraphs 5 to 7 of the General Note to ITTOIA state, section 154 ITTOIA was enacted as part of the "Tax Rewrite" whose purpose was not to change the law but to recast it in modern and more simple language.

17. The explanatory notes to section 15 ITTOIA state:

> "This section deals with activities which are strictly the duties of an employment but which, if certain conditions are met, or taxed as if they were the carrying on of the trade. It is based on section 314 ICTA."

18. Section 314 ICTA provided that:

> (1) Where the duties of any employment which are performed by a person on the United Kingdom or a designated area consist wholly or mainly –
>
> > (a) of taking part, as a diver, in the diving operations concerned with the exploration or exploitation of the sea bed, its subsoil and their natural resources; or
> >
> > (b) of acting in relation to any such diving operations, as a diving supervisor,
>
> the Income Tax Acts shall have effect as if the performance by that person of those duties constituted the carrying on by him of a trade within Case I of Schedule D; and accordingly any employment income taken into account in computing the profits or gains of that trade is not chargeable under Part 2 of ITEPA 2003 …".

19. The definition of "employment" can be found in section 4 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and provides that for income tax purposes employment includes in particular "any employment under a contract of service".

20. Section 7(2)(a) ITEPA defines employment income as earnings within Chapter (I) of Part 3 (which is section 62 ITEPA) which in turn provides that

> "earnings, in relation to an employment means:-
>
> (a) any salary, wages or fee … or
>
> (c) anything else that constitutes an emolument of the employment."

21. Section 6 ITEPA addresses the charge to tax on income derived from employment and section 6(5) ITEPA states:

> "Employment income is not charged to tax under this Part if it is within the charge to tax under Part 2 of ITTOIA 2005 (trading income) by virtue of section 15 of that Act".

22. Both parties relied on Lord Briggs at paragraph 27 in *Fowler v Revenue and Customs Comrs*[2] ("Fowler"):

> "27. There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker of Gestingthorpe JSC in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2011] I WLR 44, paras 37-39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] I WLR 637, *Marshall v Kerr* [1995] I AC 148 and *Jenks v Dickinson* [1997] STC 853. They include the following guidance, which has remained consistent over many years:
>
> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

[2] [2020] UKSC 22

(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.

(4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

(5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 133:

> 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs'."

23. HMRC also relied on that section of *Fowler* but point out that Lord Briggs went on in the next paragraphs to explicitly disagree with Henderson and Baker LJ stating that section 15 of ITTOIA does not compel the courts "…to treat a qualifying diver as carrying on a trade for all purposes under UK income tax law…".

Overview of the appellant's arguments

24. The Skeleton Argument simply states that "The appeal concerns whether or not a diver can trade in partnership with his spouse". The appellant alleges that with effect from 1 June 2013 he entered into partnership with his wife. The argument centres around the interpretation of section 15 ITTOIA and the way in which deeming works.

25. Section 15 ITTOIA allows employment income to be treated as trading income of a partnership thereby effectively reclassifying the employment of a diver as a trade. The effect of such a wide interpretation of section 15 is that it is the owners of the trade who are subject to tax on the profits from the trade rather than the diver.

26. Effectively, the fact that, in the past, HMRC had allowed a deduction for "wife's wages" meant that the appellant was trading with a view to a profit with his wife in relation to all of the diving income. The appellant argues that because a partnership tax return and accounts were lodged with HMRC, that establishes the existence of a partnership.

27. The appellant contends that section 15(2) ITTOIA is the crux of the matter because it implies or, indeed means, that a diver can trade as partnership.

28. The cases on which HMRC rely, which are *Puttman v HMRC*[3] and *Green v HMRC*[4] ("Puttman" and "Green"), had considered the arguments advanced by the appellants in these appeals (and involved very similar facts with the taxpayers in all four appeals being represented and advised by the same representative) but those appeals were heard prior to the decision in *Fowler* in the Court of Appeal let alone the decision in the Supreme Court. The appellants argues that *Puttman* and *Green* was wrongly decided because *Fowler* supports the argument that section 15(2) ITTOIA means that a diver can trade as a partnership.

Overview of HMRC's arguments

29. HMRC's position is that:

(1) section 15 ITTOIA does not allow employment income, deemed to be trading income, to be treated as that of another person or persons such as a partnership,

[3] [2019] UKFTT 0389 (TC)
[4] [2019] UKFTT 0390 (TC)

(2) in any event, the partnership did not exist, and

(3) even if it did exist, the employment income was not income of the partnership.

30. HMRC argue that Judge Fairpo's careful and detailed analysis in *Puttnam* and *Green* regarding the interpretation and application of section 15 ITTOIA and her conclusion that the UK employment income from the taxpayers' diving contracts was not income of a partnership, but instead, income of the taxpayers, is both cogent and persuasive. Those decisions were not appealed.

31. The fact that the income to which section 15 ITTOIA applies is (and remains) "employment income", notwithstanding that it is charged to tax under ITTOIA not ITEPA, is clear from the wording of section 15(1)(c) ITTOIA and section 6(5) ITEPA. Section 6(5) ITEPA would be redundant if section 15 ITTOIA deemed the source of the taxpayer's income to be the carrying on of a trade.

32. Section 15 ITTOIA deems UK employment income of qualifying divers as trading income for the purpose of income tax only and for no other purpose.

33. HMRC argue that the Supreme Court's analysis of section 15 ITTOIA confirms the limitations of the deeming provision and HMRC's understanding of its interpretation and application.

Discussion

34. Unlike in *Puttnam* and *Green,* I had no witness statements and no oral evidence but unlike in those appeals there is no argument here that the appellant is self-employed. At all material times only the appellant was an employee of Subsea. His wife was not. It was the appellant who was paid by Subsea, not a partnership.

35. Mr Buchsbaum advanced a series of eclectic arguments including arguments which the Tribunal does not have jurisdiction to determine such as an allegation that HMRC's position amounts to potential sexual discrimination. His argument that HMRC had failed to answer questions posed in correspondence in 2020 about the impact of section 15 ITTOIA on various scenarios for calculating assessable income, is not a matter for this Tribunal. This Tribunal considers only the arguments advanced before it. In any event those scenarios are not relevant.

36. His argument that, as is demonstrated in *Valantine v HMRC*[5], HMRC set a very low bar as to what constitutes a partnership does not assist. The question of whether or not there is a partnership is a matter of fact and that is a matter for the Tribunal to establish on the balance of probability, regardless of any arguments advanced by HMRC in other cases.

37. There is no dispute that no partnership agreement exists. We have no evidence as to what the appellant's wife did, or did not do, beyond an assertion by Mr Buchsbaum that, because HMRC had allowed a deduction for "wife's wages" she satisfied the criteria for being a partner. He stated that that was the rationale for "allowing" spouses to enter a partnership.

38. He argued that the appellant's wife "assists him in his administrative tasks" and had been "promoted" to partnership.

39. The Upper Tribunal in *Edwards v HMRC*[6] approved the finding of the FTT in *Qureshi v HMRC*[7] where it found at paragraph 15 that:

> "15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that 'would have or 'should have'

[5] [2011] UKFTT 808
[6] [2019] UKUT 131 (TCC)
[7] [2018] UKFTT 0155 (TC)

happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate."

40. In any event this is a specialist Tribunal, and it is within my knowledge that unless HMRC has challenged or queried any deduction in a trading account, that does not mean that it is accepted as being expenditure that has been validly occurred. There is no such presumption.

41. I can make no findings in fact about the appellant's wife's role at any stage.

42. I agree entirely with Judge Fairpo at paragraph 30 in both *Puttnam* and *Green* that:

> "With regard to the appellant's submission that, in allowing a deduction for wages, s15 must be interpreted as being more than an alteration of the provisions under which the appellant is taxed, I consider that this is mistaken: the effect of s15 is clearly that a qualifying diver is to be taxed as if he were carrying on a trade. That is, he is taxed on the profits of that deemed trade, such that expenses incurred can be deducted if they meet the criteria to be deducted as expenses of the deemed trade. There is, in my view, no reason to extrapolate further and conclude that allowing the deduction of such expenses means that an actual trade capable of being carried on in partnership exists."

43. I was wholly unpersuaded by Mr Buchsbaum's argument that the partnership must exist because the appellant had notified HMRC and submitted accounts and returns. He argued that section 12 ABZB Taxes Management Act 1970 ("TMA") made it explicit that a partnership return is conclusive for tax purposes as to whether a person does or does not have a share in the profits or losses of a partnership. The first and obvious point, which is made by HMRC, is that that section of TMA only came into force on 6 April 2018 which is after the years with which this appeal is concerned.

44. The second point is that, even if it had been in force at the relevant time, the section has to be read as a whole and it deals with disputes within a partnership. HMRC is correct in stating that that provision is designed to protect partners from being taxed on an incorrect profit share if the allocation is disputed.

45. In oral argument, Mr Buchsbaum said that the mere fact that a partnership return is submitted means that there is a partnership. That is not correct. There has to be evidence that the alleged partners were trading with a view to a profit. The accounts and tax return do not provide sufficient evidence. At all times the appellant was an employee of Subsea. His wife had no relationship with Subsea.

46. Mr Buchsbaum referred to *Fowler* as being a "game changer". In particular, he argues that the guidance at paragraphs 27(2) and (3), which he says should be read together, means that the Tribunal has no option other than to look at the intention of Parliament and thus at Hansard. The excerpts from Hansard demonstrate that the intention of Parliament was that divers should be treated as "fully" self employed and therefore traders. If a diver is trading then s(he) is free to do so in partnership.

47. The guidance at paragraph 27(5) of *Fowler* means that if the appellant is deemed to be trading then that must apply to the fullest extent, ie in all contexts for income tax.

48. Mr Buchsbaum went on to rely on Henderson LJ at paragraph 39 and Baker LJ at paragraph 46 of the Court of Appeal decision in *Fowler v HMRC* ("Fowler 1")[8] as authority for the proposition that the impact of section 15 ITTOIA is that because the diver is carrying on a trade, income changes character and is no longer employment income.

[8] [2018] EWCA Civ 2544

49. Interestingly he argued that the Supreme Court had not disagreed with the Court of Appeal.

50. Neither HMRC nor I can agree with that. At paragraph 28 of *Fowler* Lord Briggs referenced the acceptance by Henderson and Baker LJJ that section 15 ITTOIA means that a qualifying diver must be treated as carrying on a trade for all purposes under UK income tax law. Lord Briggs rejected that argument not only in relation to the double taxation treaty that was at the heart of that appeal, but also more generally.

51. Crucially he said in the following paragraphs:

> "31. …Section 15 is about the taxation of income arising from the performance of those duties of employment but, introduced by the word 'instead', provides that the income is to be taxed as if, contrary to the fact, it was profits of a trade.
>
> 33. Furthermore section 15 creates this fiction not for the purpose of deciding whether qualifying employed divers are to be taxed in the UK upon their employment income, but for the purpose of adjusting how that income is to be taxed, specifically by allowing a more generous regime for the deduction of expenses. This appears clearly from the express language of section 6(5) of ITEPA, which recognises that the income being charged to tax under section 15 is indeed employment income. If one asks, as is required, for what purposes and between whom is the fiction created … It is for the purpose of adjusting the basis of a continuing UK income tax liability which arises from the receipt of employment income."

52. I agree with Ms Tutin's argument that those findings of Lord Briggs approve the reasoning of Lewison LJ at paragraph 28 of *Fowler 1*. That paragraph, after analysing section 15 ITTOIA, makes it clear that:

> "…the purpose of s15, and hence the purpose of the deeming provision is…merely to describe the *manner* in which Mr Fowler's employment income is to be taxed [and]….the manner in which employment income…is taxed does not change its basic legal characteristics".

53. The reason that I include that quotation is because both Lewison LJ and Lord Briggs make it clear that the guidance at paragraphs 27(2) and (3) of *Fowler* has been followed because the purpose of the deeming provision is clear. That guidance does not reference ascertaining the intention of Parliament.

54. Ms Tutin relied on paragraph 25 of *Christianuyi* to urge me not to rely on Hansard. I agree with her that, unless the criteria in *Pepper v Hart*[9] are met, there is no reason to refer to Hansard. Those criteria are that the legislation is ambiguous or obscure or leads to an absurdity. Clearly neither Lewison LJ nor Lord Briggs thought those criteria applied. I do not accept that it is incumbent upon me to look at Hansard, albeit I have read the excerpts that have been produced by the appellant. They do not assist.

55. Although it was not argued in *Fowler* that section 15 ITTOIA created a trade that could be carried on by anyone other than the diver concerned, like Judge Fairpo at paragraph 29 in *Puttnam* and *Green* I find that there is nothing in *Fowler 1* which suggests that section 15 ITTOIA should be interpreted as meaning that an actual trade is created. If there had been any doubt about that, Lord Briggs puts it beyond doubt at paragraph 33 in *Fowler* when he describes the impact of section 15 as creating a fiction for the specific purpose of providing <u>how</u> that income is taxed.

[9] [1992] UKHL 3

Decision

56. For all these reasons, I find that the appellant's relevant diving income was at all times his employment income, but because of section 15 of ITTOIA it was taxed as if it was a trade. That did not make it a trade for any other purpose. Furthermore, the appellant has failed to establish that a partnership existed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 17 MAY 2022

Appendix 1

Paragraph 25

"25 The approach to construction of primary legislation that a court must take is fully set out in *Craies* on Legislation, from which we derive the following propositions:

(1) The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. The function of the court is to interpret legislation according to the intent of them that made it, and that intent is to be deduced from the language used.

(2) When seeking to construe an Act of Parliament, the courts in practice take both a literal and a purposive approach, to the extent that such a distinction is a helpful one …

(3) When construing an Act of Parliament, the court will, of course, draw as necessary upon the presumptions and principles of construction that have evolved over time …, but it is of course necessary to bear in mind that the use of extraneous materials is but one element of the construction process.

(4) With the exception of Parliamentary material – which is subject to the special rule in *Pepper (Inspector of Taxes) v Hart* – the courts are 'increasingly prepared to look at any material that is likely to be genuinely helpful in illuminating the context within which legislation is to be construed'. However, two cautionary notes must be sounded:

> (a) First, background material must not be allowed to take precedence over the clear meaning of the words used. The cardinal rule that legislation should be construed according to the intention expressed in the language used must not be lost sight of. In *Milton v DPP* [2007] EWHC 532 (Admin), Smith LJ stated at [24]:
>
> 'In my view, this case well illustrates the danger of referring to background material such as a White Paper as an aid to construction in circumstances in which that ought not to be done. When construing a statute, the court should first examine the words themselves. If the meaning is clear, there is no need to delve into the policy background. If the court is uncertain as to the meaning, it may well be helpful to consider background material in order to discover the 'mischief' at which the change in the law was aimed. However, this case illustrates the dangers of so doing. It is clear to me that the district judge was led into error by his reference to the White Paper'.
>
> (b) Secondly, a certain degree of care needs to be employed in ascertaining what material is helpful when construing an Act of Parliament … Clearly, the only material that ought to be used when construing an Act is that material reasonably available to the public in general…

(5) Parliamentary material is not treated in the same way as other extrinsic material:

> (a) Until the decision in *Pepper (Inspector of Taxes) v Hart,* 'it was generally accepted that statements of underlying policy intention on the part of the government could not be used by the courts for the purpose of construing legislation. The words enacted by Parliament were to be taken and interpreted at face value, to discover what Parliament in

fact enacted not what it would probably have wanted to enact had it thought about the point at issue more carefully.'

(b) The effect of the decision of the House of Lords *Pepper (Inspector of Taxes) v Hart* is clearly stated in the speech of Lord Browne-Wilkinson [1993] 1 AC 593 at 640:

> 'I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where: (a) the legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.'

(c) It is clear, therefore, that the circumstances in which Parliamentary material may be deployed as an aid to construction are rather narrower than those which pertain in relation to other forms of extraneous material. It is also clear that the courts have been astute to resist reference to Parliamentary material where the *Pepper (Inspector of Taxes) v Hart* criteria have not been met.