[2019] UKFTT 0691 (TC)

TC07464

Appeal number: TC/2017/01306

VALUE ADDED TAX – input tax – VAT on fees for design of tax avoidance scheme for paying directors' bonuses – whether for the purposes of the business – held yes – whether for the purpose of issuing share capital – held not – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYLOR PEARSON (CONSTRUCTION) LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 8 November 2019

Ben Elliott, counsel, instructed by Grey Eclipse (formerly Blackstar Defence Ltd), for the Appellant

Natalie Mason, officer of HMRC, for the Respondents

DECISION

1. This was an appeal against a VAT assessment issued under s73 Value Added Tax Act 1994 ("VATA 1994") in relation to the appellant's VAT periods ended 31 December 2012 and 31 March 2014. The assessment was in the sum of £12,682.00 but only £9,970.00 is disputed.

SUMMARY OF DECISION

2. The overall issue in this appeal was whether the company was entitled to deduct input VAT in relation to services provided by tax advisers as to how the company might reduce its tax and NIC liabilities in rewarding its directors, and reduce the income tax liabilities of the directors. There are two specific issues:

(1) Whether the services supplied were used for the purpose of the company's business within the meaning of s24 VATA 1994.

(2) Whether the services supplied do not have a direct and immediate link with taxable output supplies because they have a direct and immediate link with exempt supplies, being the issue of share capital in the company.

3. The tribunal decided that:

(1) the services were used for the purposes of the company's business, and

(2) they did not have a direct and immediate connection with the issue of share capital.

4. The appeal was therefore ALLOWED.

5. The direct tax consequences of these arrangements are also being challenged by HMRC but that is the subject of a separate appeal. This appeal was only concerned with the VAT aspects of the arrangements.

THE FACTS

6. The basic facts were not in dispute between the parties. I received a witness statement and oral evidence from Mark Perkins, Commercial Director of the company and was referred to a bundle of documents. I make the following findings of fact.

7. The company carries on a business of making supplies of construction goods and services, which are all taxable supplies for VAT purposes. It was accepted by HMRC that the company was a taxable person for VAT purposes and that all its normal supplies in the course of its business are fully taxable.

8. The ordinary shares in the company are held by Taylor Pearson Holding Limited. At all material times, the shares of Taylor Pearson Holding Limited were held by Mr Alex Coupland, Mr Mark Perkins, Mr Mark Robertson, Mrs Joanne Coupland and Mrs Karen Perkins (250 shares each, except for Mr Robertson who held 500 shares).

First Transaction

9. In March 2012, following a profitable trading year, the company decided to reward its three directors, Mr Alex Coupland, Mr Mark Perkins and Mr Mark Robertson with bonuses of £50,000 each.

10. The company had just emerged from the recession and at that time the directors were receiving annual salaries of approximately £35,000 each, which Mr Perkins considered to be fairly low for a company of this size at that time.

11. Under the terms of an engagement letter between the company and Blackstar (Europe) Limited ("Blackstar") dated 12 October 2012:

(1) Blackstar were engaged "to act as adviser to Taylor Pearson (Construction) Limited in relation to the provision of employment rewards."

(2) Blackstar's role and responsibilities were stated to be:

"(1) The provision of taxation advice in connection with the Transaction, and

(2) The drafting of relevant documentation in connection with the Transaction"

12. Under the terms and conditions, the services provided were described as follows:

"The Advisor will (on the basis of the information provided to it by the Company) provide taxation advice to the Company in connection with the provision of employment rewards and will assist (after legal advice from Solicitors and Counsel) in providing the necessary documentation."

13. The fee for the services was 11.5% of the amount paid by the company under the scheme. Under the terms and conditions, it was noted that VAT would be chargeable on any sums due to Blackstar under the engagement.

14. On 15 October 2012, Blackstar issued a VAT invoice to the company for professional services provided "In respect of the provision of tax advice in relation to the grant of employment rewards". The fee was £17,250 plus VAT of £3,450.

15. At a board meeting on 22 October 2012 it was decided to recognise the contributions of Alex Coupland, Mark Perkins and Mark Robertson to the company and it was resolved that 150,000 class E shares be created and amended articles of association be filed at Companies House. The main characteristics of the E shares were as follows :

(1) The shares did not carry any voting rights or rights to attend shareholder meetings;

(2) On a winding up of the company, each E share entitled the shareholder to a payment of 1p,

(3) Dividends could be paid on E shares but such shares did not entitle the holder to a dividend where a dividend was paid on any other class of share,

(4) If the turnover and pre-tax profits for the Company's accounting period ended 22 October 2015 were 500% of the turnover and pre-tax profits for the accounting period ended 30 September 2012, then the shareholders of the E shares would be entitled to 10% of the consideration payable on a subsequent disposal of the entire share capital of the Company,

(5) Where a shareholder of an E share did not hold any other shares then their consent was not required to permit a variation of the rights attached to the other classes of shares,

(6) E shares could only be transferred with the unanimous consent of the directors of the company,

(7) The shares would be issued 1p paid, 99p uncalled. The company could by notice make a call for the full amount previously uncalled (payment being due within 90 days). A shareholder who failed to pay could be required to forfeit the E share.

16. Also on 22 October 2012, each of the directors entered into an agreement with the company under which:

(1) In recognition of the services of the director during the period ended 31 March 2012, the company was willing to assist the director to subscribe for Class E shares, which were to be £1 shares with an initial called up amount of 1p with 99p uncalled.

(2) In consideration for the director offering to subscribe for the E shares the company would pay the director £500, which was to be applied in subscribing for the shares, followed by a sum of £49,500, which was to be credited to the director's loan account on which the director was free to draw as he wished.

17. The E shares were duly issued, allocated to the three directors (50,000 each) and, on 1 November 2012, the sum of £49,500 was credited to each of the directors' loan accounts.

Second Transaction

18. In November 2012, the company considered conferring further rewards on Mr Perkins and Mr Robertson (but not on Mr Coupland, who was not fully engaged in the business for that year). No further engagement letter was entered into and the transaction proceeded under the terms of the engagement letter dated 12 October 2012.

19. On 16 November 2012, Blackstar issued a VAT invoice to the company for professional services provided "In respect of the provision of tax advice in relation to the grant of employment rewards". The fee was £16,100 plus VAT of £3,220.

20. At a board meeting on 26 November 2012 the company decided to recognise the contribution of Mark Perkins and Mark Robertson and it was resolved that 140,000 additional class E shares be created.

21. A similar pattern of agreements and events followed and the additional E shares were issued, allocated to Mr Perkins and Mr Robertson (70,000 each) and, on 26 November 2012, the sum of £69,300 was credited to each of the directors' loan accounts.

Third Transaction

22. In November 2013, the company again sought to provide further rewards to Mr Perkins and Mr Robertson.

23. Under the terms of an engagement letter between the company and Evolve Professional Services Limited ("Evolve") dated 18 November 2013:

> (1) Evolve were engaged "to act as adviser to Taylor Pearson (Construction) Limited ("Company") in relation to the provision of employment rewards ("Transaction")."
>
> (2) Evolve's role and responsibilities were:
>
> > "(1) the provision of taxation advice in connection with the Transaction, and
> >
> > (2) The drafting of relevant documentation in connection with the Transaction".

24. Under the terms and conditions, the services provided were described as:

> "The Advisor will (on the basis of the information provided to it by the Company) provide taxation advice to the Company in connection with the provision of employment rewards and will assist (after legal advice from Solicitors and Counsel) in providing the necessary documentation".

25. The fee for the services was 11% of the amount paid by the company under the scheme. Under the terms and conditions, it was noted that VAT would be chargeable on any sums due to the advisor (Evolve) under the engagement.

26. On 18 October 2013, Evolve issued a VAT invoice to the company for professional services provided "In respect of the provision of tax advice in relation to the grant of employment rewards". The fee was £16,500 plus VAT of £3,300.

27. At a board meeting on 25 November 2013 the company again decided to recognise the contributions of Mr Perkins and Mr Robertson and it was resolved that 150,000 class P shares be created and amended articles of association be filed at Companies House. The main characteristics of the P Shares were as follows :

> (1) The shares did not carry any voting rights or rights to attend shareholder meetings,
>
> (2) On a winding up of the company, each P share entitled the shareholder to a payment of 1p,

(3) Dividends could be paid on P shares but such shares did not entitle the holder to a dividend where a dividend was paid on any other class of share,

(4) If the turnover and pre-tax profits for the Company's accounting period ended 22 October 2015 were 500% of the turnover and pre-tax profits for the accounting period ended 30 September 2012, then the shareholders of the P shares would be entitled to 10% of the consideration payable on a subsequent disposal of the entire share capital of the Company,

(5) Where a shareholder of a P share did not hold any other shares then their consent was not required to permit a variation of the rights attached to the other classes of shares,

(6) P shares could only be transferred with the unanimous consent of the directors of the company,

(7) The shares would be issued 1p paid, 99p uncalled. The company could by notice make a call for the full amount previously uncalled (payment being due within 90 days). A shareholder who failed to pay could be required to forfeit the P share.

28. Also on 25 November 2013, Mr Perkins and Mr Robertson each entered into an agreement with the company under which:

(1) In recognition of the services of the director during the period ended 31 March 2014, the Company was willing to assist the director to subscribe for Class P shares, which were to be £1 shares with an initial called up amount of 1p with 99p uncalled,

(2) In consideration for the director offering to subscribe for the P shares, the company would pay him £750, which was to be applied in subscribing for the shares, followed by a sum of £74,250 to be credited to their loan accounts.

29. The P shares were duly issued and allocated to Mr Perkins and Mr Robertson (75,000 each) and the sum of £74,250 was credited to each of their loan accounts.

30. In its returns for the VAT periods ended 31 December 2012 and 31 March 2014, the company credited the input tax on the invoices issued by Blackstar and Evolve against its output tax.

31. On 27 April 2016, HMRC conducted a check of the company's VAT records and, following correspondence, on 29 June 2016, issued an assessment in the sum of £12,682.00.

32. On 8 July 2016, the company's accountant, Dexter & Sharpe, appealed against the assessment. In the course of subsequent correspondence, the company accepted that £2,712.00 of the assessment was correct (which was unrelated to the services supplied by Blackstar and Evolve).

33. On 19 January 2017, HMRC concluded its statutory review and upheld the assessment on the basis that the only purpose of the transactions was to benefit the shareholders/directors of the company.

34. On 2 February 2017, the company notified its appeal to the tribunal.

35. HMRC have also opened enquiries into the company's corporation tax returns for the periods ended 31 March 2012, 2013 and 2014 and have issued NIC decisions under section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 and PAYE determinations under regulation 80 The Income Tax (Pay As You Earn) Regulations 2003. These enquiries and decisions are the subject of separate appeals on the basis that the sums paid to the employees are remuneration.

THE LAW

36. Section 26 VATA provides that a taxable person may deduct input tax as follows:

> "**Section 26— Input tax allowable under section 25**
>
> (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—
>
> (a) taxable supplies;"

37. Section 31 provides that certain supplies of goods or services specified in Schedule 9 are exempt:

> "**Section 31 — Exempt supplies and acquisitions**
>
> (1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 and an acquisition of goods from another member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply."

38. Group 5 of para 6 of Sch 9 VATA 1994 includes the following:

> "The issue, transfer or receipt of, or any dealing with, any security or secondary security being—
>
> (a) shares, stocks, bonds, notes (other than promissory notes), debentures, debenture stock or shares in an oil royalty; or …"

39. In addition I was referred to a number of cases:

Doran Bros (London) Limited v HMRC [2016] UKFTT 829 (TC)

Customs and Excise Commissioners v Rosner [1994] STC 228

Finanzamt Köln-Nord v Becker (Case C-104/12)

Praesto Consulting UK Ltd v HMRC [2019] STC 724

Kretztechnik AG v Finanzamt Linz (Case C-465/03)

Revenue and Customs Commissioners v Frank A Smart & Son Ltd [2019] 1 W.L.R. 4849

DISCUSSION

40. In their skeleton argument HMRC summarise their contentions as follows:

(1) The supply of advice was a supply used for the purposes of an exempt transaction, ie, the issue of shares,

(2) The supply of advice should not be classed as an overhead, and

(3) There is no direct and immediate link between the supply of the advice and the economic activity of the business.

41. HMRC withdrew their first argument during the hearing but I was encouraged to address the issue for the sake of completeness and will therefore do so.

Was the advice used for the purposes of an exempt transaction?

42. HMRC argued that no deduction should be permitted for the payment of input tax on services which were provided for the purposes of an exempt transaction. There is no disagreement about this simple proposition.

43. The question is whether or not the services which were provided by Blackstar and Evolve were provided for the purposes of an exempt transaction.

44. There are two aspects to this question:

(1) What was the purpose of the advice being provided, and

(2) Was the transaction in question an exempt transaction?

45. HMRC argued that the exempt transaction in question was the issue of shares. This question was however addressed some years ago in the case of *Kretztechnik*, which established clearly that the issue of shares was a transaction which was outside the scope of VAT. In that case the CJEU drew a clear distinction between transactions which involved the selling of shares and securities, which would fall to be exempt in accordance with Group 5 of para 6 of Sch 9 VATA 1994, and the issue of shares. The Court said, at [26] and[27]:

> "26. As the Advocate General rightly observes in points 59 and 60 of his Opinion, a company that issues new shares is increasing its assets by acquiring additional capital, whilst granting the new shareholders a right of ownership of part of the capital thus increased. From the issuing company's point of view, the aim is to raise capital and not to provide services. As far as the shareholder is concerned, payment of the sums necessary for the increase of capital is not a payment of consideration but an investment or an employment of capital.

> 27. It follows that a share issue does not constitute a supply of goods or of services for consideration within the meaning of Article 2(1) of the Sixth Directive. Therefore, such a transaction, whether or not carried out in connection with admission of the company concerned to a stock exchange, does not fall within the scope of that directive."

46. However, as Miss Mason pointed out, in this case the purpose of the issue of shares was not the raising of new capital. The funds which were subscribed for the shares which were issued were provided by the company. There was no increase in its net assets. She therefore submitted that this appeal could be distinguished from *Kretztechnik*.

47. This is certainly a point of difference between *Kretztechnik* and the current appeal but I do not think it detracts from what I perceive as the main ratio in *Kretztechnik*, which is, I believe, that I should look at the ultimate objective of the issuing of the share capital, not the issuance of share capital in isolation.

48. In the recent case of *Frank Smart* the Supreme Court carried out a very helpful review of the case law in this area and, at [65], Lord Hodge set out a summary of the issues arising from the case law:

> "I derive the following propositions which are relevant to this appeal from the case law:
>
> (i) As VAT is a tax on the value added by the taxable person, the VAT system relieves the taxable person of the burden of VAT payable or paid in the course of that person's economic activity and thus avoids double taxation. This is the principle of deduction set out in article 1(2) and operated in article 168 of the PVD and vouched, for example, in *Rompelman v Minister van Financien* (Case C-268/83) [1985] ECR 655, para 19; *Abbey National*, para 24; *Kretztechnik*, para 34 and *SKF*, paras 55-56.
>
> (ii) There must be a direct and immediate link between the goods and services which the taxable person has acquired (in other words the particular input transaction) and the taxable supplies which that person makes (in other words its particular output transaction or transactions). This link gives rise to the right to deduct. The needed link exists if the acquired goods and services are part of the cost components of that person's taxable transactions which utilise those goods and services: see for example *Midland Bank*, paras 24 and 30; *Abbey National*, para 28; *Kretztechnik*, para 35; *Securenta*, para 27; *SKF*, para 57 and *HMRC v University of Cambridge*, para 31.
>
> (iii) Alternatively, there must be a direct and immediate link between those acquired goods and services and the whole of the taxable person's economic activity because their cost forms part of that business's overheads and thus a component part of the price of its products: see for example *BLP*, para 25; *Midland Bank*, para 31; *Abbey National*, paras 35 and 36; *Kretztechnik*, para 36; *SKF*, para 58 and *HMRC v University of Cambridge*, para 31.

(iv) Where the taxable person acquires professional services for an initial fund-raising transaction which is outside the scope of VAT, that use of the services does not prevent it from deducting the VAT payable on those services as input tax and retaining that deduction if its purpose in fund-raising, objectively ascertained, was to fund its economic activity and it later uses the funds raised to develop its business of providing taxable supplies. See, for example, *Abbey National*, paras 34-36; *Kretztechnik*, paras 36-38; *Securenta*, paras 27-29 and *SKF*, para 64. The same may apply if an analogous transaction involving the sale of shares is classified as an exempt transaction: *SKF*, para 68.

(v) Where the cost of the acquired services, including services relating to fund-raising, are a cost component of downstream activities of the taxable person which are either exempt transactions or transactions outside the scope of VAT, the VAT paid on such services is not deductible as input tax. See for example *Securenta*, paras 29 and 31; *SKF*, paras 58-60 and *Sveda*, para 32. Where the taxable person carries on taxable transactions, exempt transactions and transactions outside the scope of VAT, the VAT paid on the services it has acquired has to be apportioned under article 173 of the PVD.

(vi) The right to deduct VAT as input tax arises immediately when the deductible tax becomes chargeable: article 167 of the PVD, *Securenta*, paras 24 and 30 and *SKF*, para 55. As a result, there may be a time lapse between the deduction of the input tax and the use of the acquired goods or services in an output transaction, as occurred in *Sveda*. Further, if the taxable person acquired the goods and services for its economic activity but, as a result of circumstances beyond its control, it is unable to use them in the context of taxable transactions, the taxable person retains its entitlement to deduct: *Midland Bank*, paras 22 and 23.

(vii) The purpose of the taxable person in carrying out the fund-raising is a question of fact which the court determines by having regard to objective evidence. The CJEU states that the existence of a link between the fund-raising transaction and the person's taxable activity is to be assessed in the light of the objective content of the transaction: *Sveda*, para 29; *Iberdrola*, para 31. The ultimate question is whether the taxable person is acting as such for the purposes of an economic activity. This is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the period between its acquisition and its use for the purposes of the taxable person's economic activity: *Eon Aset Menidjmunt OOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-118/11) EU:C:2012:97; [2012] STC 982, para 58; *Klub OOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-153/11) EU:C:2012:163; [2012] STC 1129, paras 40-41 and *Sveda*, para 21."

49. Again, as in *Kretztechnik*, it is clear from this, and in particular from (iv) above, that I am required to consider the true purpose of the arrangements and to look through

any initial transaction to ascertain objectively the overall purpose of the arrangements, considering all the circumstances.

50. In my view, the ultimate purpose of these arrangements was to incentivise the company's employees in a tax efficient manner, from the perspective of both the company and the employee. That leads me on to consider the question as to whether or not that objective was for the purposes of the business.

Business Purpose

51. It was common ground that what matters in such cases is the objective **purpose** of the expenditure. I should not therefore analyse the transactions by considering the effect of the scheme, except to the extent that that might be instructive in ascertaining the purpose of the expenditure.

52. HMRC argued that this appeal is similar to *Customs and Excise Commissioners v Rosner* [1994] STC 228 and *Finanzamt Köln-Nord v Becker* (Case C-104/12) in which input VAT incurred in defending the sole trader or individual employees personally, in criminal proceedings entirely unconnected to the business, was held not to be deductible. In my view, this is not the case here. The advice in question was provided to the company and although the directors were significant beneficiaries of the arrangements that was entirely in their capacity as directors and employees of the company and not in any personal capacity.

53. In *Praesto* the Court of Appeal considered the situation where an employee received the benefit of legal services which were provided to him in his personal capacity but in circumstances such that the company had an interest in the outcome, because if the legal action against the individual had succeeded then it was inevitable that an action against the company would soon follow. In these circumstances, the Court of Appeal held that the supply was for the purposes of the business because (i) supplies were also made to the company and (ii) the company had a direct interest in the object of the expenditure (ie, defending the claim against the employee) which was not merely incidental.

54. In the present case it is common ground that the supplies were made only to the company. There was no supply to the directors in their personal capacities and I do not perhaps therefore need to go as far as *Praesto*.

55. It was submitted on behalf of the company that the purpose of the transactions was to reward the directors in a manner that:

(1) reduced the company's liability to pay corporation tax,

(2) reduced the company's liability to pay employer's Class 1A National Insurance Contributions,

(3) eliminated the company's liability to pay over PAYE, and in this regard Mr Elliott argued that this was in the company's interests because it was the company which was liable to pay any PAYE to HMRC, and

(4) rewarded the directors in a manner such that their income would not be liable to income tax.

56. I am not convinced that this was the best way of presenting the argument because:

(1) A simple payment of salary equal to the amount of the bonuses would also reduce the company's corporation tax liability, by the same amount and with less risk of a challenge from HMRC, and

(2) Although strictly the PAYE liability rested with the company it would only be liable to pay over PAYE which it had deducted from the directors' bonuses, which, as such, would not be an actual cost to the business.

57. The reduction in the payment of employer's Class 1A NIC was a genuine, and not insignificant, saving for the company, at 13.8% of the bonuses paid, but I cannot see the corporation tax saving and the PAYE saving in the same light.

58. In my view, the most obvious purpose of these arrangements was to provide the directors with bonuses in such a way that they did not attract a liability to income tax. It is possible that had the directors been required to pay income tax on these bonuses then the company might have felt the need to make higher gross bonus payments in order to reward the directors by the same net amount, in which case the saving of the income tax liability would have benefitted the company, but this was not argued before me and I received no evidence to suggest that this might be the case.

59. Therefore, in my view, the company saw two benefits of using the scheme:

(1) The company avoided its liability to pay Class 1A NICs, and

(2) The directors received bonuses in a tax-free form.

60. In whichever way it is analysed, the fact remains that the company's objective purpose in using this scheme was:

(1) To avoid the payment of Class1A NICs, and

(2) To reward and incentivise its directors in a tax-free manner.

61. The economic and commercial reality was therefore that the services provided were tax advice in relation to the provision of employment rewards (as stated in the contracts between the parties and the invoices).

62. The reward and incentivisation of employees is one of the more obvious overheads of the business that is treated as a cost component of the company's overall economic activities. It is in principle identical to expenditure on normal payroll services. HMRC sought to argue that expenditure on non-contractual bonuses, or salary paid outside the normal course of salaries was somehow different from a "normal" payroll. In my view, it is irrelevant whether the services are supplied in relation to contractual or non-contractual rewards and I can see no merit in this argument.

63. HMRC argued in their skeleton argument and at the hearing that simply because the supply serves the general business purpose of incentivising employees the VAT

incurred is not properly deductible because the incentivisation of employees does not fulfil the condition of having a direct and immediate link between the supply of services and the taxable person's economic activity. In other words, HMRC argued that the incentivisation of employees did not have a direct and immediate link with the purposes of the business.

64. I do not consider that this argument has any merit whatsoever and do not understand why HMRC put it forward. This concerns me.

65. However, perhaps of more concern to me is that this case is materially identical to the relatively recent case of *Doran Bros*, which was decided in favour of the appellant. HMRC did not appeal *Doran Bros*, although HMRC suggested that I should not read too much into that. In addition, it was of course a decision of the First Tier Tribunal and as such is not binding on me, but convention dictates that I should treat it as highly persuasive unless I believe that it was clearly wrong. For the avoidance of doubt, I do not believe that the decision was clearly wrong.

66. In *Doran Bros*, the company had received tax advice from a promoter in the course of entering into a tax arrangement which involved the purchase of gold which was then placed in an Employee Benefit Trust for the benefit of the company's sole director and employee. HMRC denied the company's right to deduct the input tax on the tax advice received and argued that the expenditure was in respect of advice given to achieve the tax efficient extraction of funds from the company and so it was for the personal benefit of the company's sole director.

67. The Tribunal (Judge Jane Bailey and Charles Baker) found that the fee incurred by the company was for advice as to how to reward its sole employee with the least possible liability to tax and NICs. The Tribunal held that, notwithstanding the considerable benefit to the employee, the advice received was analogous to payroll services, which would be an overhead of the business and was therefore for the purpose of the business:

> "35. We consider that there may have been some benefit to Mr Doran [the employee] in advice being given to the Appellant on methods by which Mr Doran might be rewarded with only minimal payment of tax and NICs by the Appellant. There may also be benefits arising to Mr Doran from any structuring which the Appellant chose to adopt as a result of the advice given by Qubic Tax. However, the fact that there are benefits to Mr Doran does not prevent the services provided to the Appellant being for the purposes of the business.
>
> 36. Mr Qureshi [for HMRC] accepted that expenditure incurred by the Appellant on payroll services would be an overhead of the business but sought to distinguish the tax advice given by Qubic Tax on the basis that it was "outside the norm". We do not agree that this is a valid distinction; a service can be used for the purposes of the business irrespective of how common it is for that service to be used.

> 37. We conclude that advice given to a taxable person on how it can reduce its tax and NICs liabilities in rewarding its employee is advice given for the purpose of the business. The advice directly relates to the Appellant's own tax and NICs liabilities, and the reduction of these liabilities will increase the Appellant's profits. The additional benefit which Mr Doran may derive personally, even if it is considerable, does not enable us to draw a distinction between this type of advice and advice which might be given to the Appellant in respect of operating its payroll or the mitigation of any other business expense."

68. As stated above, HMRC did not appeal the decision in *Doran Bros*. Given that the present appeal also concerns advice given to a taxable person as to how it can reduce its tax and NICs liabilities in rewarding one or more employees in the context of a "tax avoidance scheme", the similarities are obvious. Not surprisingly therefore I come to the same conclusion.

69. In my opinion the incentivisation of employees, even though in this case they were directors and shareholders of the company, has a direct and immediate link to the purposes of the business.

DECISION

70. For the reasons set out above therefore I decided that this appeal should be ALLOWED.

71. 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.

PHILIP GILLETT

TRIBUNAL JUDGE
RELEASE DATE: 13 November 2019