[2020] UKFTT 00154 (TC)

TC07656

Appeal number: TC/2017/05387

Income Tax –appeal against closure notices and s 29 TMA assessments: (1) s 15 ITTOIA duties of employment as a diver in UK waters treated as a trade – did s15 take priority over the seafarer's earnings deduction in section 378 ITEPA ; (2) meaning of "seafarer" in s 378 – did a diver work "on" a ship – was the vessel a ship or an offshore installation within s 1001 ITA ; and (3) Did Regulation 185 PAYE Regs apply to the self assessment calculation under s 9(1)(b) TMA as it applied to the determination of tax payable under s 59B TMA

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL SZYMUSIK **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at Exeter EX1 2LS on 27 January 2020 with later written submissions

The Appellant in person

Max Simpson for the Respondents

DECISION

1. Mr Szymusik appeals against a closure notice in relation to 2009/10 and "discovery assessments" made under section 29 Taxes Management Act 1970 ("TMA") in relation to 2010/11, 2011/12 and 2012/13. I shall call the closure notice and the assessments together "the Assessments".

2. In each of these tax years Mr Szymusik participated, on the advice of his then accountants, DATs, in a tax avoidance scheme which he was told reduced the taxable income from his occupation as a diver to nil. But, after HMRC opened enquiries and an investigation into his tax affairs, Mr Szymusik appointed a new agent, Mr Leslie, who advised him that the scheme did not work. Mr Leslie sent a report to HMRC in which he described the scheme as "the worst tax scheme in recent knowledge" and set out the amount of Mr Szymusik's earnings in each of the relevant years. HMRC then used these figures to close their 2009/10 enquiry and make the assessments under appeal.

3. Mr Szymusik does not assert in this appeal that the tax scheme worked. He says instead that he was entitled to Seafarers Earnings Deductions ("SED") under section 378 ITEPA 2003 in computing his taxable income and this is not reflected in the Assessments.

4. HMRC assert that no such deductions are available. They say that in relation to his earnings working as a diver in the UK or on the UK Continental shelf (together the "UKCS") section 15 ITTOIA requires his occupation to be treated as a trade and that, as a result, those earnings are not eligible for SED; and in relation to his work as a diver outside the UKCS, that he did not qualify as an "seafarer" for the purposes of that deduction. As a result they say that the full amount of his earnings is taxable in the amounts assessed.

5. The appeal against the section 29 discovery assessments requires me to consider whether they were properly made.

6. Finally if Mr Szymusik's income was at relevant times taxable, an issue arises as to whether any deduction from the tax payable in respect of employer's PAYE should be made.

7. There were therefore four issues before me:

> (a) whether the section 29 assessments were properly made;
>
> (b) whether section 15 ITTOIA applies, and has the effect for which HMRC contend;
>
> (c) whether, or to what extent, the SED applies to reduce Mr Szymusik's taxable income;
>
> (d) whether, if Mr Szymusik's employer should have deducted tax under PAYE on making any payment of salary to him, the amount that should

have been deducted should be set against any liability to tax for the relevant years.

The Evidence

8. I heard oral evidence from Mr Szymusik and from Luke Buchan, the officer of HMRC who made the Assessments. I had a bundle which included some correspondence between the parties and copies of Mr Szymusik's professional diver's logbooks.

Findings of fact.

9. In the period relevant to the Assessments Mr Szymusik was engaged to work for Acergy Singapore Pte Ltd as a "mixed gas diver". His contract required the company to provide 150 days employment in each year and for Mr Szymusik to work "as and when required". He was paid a monthly salary with holidays and other benefits.

10. I understood that Acergy would contact Mr Szymusik and tell him he was required to work on a particular vessel from a particular date. He would join the vessel at the port and then travel on the vessel to the places where there was work to do in its tour of duty or 'campaign', and then travel back and disembark.

11. In the relevant periods Mr Szymusik served on board the *Seven Osprey*, the *Seven Discovery*, and the *Seven Falkirk*. These were (in ordinary parlance) ships. They were some 400 feet (120m) by 66 feet (20m) and of 8,000 tons or more and had accommodation for more than 100 people. Each had a dynamic positioning ("DP") system which enabled them to stay above one point on the seabed without anchoring. Each had cranes and other features to enable and assist with seabed operations.

12. These ships undertook dive campaigns for contracted work. The vessels returned to port every two weeks or so to change crew and to provision.

13. Some campaigns lasted six days; others up to 60 days. Mr Szymusik described a 20 day "average" job. I accept his description. There would be two days of getting the gear onto the ship at the port; 1 or 1 ½ days sailing to the first area in which work was to be done followed by some testing of the DP system. Permission had then to be obtained to go into the area of the installation to be tended and then work would start on the seabed. Work would be interrupted in bad weather, by emergencies and by trips back to port to change crew (divers were not be able to remain under compression for more than 28 days). Some campaigns involved lots of small jobs in different places; others, like removing pipes on the seabed were concentrated in a smaller area.

14. The work undertaken by the vessels varied. It all related to seabed oil installations. It included the inspection of pipes and joints, repairs to pipes and manifolds, the removal or replacement of pipes and the laying of concrete bases for equipment. The scope of the work depended upon the oil company client for which the work was being done. Sometimes a major breakdown in the network of pipes on the seabed

would require the breaking away from a scheduled work to attend to a more immediate need.

15. The work undertaken on the seabed might be at one particular point (for example to clean and inspect a particular joint or manifold or to monitor oil pressure at a particular point) or take place along the length of pipe (for example: cleaning sludge out of a pipe, cleaning and inspecting successive joints or replacing and removing lengths of pipe). One activity involved laying a line of concrete mats on the seabed each some 27 feet (8m) by 10 feet (3m). 12 to 15 each such mats could be laid in a six-hour shift: a length of some 320 to 400 feet (90 to 120 m.).

16. Where the work took place along the length of a pipe (or involved laying concrete mats), the vessel moved along the sea as the divers moved along the pipe so that it remained above the divers. Thus in the concrete mat laying activity the vessel would move about ¼ mile (350 to 450 m) over the seabed in a 24 hour period (four shifts of six hours). Where a pipe was removed it was cut into 8 m lengths and hoisted onto the vessel; the vessel would move to be above each successive length of pipe on the seabed. Where the work was at one particular point to vessels stayed above that point when the work was being done. Where the work involved the opening of the pipe it would be necessary to close and open valves at the ends of the section being worked on. That involved moving the vessel to the valves' positions and then back to the section of the pipe being worked on; and then reversing the procedure after the work had been done.

17. When moving over the place where the divers were working, the vessel was kept in place, and its position adjusted, by the DP mechanism which could be operated by the diver who remained in the diving bell.

18. Mr Szymusik would descend with two other divers in a diving bell to the seafloor. The diving bell was connected to the diving support vessel which provided oxygen (and helium mix) and life support to the bell. Two divers would leave the bell to work on the seafloor and one, the Bellman, would remain in the bell. After the end of a shift, or on completion of the work at a particular spot, the bell would be raised but its interior kept under pressure. Once the bell had been raised to the level of the support vessel it would be connected to a pressurised chamber within the vessel. The divers would then move into that chamber. There they would rest, eat and sleep until the next shift in the bell; being kept all the while under pressure and breathing the helium and oxygen mixture.

19. Maintaining of the divers under pressure in the ship provided a crew for emergencies, enabled quick transits to the depths, and most importantly avoided the need for many days (five or more) decompression after a deep dive. In a period of 24 hours a diver would usually spend no more than six hours on the seabed and the remainder in the compression room. As a result there would be four shifts of divers to enable 24 hour operation.

20. Mr Szymusik would remain under compression in this way for no more than 28 days at a time. Depending on the jobs being undertaken, movements between sites

and the weather much less than one quarter of his time under compression could be spent on the seabed, the remainder being in the compression room or on board the ship. And of the period of a campaign not all was spent under compression.

21. Mr Szymusik would undertake duties other than under compression. Among other activities when he was not under compression he would assist in the maintenance and launching of the bells, the delivery to the seabed of equipment needed by divers and the loading of stores onto the ship. Between 2012 and 2013 he acted as diving supervisor, and provided mechanical joint integrity coaching to other people on board the vessel.

22. I make some further findings of fact about the filing of Mr Szymusik's tax returns and the movements of the vessels on which he travelled in the following sections.

Issue (1) The section 29 assessments: whether they were made it within the powers granted to HMRC.

23. Section 29 (1) provides that if an officer of HMRC or HMRC "discover" that any income which ought to have been taxed had not been taxed (so that there would be an "insufficiency" of tax), the officer may, subject to subsections (2) and (3), make an assessment of the shortfall. Subsection (3) provides that where the taxpayer delivered a return for a relevant year (as Mr Szymusik did) he may not be assessed in respect of that year unless either the condition in subsection (4) or that in subsection (5) is satisfied.

24. HMRC rely upon subsection (4) as being satisfied in this case. It states:

> "the first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer *or a person acting on his behalf*." [my italics]

25. Therefore if there was an insufficiency in relation to the relevant years HMRC had to show that: (1) the insufficiency was brought about carelessly or deliberately by Mr Szymusik or a person acting on his behalf, and (2) that an officer of HMRC discovered that insufficiency.

26. As regards the first of these conditions Mr Simpson said that HMRC accepted that Mr Szymusik himself had not acted deliberately and did not put the case that he had been careless (he had instructed an apparently reputable firm to complete his tax returns), but HMRC argued that DATs, the firm Mr Szymusik had originally instructed to complete his tax returns, and which had advised him in relation to the tax scheme, had brought about an under assessment deliberately or carelessly.

27. Mr Szymusik did not suggest that the tax scheme worked. Nor did he suggest that, if there had been an under assessment of tax in the relevant years, DATs had, by filling in and submitting his tax returns, caused that under assessment. Nor did he argue that DATs' activities in so doing were not careless or negligent.

28. A letter from Mr Leslie, Mr Szymusik's new adviser, to HMRC of 6 March 2015 contains a description of the scheme and DATs' actions (see also para [2] above). Although the letter does not detail events year by year, I concluded that it was more likely than not that any insufficiency in the self assessments for 2010/12 to 2012/13 was brought about carelessly or deliberately by DATs acting on behalf Mr X.

29. As regards the second condition to the operation of section 29(1), Mr Buchan told me that after an enquiry was opened into Mr Szymusik's 2009/10 tax return an investigation started into his returns for 2010/11 to 2012/13 on 22 August 2012. Following that Mr Szymusik appointed Mr Leslie to act for him in relation to the investigation, and Mr Buchan had a number of meetings and telephone calls with Mr Leslie. Mr Buchan formed the view that the tax scheme did not work and that Mr Szymusik's self assessments of the relevant year was understated. He gave instructions for the making of the assessment on 17 October 2014.

30. The use of the word "discovers" rather than "has discovered" in section 29 indicates that an officer who comes to the conclusion that there is an insufficiency must not let his discovery grow stale before he issues an assessment. It seemed to me, however, that Mr Buchan made a discovery and that he did not let it go cold.

31. I conclude that if there was an insufficiency the requirements of section 29 were satisfied.

Issue (2): Section 15 ITTOIA.

32. Section 15 ITTOIA provides that if:

> "(a) a person performs the duties of employment as a diver or diving supervisor [in the UKCS],
>
> (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",

then "the performance of the duties of employment is instead treated for income tax purposes as the carrying on of trade in the UK".

These last words indicate that it is only the duties on the UKCS which are treated as a trade; income from duties outside the UKCS remains employment income.

Condition (a)

33. There was no doubt that Mr Szymusik was an employee and that in the course of that employment he performed duties as a diver or diving supervisor in the UKCS. It seemed to me that from the moment of his embarkation on the ship he was fulfilling his contractual obligations as a diver even though it was only later that he took to the water. The condition in section 15(1)(a) was satisfied.

Condition (b)

34. This requires the duties of the employment to consist wholly or mainly of seabed diving activities.

35. In any 24 hour period Mr Szymusik was on the seabed for no more than six hours. If it was a period when he was under compression the remaining 18 hours would have been spent in the decompression chamber on board ship. If it was a period at the end of a period in which he had been diving he could spend up to 5 days in the compression chamber decompressing. In the period between leaving port and starting activity on the seabed Mr Szymusik would not be diving. Thus measured in terms of time spent, Mr Szymusik's activity between joining and leaving the ship would not be wholly or mainly diving.

36. These activities were in my view, duties of his employment. It would be wholly unrealistic to say that his travel on the ship to the areas in which the undersea work was to be undertaken, his time in the compression chamber or his time out of it assisting in diving operations were not duties he was required to perform. Thus in terms of time spent his duties did not consist wholly or mainly of being a diver on the seabed.

37. But section 15(3) provides that diving activities include "taking part as a diver in diving operations". It seems to me that when in the compression chamber on board ship, or onboard a ship under way to commence a diving campaign, Mr Szymusik was taking part as a diver in diving "operations" even though he was not on the seabed. That is because taking part in an operation must, in my view, include the preparation for it and activity analogous to tidying up after it.

38. Taking that wider meaning of seabed diving activities, I find that Mr Szymusik's duties consisted wholly or mainly of activities satisfying the condition in section 15(1)(b).

Condition (c): "any employment income from the employment would otherwise be chargeable to tax under Part 2 of ITEPA"

39. A difficult question arises in relation to condition (c). This question involves the interaction of this condition with the SED which is found in section 378 ITEPA. I shall return to the terms of this deduction and the conditions for it in the next section but for present purposes it is sufficient to note that it provides for a deduction from the earnings of employment attributable to an eligible period of work as a seafarer of 100% of those earnings.

40. The question is: which is applied first: section 15 or the SED?

41. If the seafarer's earnings deduction is applied before section 15(1)(c) then, because 100% of his income would be deducted under the SED, Mr Szymusik would have no net earnings from his diving activity. Thus no income from that employment would be charged to tax under Part 2 ITEPA because it would all be charged as

income of a trade. If that were the case condition (c) of would not be satisfied and section 15 could not apply.

42. Mr Simpson argued that the converse is the case. He said that one should start with section 15. The effect of section 15 was to deem any employment earnings not to be employment earnings with a result that the SED could not apply because, as a result of section 15, there were no earnings from employment and so no deduction.

43. Mr Simpson submitted that this was the case because in section 15 the reference to "employment income" was a reference to the gross amount of such income before any deductions. Thus he said that condition (c) would be satisfied even if the SED would otherwise have been available.

44. I have concluded that Mr Simpson was correct. ITEPA contains an unhelpfully convoluted set of definitions and I fear it is necessary to plough through them to see what is "chargeable" to income tax under Part 2 and what is "charged". Part 2 includes sections 3 to 61.

45. Section 7 defines "employment income" and "general earnings". For present purposes they are the same thing and include "earnings" as defined by section 62. That section defines earnings to include salary, wages, fees and other emoluments or profits of an employment. Section 15(2) ITEPA says that the full amount of any general earnings for a year in which an employee is UK resident is an amount of taxable earnings.

46. Section 9 ITEPA says that the "amount of employment income which is charged to tax" is, in the case of general earnings, the "net taxable earnings from an employment." Net taxable earnings are defined by section 11 to mean the total of any taxable earnings less the "amount of any deduction allowed under section 327(3) to (5)". Those subsections list the seafarer's earnings deduction.

47. Thus, as used in ITEPA, "employment income" is a gross sum before deductions, and although the amount of it which is "charged" to tax is the net amount after any deductions, it is the gross income which is "chargeable" to income tax. As a result condition(c) is satisfied because that employment income would, apart from section 15 be chargeable to income tax under Part 2 ITEPA.

48. Mr Simpson also relied upon section 6(5) ITEPA which provides that "employment income is not charged to tax" under ITEPA if it is treated as trading income by section 15.

49. I agree with him that that section indicates a general parliamentary intention that section 15 should take precedence over ITEPA, but its words do not obviously solve the precedence conundrum. That is because they prevent the application of section 378 only if the employment income is not "relevant general earnings" which is defined to include taxable earnings under section 15 *ITEPA* which does not indicate that section 6(5) has priority.

50. Mr Simpson also referred me to the decision of the Court of Appeal in *Fowler v HMRC* [2018] EWCA Civ 2544. In that case the Court of Appeal held that the effect of the deeming required by section 15 meant that for the purposes of the double tax treaty with South Africa, Mr Fowler's income was to be treated as trading income rather than employment income. I found this case less helpful because it did not address the issue of priority between section 378 ITEPA and section 15 ITTOIA.

51. I find that section 15 applies and has the effect that in respect of income derived from his work on the UKCS the SED cannot apply, so that such income is taxable only as the profits of the trade.

Issue (3) the Seafarers Earnings Deduction (the "SED").

52. Section 378 ITEPA provides that "a deduction is allowed from earnings of employment as a seafarer if-

> (a) the earnings are [taxable earnings of an employment] ,
>
> (b) the duties of the employment are performed wholly or partly outside the UK, and
>
> (c) any of those duties are performed in the course of an eligible period."

53. Section 379 provides that the deduction is 100% of the earnings attributable to the eligible period.

54. I address first the conditions in paragraphs (a) to (c), and then the opening requirement that the taxpayer be a “seafarer”.

55. The amounts received by Mr Szymusik in respect of his employment outside the UKCS, were earnings to which section 15 did not apply; thus they were taxable earnings of his *employment* (because they were not deemed as a result of section 15 ITTOIAto be earning of a trade – see [33] above). As a result in relation to such earnings (a) is satisfied.

56. Where the duties were performed outside the UKCS they were duties performed outside the UK. By section 382 duties performed on a voyage beginning or ending outside the UK but excluding any part beginning or ending in the UK are treated as performed outside the UK. In relation to the duties Mr Szymusik undertook outside the UKCS it appeared that condition (b) was satisfied (see the analysis below of the five periods in which Mr Szymusik worked outside the UKCS)

57. So far as the eligible period condition (c) is concerned, I understood that HMRC do not dispute that Mr Szymusik’s duties were performed in the course of an eligible period so that (c) is satisfied.

58. As a result, in relation to the non-UKCS duties, section 378 applies if the earnings were earnings of an employment "as a seafarer". That expression is defined in turn by section 384:

> “(1) in this Chapter employment "as a seafarer" means employment ... consisting of the performance of duties on a ship or of such duties and others incidental to them."

59. For these purposes section 385 defines a ship:

> "In this Chapter "ship" does not include an offshore installation".

60. In turn "offshore installation" is defined (see schedule 1 ITEPA) by section 1001 Income Tax Act 2007 (“ITA”). This provides:

> "(1) In the Income Tax Acts "offshore installation" means a structure which is, is to be, or has been put to a relevant use while in water…
>
> (2) But a structure is not an offshore installation if -
>
> (a) it has permanently ceased to be put to a relevant use,
>
> (b) it is not, and is not to be, put to any other relevant use, and
>
> (c) since permanently ceasing to be put to a relevant use, it has been put to use which is not relevant.
>
> (3) A use is a relevant use if it is:
>
> (a) for the purpose of exploiting mineral resources by means of a well, or
>
> (b) for the purposes of exploration with a view to exploiting mineral resources by means of a well ...
>
> (4) For the purposes of this section references to a structure being put to use while in water are to the structure being put to a use while
>
> (a) standing in any waters,
>
> (b) stationed (by whatever means) in any waters, or
>
> (c) standing on the foreshore or other land intermittently covered with water.
>
> (5) In this section "structure" includes a ship or other vessel.”

61. HMRC argue that for the purposes of section 378 Mr Szymusik was not employed "as a seafarer". That was for two reasons:

> (a) they say that Mr Szymusik’s employment was not one which consisted of the performance of duties "on" a ship. They say that as a diver his duties were performed “from” the ship and "on" the seabed, and that everything else was incidental. Mr Szymusik, they say, was not "on" the ship when he was in the diving bell or on the seabed, and when he was in the compression chamber he was not performing the duties of his employment; and
>
> (b) they say that the vessels from which Mr Szymusik work worked were "stationed" over the part of the seabed in which the work was to be done. There they were being put to a relevant use, namely exploiting mineral

> resources (oil) by means of a well. They were therefore offshore installations within section 1001 ITA and, as a result of section 385, not "ships" for the purposes of section 384 (whatever might be the proper description of those vessels in everyday speech).

62. I take each argument in turn.

(1) "on" a ship.

63. Mr Szymusik notes that the Oxford English Dictionary defines a seafarer as "a person who regularly travels by sea", the Cambridge dictionary defines the word as a person who travels by sea, and Collins English Dictionary defines it as "a traveller who goes by sea". He is, he suggests, within the ordinary meaning of a "seafarer".

64. Secondly Mr Szymusik says that the vessels were diving support vessels - ships specially equipped and primarily designed for and used in connection with operations on the seabed carried out by divers. When on the seabed the divers were not scuba divers (divers with tanks on their backs acting independently of the ship); they were connected by umbilical cords to the bell, and the bell was supplied with air, power, light and communication via its umbilical connection to the ship. The divers when on the seabed were tied to the ship and could not exist without it: they were part of it and dependent upon it. In this sense their duties were performed "on" the ship.

65. There is, it seems to me, some potential breadth of meaning in the ordinary usage of the words "on a ship". A worker in the engine room of the ship will perform his duties "in" the ship but nevertheless would I think properly be regarded as performing duties "on" a ship. A person spending a voyage in a cradle painting the outside of the ship would be outside the ship but I think would in ordinary parlance be regarded as working "on" a ship. A pilot of a plane stationed on an aircraft carrier would normally be described as working on that carrier.[1] A submariner works "on" a submarine although he is always inside it.

66. In *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd and others* [2005] STC 1111 at [18] Lord Hoffman said that whilst a defined term may be given a meaning different from its ordinary meaning:

> "that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term defined may throw light on what they mean."

67. It seems to me that the normal use of the word "seafarer" colours the words of the definition in section 384 and that "on" should be understood as importing dependence on the ship and attachment to it during the course of a journey over the sea.

68. Mr Szymusik and his fellow divers could not carry out their work on the seabed without the ship; they could not have been dropped into the ocean by helicopter. Their presence for 18 hours in each 24 hours in the compression chamber was part of what

[1](although potentially excluded from SED by section 384 (2))

they had to do as employees. They were dependent on the ship at all times in the course of its travel. In my judgement they could properly be described as performing their duties on the ship during the course of their travel on it. Thus, if the vessel they were on was a “ship” for the purpose of section 384, they would be seafarers for the purposes of that section.

(2) a ship or an offshore installation.

69. Section 1001(5) ITA makes clear that a ship can be a "structure", and thus can be an offshore installation for the purposes of that section with the result that such a ship can be excluded from being a "ship" for the purposes of section 384.

70. Section 1001 imposes two requirements for a structure (or ship) to be an offshore installation: first it must be standing in or stationed in water, and second it must be put to (or have been put to, or be going to be put to) a relevant use while so stationed.

(i) "stationed".

71. The vessels could not be described as standing: that word suggests some sort of rigid contact with the sea floor. The issue therefore was whether they were “stationed".

72. In *Torr v R&C Commissioners* (2008) SPC 679, the Special Commissioner held that a ship would be "stationed" if it were substantially stationary. The vessel in that case had travelled from oil field to oilfield. It had made 18 movements in 2002/3, 24 movements in 2003/4, and 26 in 2004/5. Frequently it had been called away to deal with higher priority problems. Its longest job in 2002/3 had lasted 28 days to "break hydrate and flush flow lines to platform". When working on an X-mas tree (described by the Special Commissioner as a structure projecting from the seabed through which the oil from the well flowed and which had a series of valves controlling the flow through the pipeline to the oil platform) it used dynamic positioning to maintain its position over the tree. The Special Commissioner held that when dynamically positioned it was stationary for these purposes.

73. In *Gouldson v R&C Commissioners* [2011] UKUT 238 (TCC) the Upper Tribunal agreed with the Special Commissioner in *Torr* that "stationed" did not require vessel to be fixed rigidly in one immovable position, but allowed of minor movements in relation to a fixed point. It said that the object of this legislation was

> "to deny relief to those who are working on essentially fixed installations used, directly or indirectly for mineral exploitation."

74. In *John Davies v HMRC* [2012] UKFTT 127 (TC) and the tribunal found that the ship in question in that case could not be described as substantially stationary or stationed. It distinguished *Torr* on the bases that (a) in *Torr* the ship had moved on 24 occasions in one tax year and 26 in the next whereas the ship in that case had moved on that number of occasions per month and (b) the variety of work the ship had undertaken had been greater.

75. Mr Szymusik had prepared a summary of his voyages from his seafarer's and diver's logs and his passports. The summary was sample checked by Mr Leslie. I conducted a small check too. Its accuracy was not disputed by Mr Simpson. This record shows that in the period 6 April 2009 to 5 April 2013 Mr Szymusik worked on voyages outside the UKCS in five periods. Mr Szymusik's diver's logbook shows those days of his voyages when he was diving or on the seabed. That logbook also indicated the oil field in which Mr Szymusik was diving on those days.

76. Mr Simpson prepared an analysis of those voyages on the basis of which he submitted that from time to time the vessel in which Mr Szymusik was living was "stationed" in the various fields because it was present in a particular period field for a substantial period. Mr Szymusik commented on this analysis and I set out my findings below.

77. I have also found that, as Mr Szymusik submitted, there were periods during the vessel's stay in a particular field where there was no diving activity. In these periods it seems unlikely that the vessel was constrained to be stationed in one place and that it is likely that it moved around the field. Further I have accepted Mr Szymusik's evidence that when conducting work the vessel was moved within a field to enable taps to be turned on and off and movement to different sections of a pipeline.

Period 1

(a) Mr Szymusik joined the *Osprey* in Holland on 2 June 2009. He left the ship at Tangier on 14 June 2009. He was onboard for 12 days. His diving log shows dives between 4 June and 12 June at "E17 Holland". The log shows diving on six of those days: 4-7,10 and 12.

(b) I had no evidence as to the size of E17 Holland. The work undertaken is described variously as dredging, rock removal and bagging.

Period 2

(a)Mr Szymusik joined the *Osprey* on 8 July 2009 and left the ship on 1 August 2009. He was aboard for 24 days. I could not tell from the seaman's log at which ports he had embarked and disembarked, but I accept the description in Mr Szymusik's summary of those ports as being ports in Holland because it is consistent with the evidence in relation to Period 1.

(b)Mr Szymusik's diving log shows that between 10 and 15 July (but with the exception of 12 July) he was diving in the Nini field, on 16 July in the Siri field, on 17 July on the Stine field, on 18 July in the Harald field and on 22, 23 and 24 July in the Nini field again. There was no record of a dive on 12, 19, 20, and 21 July.

(c) I find from Mr Szymusik's evidence that these fields were some 32km from each other.

(d) The work done is described as barrier isolations, metrology, ties in 2 x 10", guiding out for 6" fit, inspection and tie in riser.

Period 3

(a)Mr Szymusik joined the *Osprey* on 6 January 2010 at Esberg (I could not read this place name clearly but Mr Szymusik records it as being in Holland, which I accept) and disembarked there on 6 February. He was aboard for 33 days.

(b)In this period his diver's log shows that he dived for 15 days between 12 January and 31 January in the Siri field (there being no record of dives on 16, 21, 22, 28, and 29 January).

(c)As for Periods 1 and 2 the work described in the log as undertaken was different for each dive.

Period 4

(a)On 12 August 2010 Mr Szymusik joined the *Discovery* at a port in Canada and disembarked on 23 August also in Canada.

(b)There were no diving log records which related to this period.

Period 5

(a)Mr Szymusik joined the *Eagle* on 7 November 2010 at Luanda and disembarked on 30 November 2010. He was aboard for 23 days.

(b)In this period his diving log shows dives on 18,19, 20, 23 and 27 November in the Girassol field.

(c)The lack of diving activity on 21 and 22 November and between 23 and 26 November indicates to me that the vessel was unlikely to have been present at one place at these times.

(d)The diving logs indicated that various differing tasks had been undertaken in these dives.

78. This is not the kind of detailed evidence that the FTT had in *John Davies* of the movements throughout a year of the vessels on which Mr Szymusik travelled, but I reach the following conclusions

(i) The disparate nature of the tasks undertaken, the movements from field to field in a relatively short time and my findings earlier in this decision as to the nature of the work undertaken indicate to my mind that on the campaigns on which Mr Szymusik was on board the *Osprey* it was not for the purpose of section 1001 substantially stationary or, as the Upper Tribunal put it in *Torr*, that it had the nature of an essentially fixed installation.

(ii) as regards the *Discovery,* the lack of evidence of what it was doing taken with its description in the leaflet provided by Mr Szymusik, lead me to conclude that it was not proved that it was not stationed at that time or earlier times.

(iii) in relation to the *Eagle*, I conclude, for reasons similar to the *Osprey*, that it was not stationed when Mr Szymusik was aboard.

79. Section 1001(1) ITA refers to a structure (which may include a ship) which "is, or is to be, or has been" put to a relevant use. Subsection (2) excludes structure which have permanently ceased to be so used. Thus even if I find that while Mr Szymusik was on board any of the vessels it was not stationed, the vessel could still be required to be treated as an "offshore structure" if it had in the past been put to such a use or was going to be put to such a use in the future.

80. In the material Mr Szymusik produced the *Osprey* is described as a "versatile vessel ideally suited to subsea construction and diving operations". The reference to subsea construction suggested that it might take a part in a large underwater oil extraction construction project which could require it to remain in the same place for a considerable time: in other words that it could have been in the past put to use while stationed above the construction site. However, Mr Szuymusik's description of its use in campaigns and the nature of the work undertaken when he was aboard persuade me that this was unlikely and that there were no sufficiently certain plans for the future of which it could be said that it was to be put to such a use. I therefore find that it did not fall within section 1001(1) and was a ship for the purposes of section 378.

81. In relation to the *Eagle* the evidence in the diving logs of the work undertaken suggested that it was not being used for a long project but there was no evidence of such use being repeated or which suggested that it had not been used as a stationary vessel in the past, and since its description in the flyer, like that for *Osprey* indicated that such use was possible, I concluded that there was not sufficient evidence to show that it had not been, or was not going to be, so used.

82. The evidence relation to the *Discovery* was yet more scant. I could not conclude that it had not been so used.

(ii) put to a relevant use.

83. Mr Szymusik says that activities such as those undertaken by the *Osprey* in Period 2, namely dredging, rock removal and bagging, or as he put it compendiously seabed rectification was not a use "for the purpose of exploiting mineral resources by means of a well".

84. Had section 1001(1) read "use for a purpose <u>in connection with</u> the exploitation of mineral resources" it would be clear to my mind that the *Osprey* was so used. But whereas cleaning a pipe might be for the purpose of exploiting the mineral resource which would flow through that pipe, rectifying the seabed did not immediately seem to qualify for that appellation.

85. I am inclined therefore to agree with Mr Szymusik in relation to this activity. But the description he gave of the activities conducted on the seabed, some of which were no doubt conducted when he was on the *Osprey* included matters such as pipe cleaning and flow monitoring were for the exploitation of the oil flowing from a well. Thus if it had been "stationed" there would have been times at which the vessel was

put to use for the purpose of the exploitation of oil by means of a well and as a result when it would have been an offshore installation and not a “ship”.

86. In relation to the uses to which the *Eagle* and the *Discovery* were put, or had been put, there was insufficient evidence for me to conclude that they had not been put to such use or if that had that the cessation of such use was permanent. It was not shown that they passed that test.

87. I conclude in relation to Mr Szymusik’s earnings in Periods 1, 2 and 3 that he is entitled to a deduction under section 378. In relation to Periods 4 and 5 I conclude that he is not so entitled.

Issue (4) PAYE deductions.

88. Section 9(1) TMA provides that every tax return under section 8 TMA shall include a self-assessment "that is to say -

> (a) an assessment of the amounts in which [on the basis of the return he] is chargeable to income tax and capital gains tax for the year ... and
>
> (b) an assessment of the amount payable by him by way of income tax, that is to say the difference between the amount by which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source.

89. Section 8(5) provides that in section 8 and 9 any reference to income tax "deducted at source" is to income tax deducted or "treated as deducted from any income".

90. Although they must both be part of the same self assessment I shall call the assessment under 9(1)(a) the "taxable amounts assessment”, and that under section 9(1)(b) the "tax payable assessment".

91. Section 59B(1) TMA provides that the difference between

> "(a) the amount of income tax ... contained in a person's self-assessment under section 9 for any year ... and
>
> (a) the aggregate of any payments on account ... and income tax which… has been deducted at source

shall be payable by him". And section 59B(7) provides that reference to income tax deducted at source is to such to tax deducted or “treated as deducted from any income” – echoing section 8.

92. There is, perhaps, some uncertainty in the meaning of the words “income tax ... contained in a person's self-assessment” in paragraph 59B(1)(a) because section 9(1) speaks of two assessments - the taxable amounts assessment and the tax payable assessment. If section 59B(1)(a) referred to the latter there would be anomalous double counting of deductions for "income tax deducted at source", because such amounts would also be deductible under (b). Thus it appears that section 59B(1)(a)

must deal with the taxable amounts assessment made under section 9(1)(a), not the tax payable assessment.

93. Section 29(1) TMA provides (as noted above) that where an officer discovers in an insufficiency in tax he may "make an assessment in the amount of a further amount which ought ... to be charged to make good ... the loss of tax". Such an assessment, in order to be consistent with section 9(1), must in my judgement consist of both an assessment of the income liable to tax and the net liability of the taxpayer.

94. Section 28A provides that an enquiry into a taxpayer's return is completed by HMRC giving a closure notice, and that such notice must make amendments to the return required to give effect to his conclusions. It seems to me that since the return must provide the "assessments" required by both section 8(1)(a) and (b), a closure notice must not only make any amendment to the taxable amount assessment but also make any necessary amendments to the tax payable assessment. And it has been my experience in this tribunal of closure notices that they make such amendments if needed.

95. Section 31 provides that an appeal may be brought against any "conclusion stated or amendment made" by a closure notice or any other assessment which is not a self-assessment (such as that under section 29). Sections 50(6) and (7) provide that, on an appeal notified to the tribunal, the tribunal may reduce or increase an assessment according as a taxpayer is over or under charged by it. It seems to me that the jurisdiction given to the tribunal by this section extends to both the taxable amounts assessment and the tax payable assessment embraced by a self-assessment amended on closure and to a section 29 assessment.

96. Regulation 185 of the PAYE regulations SI 2003/262 provides that for the purpose of determining the difference mentioned in section 59B(1) the amount deducted at source is the "total net tax deducted ... after (5) [adding] any tax treated as deducted", and, by regulation 185(6) "tax treated as deducted" means any tax which the taxpayer's employer was liable to deduct under the PAYE regulations but failed to do so (unless a direction was made under regulation 72, 72F or 81 – which are not applicable in this case).

97. The PAYE regulations apply only to employment income. Thus income which falls within section 15 ITTOIA does not give rise to a requirement to deduct under the regulations. But that part of Mr Szymusik's income which does not fall within section 15 would potentially be subject to a requirement for Mr Szymusik's employer to deduct and account for PAYE.

98. Against this background I asked Mr Simpson to consider, in relation to Mr Szymusik's employment income - that is, on the basis of my findings above as to the operation of section 15, and so excluding income which arose from work undertaken within the UKCS in relation to which SED was not available, whether regulation 185 had any bearing on the tax assessable if Mr Szymusik's employer had failed to deduct the tax it should have deducted under the PAYE regulations when making payment to him.

99. To my embarrassment I framed the question by reference to section 59B TMA only and not by reference to the appeal against the Assessments

100.Mr Simpson responded arguing (1) that the tribunal did not have any jurisdction over section 59B, and (2) that Regulation 185 did not affect liability to tax. In that later context he says that there is a difference between liability to tax on income and the collection of the tax payable. The liability to tax depends on taxable income and as calculated under section 23 ITA does not allow for a deduction for tax collected through the PAYE system; the amount payable is calculated under the separate collection mechanism in section 59B.

101.I agree with Mr Simpson that the tribunal has no jurisdiction in relation to the operation of section 59B. That section is not concerned with assessment but with the collection of the net tax due. Section 30 gives the tribunal jurisdiction only in only in relation to assessment. I accept that that question is not before the tribunal. It could be raised in collection proceedings before a competent court.

102.I also agree with him that the legislation imposes tax liability on the recipient of income and that there is a difference between the amount of tax for which he is liable (calculated under section 23 ITA) and the amount which is payable - the latter being the liability less the amounts paid or treated as paid at source.

103.But the self-assessment required by section 9(1)(b) - the "tax payable assessment" - is described by the legislation as precisely that latter sum. This appeal is against an adjustment to such an assessment and the making of an assessment under section 29 and therefore the tribunal has jurisdiction in relation to the computation of the amount payable under that subparagraph.

104.That raises the question as to whether "income tax treated as deducted" within section 8(5) TMA includes "tax treated as deducted" within the meaning of regulation 185(6). That is a question within the jurisdiction of the tribunal because it relates to an appeal against the amendments to the liability assessment under section 9.

105.An anomaly arises if tax treated as deducted within regulation 185 is not taken as treated as deducted for the purpose of section 9 because that would result in the amount payable as determined under section 9 differing from that payable under section 59B despite the fact that section 59B(1) determines the "amount which "shall be payable by him" and section 9(1)(b) speaks of the "amount payable by him by way of income tax". The existence of that anomaly would suggest that amounts which are "treated as deducted" for section 59B purposes should also be treated as deducted for section 9(1)(b) purposes: in other words that “treated as deducted” should be construed to mean treated as deducted by any legislative provision.

106.On the other hand, the language of regulation 185 indicates that it applies specifically for the purposes of section 59B and not more generally. That is in contrast to, for example, section 710(6) ITEPA which requires an amount for which an employer accounts in relation to notional payments to be treated generally (and not

for the purposes any particular section) as deducted in respect of an employee's liability to income tax.

107. I have concluded, with some hesitation, that regulation 185(5) and (6) do not have a wider effect, and, as a result, tax treated by the regulation as having been deducted is deductible in the computation under section 59B (and so is relevant to collection proceedings) but is not deductible for the purposes of section 9. That has the result that if Mr Szymusik's employer should have deducted tax but did not, the amount of that tax may reduce what he has to pay under section 59B but not the amount of the self-assessment assessment under section 9 or the discovery assessment under section 29.

Conclusions

108. I find:

(a) that the section 29 assessments were properly made;

(b) that section 5 applies in relation to Mr Szymusik's employment as a diver on the UKCS and accordingly that such income cannot benefit from SED;

(c) that income attributable to Mr Szymusik's employment as a diver outside the UKCS is, to the extent described at the conclusion of the discussion on Issue (3) above, subject to the seafarer's earnings deduction and must be reduced accordingly; and

(d) whilst the effect of regulation 185 may be applicable in collection proceedings it is not applicable to the determination of the liability assessment under section 9(1)(a) and the closure notice in respect thereof or to the section 29 assessments.

109. I adjourn the appeal to enable the parties to agree the relevant figures. They may apply for the hearing to be reconvened if they cannot agree.

Rights of appeal

110. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

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