TC02168

Appeal number: TC/2011/07784

Income Tax – calculation of business profits – whether compensation payment taxable as income - yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN LINTS **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
SCOTT A RAE, LLB, WS

Sitting in public at George House, 126 George Street, Edinburgh on Monday 18 June 2012

The Appellant appeared in person

The Respondents were represented by Mr William Kelly

DECISION

Preliminary

1. This Appeal relates to whether a payment of £4,000 to the taxpayer in terms of the Edinburgh Small Business Additional Support Scheme ("the Scheme") falls to be included as taxable income of his business for the Year 2008/09. This Scheme is operated by Transport Initiatives Edinburgh Limited ("TIE") to support the interests of businesses affected by the construction of the Edinburgh tramway.

2. The Appellant, the taxpayer, was at the material time in practice on his own account as a solicitor, trading as Lints Partnership. One of the premises from which he operated was at 8-11 Crighton Place, Leith Walk, Edinburgh, which was on the route of the proposed tramway as originally projected. The Respondents are HMRC.

The Facts

3. The circumstances which give rise to this Appeal are not in dispute. They may be summarised as follows:-

(i) Mr Lints' offices at Crighton Place, Leith Walk, Edinburgh were originally on the projected route of the new Edinburgh tramway system, which was being promoted by TIE.

(ii) All (or most) of the premises at street level at that part of Leith Walk were occupied as business premises. At upper levels there were residential flats.

(iii) TIE publicised the Scheme by in particular circulating copies of a pamphlet (Production A/7-8), a copy of which was received by Mr Lints.

(iv) Mr Lints made an application in terms of the Scheme seeking a payment of £4,000. A copy is produced as Production A/3-4, and confirms that the rateable value of his premises is under £28,000 and that the annual turnover of the business exceeds £61,000 being conditions of eligibility for the Scheme.

(v) A payment of £4,000 to Mr Lints was made by TIE during the Year 2008/09.

(vi) Over the course of about three years construction works relating to the proposed tramway system took place in the immediate vicinity of Mr Lints' offices. These took place during about ten periods which cumulatively totalled about a year.

(vii) These works caused inconvenience and disruption to Mr Lints and his staff.

(viii) There was no significant fluctuation in the level of business turnover at these premises during the periods affected.

(ix) Mr Lints has not pursued any other claims or remedies against TIE in respect of the disruption caused by the construction works.

Submissions

4. It was agreed by Parties that Mr Kelly for HMRC should speak first.

5. He submitted that the receipt fell to be categorised as taxable or otherwise according to its nature in the recipient's hands, although the payer's purpose could be relevant. Recompense for services or for loss of profit would indicate a revenue and hence taxable receipt. In the present case HMRC viewed the £4,000 as a revenue receipt, and Mr Kelly referred us to the terms of their letter dated 16 June 2011, (Production B17-22), which subsequently was confirmed by letter dated 26 August 2011 (Productions B25-27).

6. Mr Kelly challenged the taxpayer's argument that a trading relationship with the payer was a pre-requisite before liability to tax arose. Further, the fact of the payment's being unsolicited and voluntary did not preclude a tax charge. In his view it was significant that the explanatory leaflet (Productions A7-8) referred to "business" interests. The payment was made as a result of a claim made by the Appellant (see Application Form – Production A3). The motive of TIE here was obvious, viz – it was to compensate for potential business disruption, and accordingly it represented a taxable receipt.

7. Mr Kelly referred us extensively to authority in support of his argument. He noted in particular *Murray* v *Goodhews* 52 TC 86 in which Buckley LJ observed:-

> "In my opinion a perusal of these authorities leads to the conclusion that every case of a voluntary payment … must be considered on its own facts to ascertain the nature of the receipt in the recipient's hands. All relevant circumstances must be taken into account. These may include the purpose for which the payer makes the payment or the terms, if any, upon which it is made, as for example, in the Falkirk case."

That refers to the decision *CIR* v *Falkirk Ice Rink Ltd* 51 TC 42 p52 where Lord Cameron commented:-

> "That the existence of a trading relationship between payer and recipient is not necessary in order to stamp a payment as a 'trading receipt' is made clear by the decision in the *Lincolnshire Sugar Co Ltd* case".

(That refers to *Smart* v *Lincolnshire Sugar Co Ltd* 20 TC 643).

8. He noted also the decision of Rowlatt's remarks in *Chibbett* v *Joseph Robinson & Sons* 9 TC 48 at p60 –

> "I think everybody is agreed … that in cases of this kind the circumstance that the payment in question is a voluntary one does not matter. … you must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office, and in respect of his trade, if it is a question of trade, and so on. You have to look at his point of view to see whether he receives it in respect of those considerations".

9. Further reference was made to *Rolfe* v *Nagel* 55 TC 585; *Lang* v *Rice* 57 TC 80; *Donald Fisher (Ealing) Ltd* v *Spencer* 63 TC 168; *Poulter* v *Gayjon Processes Ltd* 58 TC 350; and *Ryan* v *Crabtree Denims Ltd* 60 TC 183.

10. In essence, Mr Kelly submitted, the payment by TIE was linked to the turnover of the business. TIE anticipated a loss of footfall affecting business interests generally with consequent losses for which it might well be considered liable. The compensation payments were made for such losses. Accordingly they were taxable as a receipt representing loss of turnover. Liability arose in terms of Section 5 of the Income Tax (Trade and Other Income) Act 2005. For these reasons Mr Kelly urged us to dismiss the Appeal.

11. In reply Mr Lints submitted that the receipt should not be taxable. It represented a voluntary gift and recompense for inconvenience and losses not of an *income* nature. The publication circulated about the Scheme had been delivered to his office unsolicited. Nowhere was it stated that the payment was to compensate for loss of business. There was no requirement on him to show trading difficulties or evidence of loss of profit. Mr Lints claimed that in fact his trading income had not decreased during the relevant time (and this was not disputed by Mr Kelly). The disruption had been for ten distinct periods over about three years, totalling about 12 months. Access routes to his office had become tortuous; the construction works were noisy; dirt and muck was generated by the works; the office and its windows required to be cleaned daily; and refuse collections were disrupted.

12. Mr Lints referred the Tribunal to the terms of the Note of Meeting of 30 March 2011 which he had with HMRC's representatives (Productions A11). He explained that he adhered to the points made by him as recorded on page first of that Note. The payment had been declared openly in his tax accounts and thereafter (appropriately in his view) deducted. He received the cheque yet was not required to sign any discharge from liability in favour of TIE.

13. Mr Lints relied on *Murray* v *Goodhews*, which stressed that each such compensation case depended on its individual circumstances. He considered the circumstances in *Falkirk Ice Rink* clearly distinguishable from his Appeal. There the payment had been made by existing customers for a continuing service.

14. In his case, Mr Lints emphasised, the payment was voluntary, a gift, which did not relate to his trading as such. It was akin to a *solatium* payment. His stance was summed up in his letter of 1 March 2011 to HMRC (Production B15).

15. He explained that in the course of his negotiations with HMRC reference had been made to their practice guidelines contained in "BIM41810". He considered that in his case these guidelines indicated that the receipt should not be taxable.

16. For all of these reasons Mr Lints considered that his Appeal should be allowed.

Decision

17. In determining whether this "compensation" payment is taxable as income the Tribunal has to determine for what it was the *surrogatum*. While there is extensive case-law on the topic, there is no proven *litmus* test. Each case depends on its individual facts and circumstances. The mere fact of the payment's being made once and for all, does not preclude its being a *revenue* receipt, taxable as trading profit. Neither does the absence of any pre-existing or continuing relationship between the taxpayer and TIE.

18. Significantly in our view the inclusion within the Scheme of businesses but not private individuals, suggests that it is a *surrogatum* for business turnover. The nature of the works carried out by TIE were liable to affect the "footfall" at commercial premises generally in the vicinity. That, no doubt, would affect different businesses to a varying extent. In the case of a solicitor's practice and estate agency the chance of casual custom would seem less likely than in a newsagent's or general store. Apparently there are residential subjects above the commercial premises occupying the buildings at street-level, but no information was provided as to whether there was a similar scheme to benefit them. We have to assume that there was not. Interestingly Mr Lints complained not about loss of turnover (that, it seems, had remained steady) but rather of dust, noise, general pollution and personal inconvenience. The upstairs residents, not eligible under the Scheme must have suffered similarly.

19. There were two levels of compensation, depending on whether the claimant's business turnover exceeded the (then) VAT margin of £61,000. Evidence of net profit or loss, however, was not required. Curiously, payment of the compensation was not made conditionally in settlement of all or any possible claims potentially arising from the works. However, there must have been some advantage in introducing such a Scheme to settle a relatively large number of fairly small claims in a straightforward and administratively inexpensive way.

20. It is in our view significant that the expense of remedying the disruption complained of by Mr Lints would (to a great extent) be a revenue item. Increased costs of cleaning and general maintenance are, of course, revenue in nature.

21. Considering that the Scheme was for businesses and not private individuals, and, further, that the works would have affected footfall (albeit less markedly in certain types of business where custom was prompted by necessity) and, moreover, that the expense of remedying the disruption and pollution would be revenue in nature, we are drawn inexorably to the conclusion that the £4,000 payment should be included as a taxable receipt of Mr Lints' business. We do not consider that a receipt made in terms of the Scheme would be treated differently for tax purposes from one business to another, depending on the nature of that business' pattern of trading and its vulnerability to disruption of this nature.

22. It had occurred to us that possibly the payment might be apportioned between business and personal elements, the latter representing *solatium* and not being liable to income tax. However, we are not so persuaded given the stress in the publicity material and the Application Form to the business aspect, and we pay regard particularly to the absence of any compensation being paid to the residential occupiers upstairs.

23. For these reasons we dismiss the Appeal.

24. 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.

KENNETH MURE, QC
TRIBUNAL JUDGE

RELEASE DATE: 16 July 2012