Caught Ashby, bowled Gordon

Indirect Tax | General Features



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Peter Ashby reflects on the efforts required to overturn an unreasonable penalty

Key Points

What is the issue?

HMRC may not back down, even when they are wrong, if you appear to have limited resources to fight

What does it mean for me?

Sadly, if you are charging a client fees to defend it, you must take into account the fact that HMRC may not see sense. You may have to accept defeat if HMRC can win by threatening to go to the tribunal

What can I take away?

Important points of law may need to be fought either at a loss, or even pro bono, in order to get the courts to decide upon them. Sometimes it just has to be done

This is the report of a case that did not reach the First-tier Tribunal (FTT). It concerns a cricket club (ACC) which is a community amateur sports club (CASC), so is treated as a charity in many respects. It coaches cricket for all ages, boys and girls, and of course is non-profit making; or, more accurately, it uses all of its money to further its charitable purpose.

ACC has a link with Hampshire County Cricket Club because Hampshire's captain, Jimmy Adams, used to play for the club and his father is still involved with ACC. There is cricketing cooperation, but no financial cooperation. ACC plays in the Hampshire Cricket League. All its players are amateur and are unpaid as regards playing and travel expenses. Some players have been paid for coaching services. Students get their travel expenses reimbursed.

ACC was asked to provide a place for an overseas player/coach. Typically, this would be a promising young player who would also coach the teams. He would be paid only as a coach. To get a visa/work permit, the UK Border Agency insisted that he had a contract of employment. ACC wrote one for him.

HMRC started a purge of cricket clubs and, in May 2012, conducted a PAYE audit. They looked at all aspects of the club, implying that ACC 'employed' the cleaners, the tea lady, all the coaches, the groundsman and the overseas player/coach.

Luckily, ACC knew me.

HMRC ‘ascertained the facts’ again and then accepted that everyone was self-employed, apart from the overseas coach, who had a written contract of employment, and the UK coaches, who were also employees. They wanted tax and NIC.

I asked ACC to complete the employment status indicator (ESI) for the coaches and we passed the results to HMRC. HMRC must accept that an ESI is binding if the facts are entered honestly, so they dropped the coaches and concentrated on the player coaches.

We said that as these overseas people (two of them) were Commonwealth citizens, they had a personal allowance for tax and no other chargeable income, as they were not resident here; therefore, no tax was due. The Revenue eventually agreed. The £2,300 tax demand became nil, leaving only NIC
to pay.

ACC did not know that it was the ‘employer’ for NIC; however, it accepted the HMRC ruling and paid the NIC of £1,278. Game over? It was only just the start. HMRC wanted penalties for failing to operate NIC withholding for two players spanning two years – 2008/09 and 2009/10. As neither P11D(b)s nor P35s had been filed, and NIC had not been deducted or paid over, the penalty was substantial but was capped at 100% of the NIC due.

I argued that it was unreasonable to punish a CASC for a minor and unknown offence by demanding a 100% penalty, when tax evaders under the Liechtenstein Disclosure Facility (or the Swiss agreement) paid only 20%. HMRC said they were bound by law to issue the 100% penalty. I argued that TMA 1970s 102 allowed them to mitigate penalties.

HMRC refused to mitigate, saying they were bound by statute to take the penalties and had already reduced these to 100%. HMRC refused to comment further on s 102, arguing they could only do this after the penalty was determined and after the appeal was heard. We differed on the interpretation of s 102.

Because ACC refused to pay a penalty after the contract settlement letter arrived, inviting a 100% penalty, HMRC issued a formal penalty determination. We appealed on the basis that Keith Gordon, who was acting for us, noticed the penalty was

issued to ‘ACC’.

A cricket club is not a person under tax law, so it is incapable of being penalised according to TMA 1970 s 98A (2)(a). We also added that HMRC’s refusal to consider s 102 was incorrect. We suggested it was unreasonable to expect a small CASC to understand the tax legislation and that even HMRC had got the tax element wrong; and we said the penalty was not issued by a duly authorised officer of HMRC because it was not signed by a duly authorised officer.

The tribunal process starts with HMRC having to prepare a statement of case. This requires HMRC to state their position on the matters in dispute. However, in this instance, HMRC seemed to believe that this rule did not apply to them. At first, HMRC ignored some of our grounds of appeal. We gave them a second chance, at which they set out our grounds but advanced no arguments on them.

I would have believed the HMRC case officer when she said that she had done all that was necessary; after all, she does this every day and I was new to the tribunal rules. However, Keith persuaded me that the rules required HMRC to justify their position and to apply to the tribunal for an ‘unless’ order, which gives HMRC an ultimatum.

Meanwhile, HMRC proceeded as if nothing was wrong, going on to the next stage of the process – disclosure of documents.

I was astonished to find that a large bright orange package marked ‘HMRC documents’ and addressed to me had been left on my doorstep while I was out, despite the package stating that it had to be signed for. The package contained the PAYE records of numerous people from Hampshire County Cricket Club, presumably on the basis that they may have played for ACC. The papers disclosed people’s names, including that of international star Shahid Afridi, addresses, NI numbers and, in some instances, their earnings. I protested that the documents were for people who had never played for, let alone been paid by, ACC. The HMRC officer said that she was giving us her complete file and invited us to suggest which documents may have been relevant. We rejected this, pointing out that it was not our job to sort out their documents.

To deal with our ‘unless order’ application and our complaint about HMRC’s documents, the FTT called a case management hearing. We agreed, noting that the

hearing may have to be held in private if we discussed the personal details of people with no connection with the case. I also needed to brief Keith, meaning a trip to London at my expense, as this was pro bono work. I added this potential costs claim to the list of issues.

Three days before the case management hearing, HMRC pulled the plug. They were told by their technical experts that ACC was not a legal person, so invalidating the penalty, which was vacated. HMRC would not accept our additional arguments, but despite the fact that they could issue the penalty to a real person if they so wished, they chose not to do so. They also agreed to pay my costs, but only if the tribunal issued a direction to do so. Not what I call a good loser.

HMRC admitted that they should have sought advice sooner about whether a cricket club was a person for penalty purposes. They finally admitted that it was not, after five months and three requests by us. Most cricket clubs, and probably most amateur sports clubs, are not persons. HMRC admitted that they should have made the penalty out to a person, suggesting that a member of the management committee at the time of the offence would have been sufficient. If so, TMA 1970 s 114 could have been applied to correct the glaring error on their part, if all other matters were correct. The employer might well be ‘the club’, as it was the club that made the payments; but while the club can be an employer, as TMA 1970 s 15(12) specifically covers ‘body of persons’, s 98A does not. This is a possible loophole.

Cricket is a game played to strict rules, as is tax. But cricket is played by two sides playing to the rules, something which I feel the Revenue did not do. They certainly did not apply the spirit of the law. They got their NIC and tried to extract tax from ACC on spurious grounds. They asserted that all sorts of people were employees. They were technically incorrect about numerous matters and ignored the tribunal procedure rules. Only the last HMRC person I dealt with acted in a way that I would have expected a chartered tax adviser to have acted.

ACC’s constant thoughts were why does HMRC spend so much money and time trying to trap minnows like ACC, while significant numbers of tax evaders with offshore bank accounts can settle for a 20% penalty? This was a question that I could not answer.