[2019] UKFTT 390 (TC)

TC07205

Appeal number: TC/2017/07500

INCOME TAX – whether earnings of a diver within s15 ITTOIA 2005 can be regarded as earnings of a partnership – no – whether the diver was self-employed – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID GREEN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Manchester on 3-4 October 2018

Mr Buchsbaum for the Appellant

Ms Poots, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a closure notice for the tax year 2012/13 issued on 27 February 2017 in the amount of £15,060.29.

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

Background

3. The appellant is a mixed gas diver. In the relevant tax year the appellant treated the income from his engagement by Subsea 7 (Singapore) Pte Limited (Subsea 7) as trading income of a partnership with his spouse. The appellant reported 50% of that income on his tax return as his share of the profits of the partnership.

4. HMRC opened enquiries into the return and issued closure notices giving effect to HMRC's conclusion that all of the income from Subsea 7 should be treated as income of the appellant.

5. It was agreed between the parties that, if the appellant is an employee, his income falls within the scope of s15 ITTOIA 2005.

6. The appellant noted, in opening, that HMRC had also enquired into another tax year but had withdrawn the assessment before that had proceeded to a hearing. It was submitted that HMRC had therefore accepted that for those years, the income should be regarded as income of a partnership. HMRC argued that the assessments had been withdrawn on a without prejudice basis and the withdrawals were not relevant to this matter.

7. Each case has to be considered on its own facts and, as the other assessments were withdrawn without prejudice, I do not consider that any inference can be drawn of relevance to this matter from those withdrawals.

8. The appellant also suggested in the hearing that HMRC should not be allowed to raise arguments that were not included in correspondence during the enquiry. HMRC noted that the arguments had been included in the statement of case some months earlier without objection. I do not consider that HMRC could be precluded from raising arguments that were set out in their statement of case, simply on the basis that the arguments had not been set out in earlier correspondence.

Whether s15 ITTOIA means that employment income of a diver can be regarded as trading income of a partnership

Appellant's case

9. The appellant argued s15 ITTOIA operates to reclassify the employment of a relevant diver as a trade and that the effect of s15 should be interpreted widely. In particular it was submitted that s15 should be interpreted as meaning that it is the owners of that trade who are subject to tax on the profits from the trade rather than the diver specifically.

10. The appellant argued that there are various differences between taxation of employment and taxation of a trade. It was submitted that a key difference is that in employment it is the person who performs the duties who is taxed whereas in the context of a trade, it is the owner or owners of the trade (including inactive owners) who are taxed on the income of the trade, regardless of who performed the duties which gave rise to that trade income. The appellant further argued that the decision as to who is the owner of a trade is one which made by the owners of that trade, as supported by the fact that partners can and do determine their profit sharing ratios.

11. In this case, it was argued that the appellant and his spouse had formed a partnership on 6 April 2009 and that it was this partnership which owned and carried on the diving trade that was created by s15. Accordingly, the appellant argued that it was this partnership that was subject to tax on the income derived from the duties performed by the appellant.

12. It was submitted that, if Parliament had not intended this broad interpretation to apply to s15 and to limit the statute so that the trade could only be a trade of the employee and not of a partnership, clear words would be required to limit the application of s15 accordingly. Further, if the intention of Parliament had been only to extend favourable expenses deductions to divers, as submitted by HMRC, the appellant argued that s15 would have drafted differently with specific reference to expenses deductions.

13. The appellant also submitted that, as HMRC allows wages paid to a spouse to be deducted in calculating the taxable income of the diver, this confirms that s15 does more than alter the way in which a diver is taxed.

HMRC's case

14. HMRC submitted that s15 applies only for tax purposes and has no wider deeming effect. The effect is that an individual employee's performance of their duties is treated for tax purposes as the carrying on of a trade.

15. It was submitted that, on a natural reading of s15, it is clear that the trade referred to is a trade of the employee only. The language does not support an extension of the meaning to encompass a trade owned by another person. It was submitted that there cannot be a separate owner of an employee's trade and further that a partnership cannot be an employee, as employment involves personal obligations.

16. HMRC argued that the purpose of this legislation was to change the timing of the tax payment and to provide more generous rules for the deduction of the expenses of divers. It was not to give effect to a wider purpose, which would allow for a different person to be taxed on the income.

17. HMRC submitted that express words would be required for s15 to operate to allow a change in the person subject to tax on the income.

Discussion

18. s15 ITTOIA states that in qualifying circumstances, the "performance of the duties of employment [of a relevant diver] is … treated for income tax purposes as the carrying on of a trade in the United Kingdom".

19. I note also that s15 has no effect for the purpose of National Insurance Contributions (NICs). Divers within the scope of s15 are not required to pay Class 4 NICs, which I consider adds to the conclusion that s15 does not create a trade for all purposes.

20. The wording of s15 is therefore clear that the provisions apply for income tax purposes only. In particular, s15 refers only to specific activities: "performance of the duties of employment" is deemed to be the "carrying on of a trade". It does not deem the employment generally to be a trade for all legal purposes, and so I find that it cannot be interpreted as meaning that the employment should be treated as a trade which is separate to the diver and capable of being owned and carried on by another person, or by persons in common under partnership law.

21. It is well established that employment is personal to an individual, involving personal obligations, such that the only person who can perform the duties of an employment is the individual employee. This is discussed further below.

22. Accordingly, I consider that the only person who can be regarded as "carrying on a trade" within the meaning of s15 is the individual "performing the duties of the employment".

23. I find that s15 cannot be interpreted as meaning that the employment income of an individual diver can be regarded for tax purposes as trading income of a partnership in which that individual is a member.

24. Indeed, if the intention of Parliament had been that s15 should be so broadly interpreted I consider that it would have required express wording to the effect that the deeming provisions applied to create a trade for all legal purposes.

25. At the time of the hearing, the Upper Tribunal decision in *Fowler* [2017] UKUT 219 (TCC) was being appealed to the Court of Appeal. The appellant had argued that the First Tier Tribunal [2016] UKFTT 0234 (TC) had found that the effect of s15 was to recharacterize the employment activities as activities of a trade (at §113) and that, as the Upper Tribunal had decided the matter on the definitions in the treaty, that decision had not altered the finding of the First Tier Tribunal.

26. It should be noted that the situation in *Fowler* was rather different to the situation in this case: Mr Fowler was not arguing that s15 created a trade which could be carried on by anyone other than himself, he was simply arguing that the deeming provisions of s15 applied in the interpretation of tax treaties.

27. The Court of Appeal ([2018] EWCA Civ 2544) subsequently restored the First Tier Tribunal decision, concluding that the deeming effect meant that Mr Fowler's income was trading income for the purpose of interpreting the relevant tax treaty.

28. However, I note that at §43 Henderson LJ (giving the majority decision) states that "The drafting technique employed in [the predecessor to s15, section 314(1) of the Income and Corporation Taxes Act 1988] is different from that of the "Tax Rewrite" project, **but in my view the substance is the same**. The Income Tax Acts are directed to have effect "as if" the performance by the relevant person of the specified duties of his employment "constituted the carrying on **by him** of a trade within Case I of Schedule D" (emphasis added).

29. There is, in my view, nothing in the Court of Appeal decision in *Fowler* which suggests that s15 should be interpreted as meaning that an actual trade, which may be carried on by persons other than the diver, is created. On the contrary, I consider that decision makes it clear that the effect of s15 is to deem a trade to be carried on by the diver only.

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

Whether the diver was employed or self-employed

Appellant's case

31. The appellant argued that, if s15 ITTOIA cannot be interpreted to mean that the income of his employment should be treated as income of a partnership, the reality of the relationship between the appellant and his engager, Subsea 7, was not one of employee and employer but was, instead, one of self-employment.

32. The appellant provided a witness statement and gave oral evidence at the hearing.

33. He confirmed that, for the period in question, he had been engaged by Subsea 7 under a day rate workers agreement dated 1 November 2006 (provided in evidence). This had governed his work for Subsea 7 up to November 2014.

34. The appellant described his work as mixed gas saturation deep sea diving, which meant that whilst working he lived in a chamber on board ship which was then pressurised to a specific depth and not decompressed until it was commercially viable to bring him up from the dive. The time taken to adjust to pressure and decompression time depended on the depth of the dive. For example, a 100m dive would require 4 days decompression.

35. The appellant explained that the time taken for safe pressurisation and decompression means that, for practical reasons, divers enter the pressurisation chamber as soon as practical after arriving on the ship. The diver will then work for up to 28 days in the saturation chamber rather than undergoing pressurisation and depressurisation for each trip to the sea bed. The saturation chamber provides access to the submersible which takes the diver to the sea bed.

36. The actual time spent in the saturation chamber varies and can be changed without notice by the ship supervisor for a wide variety of reasons including weather changes and changes of assignment which would exceed the safe working limits. In one case, a diver in the chamber became ill and the business decided to remove the entire team from the chamber rather than replace the diver.

37. The appellant confirmed that he had worked for Subsea 7 from 2004/5 onwards and had not worked for anyone else since 2004/5. Before working for Subsea 7, he had worked for a range of smaller clients: he would send out his CV to various companies and would work for a period of time and was paid only whilst on the vessel. The appellant explained that a diver builds up relationships with companies in order to be asked back to do more work, offered on a "are you free tomorrow" basis.

38. The appellant's evidence was that, at the same time as working for Subsea 7, he was asking others for work as he was not committed to Subsea 7 and it was necessary to stay in the loop and maintain a relationship with offshore managers. His evidence was that these managers were easily offended and didn't ask a diver back if the diver turned down work. He had, for example, had a long break from Subsea 7 when there had been a change of offshore manager and the new manager did not get on with the appellant.

39. The appellant also stated that he chose not to take work from others, but that he was always networking to maintain documentation and let companies know of updated certifications. This took the form of informal discussion with others in the industry.

40. He explained that the relationship with Subsea 7 followed the pattern of working ad hoc established with smaller clients earlier in his career. Subsea 7 would email a number of divers to say that spaces were available for a project starting in the next week and asking which divers were available. If more divers applied than were required, the ship manager for Subsea 7 would select a team and Subsea 7 would let the others know that they were not required.

41. The appellant would not always be available even if not actively working. There are substantial rules and regulations in the diving industry which need to be adhered to and which include minimum periods of time between periods of compression. This is normally a 1:1 ratio. The required down time can be shorter but, if it is, a minimum of 28 days must then pass before the diver can spend another period in the saturation chamber.

42. However, even if an assignment was accepted by the appellant, assignments could be delayed or cancelled. In some cases, the appellant had been travelling to Aberdeen to meet the ship when he had been advised that the project was cancelled, and he was not needed. The appellant explained that this was rare, but he considered that it happened at least once a year. The appellant's evidence was that he was not paid for his travel if the work was cancelled before he arrived at the ship. Travel expenses would only be paid if he had boarded the ship before cancellation.

43. Divers could also cancel work assignments which they had agreed to undertake, although this was unusual as the diver would not want to upset the manager who had picked them for the team. The appellant provided copies of an email exchange in May 2012 where he had advised Subsea 7 that he could not take on work "as soon as I was told I was required", due to unforeseen family circumstances.

44. The appellant's conditions of engagement dated 1 January 2013 were provided in evidence and included, at clause 8.2, a statement that ODIA personnel (which includes the appellant) are paid the day rate for each day starting on the day mobilised at the worksite. Clause 8.3 entitled the diver to be paid at the day rate if placed on unplanned standby after mobilisation. An allowance for travel expenses is paid for each day or part day worked offshore. The ODIA agreement at clause 6(f) states that the day rate is paid for the day on which a diver is required to mobilise to a worksite.

45. The appellant explained that his contractual day rate for the relevant period was £508.06, but that this was the basic pay rate. For days spent into the saturation chamber, a bonus of £802.08 per day was also paid. Minimum rates are set by the Offshore Diving Industry Agreement (ODIA), a collective agreement between diving contractors and the RMT trade union, to minimise the risk of divers 'flooding' from one contractor to another.

46. Given the rates of pay, businesses will generally want to move divers into the saturation chamber as quickly as possible and then transfer them off ship after

decompression as quickly as possible. The appellant explained that his contract with Subsea 7 did not provide pay for days not worked.

47. Not all of the appellant's working days were spent in the chamber; for each dive, a diver was required on deck outside the saturation chamber. This diver is chosen from the team by the offshore management and is notified once the team arrives on board. The appellant had been told on many occasions that he was to be the diver on deck in a team. As the diver on deck does not earn a saturation bonus, the role is not popular and the diver is usually offered an assignment in the saturation chamber with the next team. However, the appellant explained that this is often turned out as the assignment would follow on immediately from the deck assignment and would involve being away from home for a long period of time. The appellant stated that he had turned down such guaranteed saturation chamber assignments.

48. The appellant submitted that, on the evidence, the nature of his engagement by Subsea 7 was that of self-employment. In particular, it was submitted that there was no mutuality of obligation between the parties as neither party had a legal obligation to offer or accept work (as stated in clause 2.2 of the day rate worker agreement). It was submitted that this was supported by the cases of *Carmichael & Anor v National Power* [1999] 4 All ER 897 and *Hafal Ltd v Lane-Angell* UKEAT/0107/17/JOJ.

49. It was further submitted that in order to provide his services as a diver the appellant required the support of his back office provided by his spouse. As such the services were not exclusively provided by the appellant, such that there was no contract for personal service, but rather a contract for team services. Following *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 such a right of substitution was seen as being mutually exclusive to a contract for personal services.

HMRC's case

50. HMRC submitted that the contract between the appellant and Subsea 7 was one of personal service, rather than a contract for services. The approach to determining whether an employment exist was set out in *Ready Mixed Concrete (SE) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497and requires that there be mutuality of obligation, control by the engager and that the other provisions of the contract are consistent with it being a contract of service.

51. HMRC submitted that the appellant's reliance on *Carmichael* did not assist as mutuality of obligation could arise in a "series of discrete contracts of employment [where mutuality of obligations] subsists throughout each discrete contract" (*Weight Watchers (UK) Ltd* [2011] UKUT 433 (TCC). The point was also confirmed in *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735 where Elias LJ (at §10) noted that "There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed".

52. In the case of the appellant, HMRC submitted that there was mutuality of obligation in each engagement accepted: the appellant was obligated to carry out the agreed work and Subsea 7 were obliged to pay him the agreed rates regardless of the

quality of the work done. Subsea 7 had confirmed to HMRC that that the appellant was not entitled to provide a substitute or engage an assistant to carry out his duties. HMRC submitted that the day rate worker agreement between the appellant and Subsea 7 was a contract for discontinuous work, as described in *Weight Watchers*, being an overarching contract with discrete contracts for each period of work.

53. HMRC submitted that there was also sufficient control by Subsea 7 over the appellant's work and, in particular the manner in which he undertook the work (in accordance with *Narich Pty Ltd v Commissioner of Pay-Roll Tax [1984] ICR 286*). In particular, Subsea 7 had confirmed that the appellant was required to work at the locations and in accordance with shift patterns specified by Subsea 7, and his work was carried out under the full direction and control of Subsea 7.

54. Finally. HMRC submitted that the other conditions of the contract were consistent with it being a contract of service, including provisions relating to performance management, an entitlement to holiday pay, being subject to a code of conduct and being required to notify Subsea 7 if he was unable to work due to illness.

Discussion

55. The approach to determining whether an employment exist was, as both parties noted, set out in *Ready Mixed Concrete (SE) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497: "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service" (at 515).

56. Considering these points, therefore:

57. *Mutuality of obligation:* the principal submission made by the appellant was that there was no mutuality of obligation between himself and Subsea 7 and therefore he could not be considered to be employed as part (i) of the test in *Ready Mixed Concrete* would not be met.

58. I have considered the appellant's submissions as to *Carmichael* and *Lane-Angell* but consider that these do not assist in this case. Both of those cases were concerned with the question of whether there was an overarching contract of employment that continued between periods of work rather than the status of each period of work, in order to access certain employment benefits.

59. In *Carmichael* Lord Irvine noted that "no issue arises as to their status when actually working as guides" and Lord Hoffman remarked that "it may well be that when performing that work, they were being employed". The case, therefore, did not consider in any detail whether the guides were regarded as employed for each period of work. It was concerned only with the overarching arrangement.

60. *Lane-Angell* was, similarly, concerned with the question whether there was an umbrella contract to determine whether the claimant had sufficient qualifying service to be entitled bring a claim for unfair dismissal. The Employment Appeal Tribunal did not disagree with the Employment Tribunal's finding that there was mutuality of obligation during periods when the claimant was on the rota.

61. HMRC submitted that, for tax purposes, there is no requirement that there be mutuality of obligation between periods of work. What matters is there is mutuality of obligation during each assignment, as set out in *Weight Watchers*.

62. Although in this case there was no overarching mutuality of obligation between assignments (on the evidence and as stated in clause 2.2 of the day worker agreement), the contract does not exclude the possibility of mutuality of obligation within each assignment. In correspondence with HMRC, for example, Subsea 7 confirmed that divers would be paid for an assignment even if no work could be undertaken on a particular day as a result of (for example) bad weather conditions. Similarly, once on board ship, the appellant was required to perform the duties assigned to him by Subsea 7. This was not disputed by the appellant. I find therefore that there is mutuality of obligation during each assignment.

63. *Right of substitution*: the appellant argued there was no contract for personal service as his spouse provided back office services and so the services were not exclusively provided by him, and that the contract was for team services. HMRC submitted that the appellant was not allowed by Subsea 7 to provide a substitute to undertake activities on his behalf.

64. The day rate worker agreement is specifically between Subsea 7 and the appellant. It makes no reference to partnership and was entered into three years before the partnership existed. There was no suggestion, or evidence, that the contract had been novated to the partnership. Subsea 7 stated in correspondence that they would not enter into diving contracts with partnerships. In my view, the contract is clearly personal to the appellant as "the Individual" and requires "the Individual … carry out all duties and tasks". I consider that there is no scope for interpreting the contract as being one for "team services".

65. The appellant's evidence was that his spouse dealt with administration whilst he was away on assignment with Subsea 7 and that she dealt with third party professionals and liaised with customers to find future work for the appellant.

66. In my view, none of these activities relate to the appellant's engagement by Subsea 7 and so the performance of such activities by the appellant's spouse cannot be regarded as being in substitution for the appellant in the Subsea 7 contract, even if such substitution was permitted.

67. *Control:* The appellant did not make particular submissions as to control, and HMRC stated that control was exercised by Subsea 7.

68. The contract between the appellant and Subsea 7 requires the appellant to "carry out all duties and tasks of whatever nature … as may be required from time to time for the Company or [any firm or company to which the [appellant] is assigned by the

Company to provide services] (clause 2.1). The agreement also requires that the appellant work whatever hours are required (clause 5). Although the appellant is not obliged to accept any given assignment, the contract is clear that, where an assignment is accepted, Subsea 7 can then utilise the appellant as they choose.

69. Further, the appellant's evidence was that he did not know until he arrived at the ship what his role would be on any given assignment as it was the ship manager who would determine (for example) which team member would be the deck diver. It was also the ship supervisor who determined the length of time that the team spent in the saturation chamber (subject to health and safety constraints).

70. Correspondence between Subsea 7 and HMRC states that Subsea 7 consider that divers are under the full direction and control of dive supervisors and the offshore manager, and that they are required to follows Subsea 7 protocols for all activities. Any change from the protocols is subject to a management of change procedure and requires authorisation by Subsea 7. Subsea 7 also confirmed that the divers can be given extra tasks and can be moved from task to task and reassigned if necessary. This was not disputed by the appellant.

71. On the evidence provided, it is clear that it is Subsea 7 who has control over the work undertaken by the appellant on any given assignment. Subsea 7 can, and does, determine the tasks to be undertaken by the appellant and the hours to worked on any given assignment.

72. *Other factors:* The appellant stated that he (and, on his behalf, his spouse) sought work from other companies as it was necessary to stay in the loop and maintain a relationship with offshore managers, but also that he chose not to take work from those companies.

73. The appellant also stated that he had worked only for Subsea 7 from 2004/5 onwards and subsequently explained that his contacts with other companies consisted of informal networking and updating contacts in the industry. I find, therefore, that the appellant was not in fact looking for work from other companies whilst working for Subsea 7.

74. The day rate works agreement states that the appellant accrues and is paid holiday pay for each day of work (Clause 6). I consider that this is indicative of employment, as a self-employed individual would not be entitled to holiday pay from an engager, even though the clause also notes that the appellant is required to take his holidays between assignments.

75. *Risk:* the appellant stated that his travel expenses would only be paid if he had boarded the ship before cancellation; this was, he stated, a rare occurrence and only happened once a year. The evidence from his contract and payslips is that a standard travel allowance was paid by Subsea 7 for each day worked rather than that travel expenses were specifically reimbursed. No other financial risk was identified by the appellant.

76. In correspondence with HMRC, Subsea 7 stated that defective work was not required to be corrected by a diver and that the diver would be paid for an assignment

regardless of performance. If work was unsatisfactory, Subsea 7 bore the cost of correcting the work.

77. I consider, therefore, that the appellant had very limited financial risk in undertaking the assignments as this risk was limited to the possibility that travel expenses would be incurred for an assignment that was cancelled whilst he was on route to the ship; the appellant described this event as “rare”.

Conclusion as to employment status

78. I find, therefore, that there was mutuality of obligation in each of the assignments taken on by the appellant; that Subsea 7 had substantial control over the appellant’s work (both as to what work was done and how it was done); and that the other factors raised are not inconsistent with a contract of service.

79. On that basis, the relationship between the appellant and Subsea 7 was one of employment and not a trade capable of being carried on in partnership (or, indeed, as a sole trader).

Whether there was a partnership

80. The appellant further argued that, even if he were regarded as employed, the case of *Newstead v Frost* 53 TC 525 made it clear that a partnership can exist to exploit the earnings of one partner and that the partners do not have to have the same role. The appellant acted as the diver, whilst his spouse provided administration functions.

81. The appellant also noted that, in the case of *Valantine* [2011] UKFTT 808, HMRC had argued that limited participation was not a bar to someone being a partner in a partnership.

82. The appellant’s evidence was that he had entered into a partnership with his spouse on 6 April 2009, having previously been a sole trader. Although no partnership document was entered into, it was submitted that the partnership existed because it met the criteria in s1 Partnership Act 1890: “Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.” s45 of the Partnership Act 1890 states that “The expression “business” includes every trade, occupation, or profession.” It was submitted he Oxford English Dictionary (second edition) includes “employment” within the definition of each of those terms. In addition, s2 Partnership Act 1890 provides that “The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business”.

83. It was submitted that the Partnership Act did not distinguish between employment and self-employed and that, as the definitions of trade, occupation, and profession each include employment, the employment of the diver could be carried on by the partnership.

84. The appellant submitted that he and his spouse considered that they were in partnership and that his income belonged to the partnership. Although Subsea 7 were not formally notified that the appellant had entered into a partnership with his spouse

it was submitted that this did not affect the position. Subsea 7 had not told the appellant had he could not operate through a partnership. It was submitted that, even if Subsea 7 had told HMRC that they would not engage a partnership, they were referring to a partnership of two or more divers and not a partnership between a diver and a person providing administrative support.

85. It was further submitted that there are acknowledged situations where an employment can be carried out on behalf of a partnership. For example, there are tax concessions that apply where a partner of a firm acts as director of a client, which enable the income to be treated as income of the partnership for tax purposes rather than as employment income of the individual.

86. The appellant also argued that the decision in *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98 indicated, in paragraph 74, implied that it was possible to have a valid partnership in which the partners enter into employment contracts with a client. It was submitted that this supported the contention that the partnership could be employed by Subsea 7.

87. Finally, the appellant argued that if the engagement with Subsea 7 was not with the partnership then the appellant had entered into it without the consent of the other partner and so the appellant was required to account to the partnership for the profits made, under s30 Partnership Act 1890.

HMRC's case

88. HMRC submitted that no partnership existed as the appellant and his spouse did not carry on any business in common. In particular, the contract with Subsea 7 was not with a partnership and the work for Subsea 7 was not carried out by the partnership.

89. Therefore, even if the partnership existed, the income received from Subsea 7 was not income of a partnership. The contract was entered into between Subsea 7 and the appellant as an individual, not with the partnership. Subsea 7 confirmed to HMRC that they would not offer a contract for work through a partnership or a company.

Discussion

90. As already set out above, I have found that the appellant was an employee of Subsea 7 and that s15 does not operate to create a trade which can be carried on in partnership.

91. I do not agree with the appellant's submissions that the case should be equivalent to *Newstead v Frost*. The appellant's contract with Subsea 7 was entered into three years before the partnership was created, and was not novated to the partnership, and so the contract cannot have been entered into by the partnership in order to provide the services of the diver. The contract is, as set out above, clearly a contract of personal service between Subsea 7 and the appellant alone. It is not particularly surprising that Subsea 7 did not see any need to tell the appellant that he could not provide services through a partnership, as their contract was not with a partnership.

92. I also do not agree with the appellant's submissions that the partnership could be employed. As set out above, the partnership was not employed by Subsea 7 in any case. The decision in *Protectacoat* refers to the possibility of the partners in a partnership each being engaged as employees: it does not, even in obiter, find that the partnership itself can be engaged as an employee. It is well established that an employment requires personal service and so cannot be undertaken in partnership.

93. The reference to the tax concession for partners engaged as directors does not, in my view, assist: the earnings of a director are (in the absence of the concession) taxed as employment income because a director is an officeholder and statute defines income of officeholders as being within the scope of PAYE. This does not mean that the engagement of the partner as a director equates to employment of the partnership. Indeed, if a partnership could be employed, there would be no need for the concession.

94. The reference to s30 Partnership Act 1890 is also not of assistance: the obligation is on the partner to account for *profits* earned without consent in carrying on a business of the same nature. As already established, I find that the appellant was employed by Subsea 7 and so was not carrying on a business. As also established, s15 applies only for income tax purposes and so cannot be interpreted as meaning that the appellant was carrying on a business for the purposes of the Partnership Act 1890.

95. As such, I consider that the question whether there is a partnership is largely irrelevant: the appellant's activities in relation to the contract with Subsea 7 do not amount to a trade which could be carried on by that partnership and I find that there are no circumstances in which the appellant's employment could be regarded as giving rise to income which could be attributed to the partnership for tax purposes.

Decision

96. For the reasons set out above, I find that the appellant was an employee of Subsea 7; that the income from his contract was not income of a partnership but, instead, income of the appellant. The appeal is dismissed.

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

ANNE FAIRPO

TRIBUNAL JUDGE
RELEASE DATE: 17 June 2019