TC02275

Appeal number: SC/3227/2008

TYPE OF TAX – Corporation tax - deductibility of expenditure - sponsorship payments intended to improve fortunes of sports club - expectation of trade benefits principally as a result of recognition by others involved with the club of taxpayer's benefaction - dual purpose of benefitting sports club and taxpayer's trade - payments not deductible - direct promotion of taxpayer's business also obtained - value of that promotion not deductible - Income and Corporation Taxes Act 1988, s 74

FIRST-TIER TRIBUNAL
TAX CHAMBER

INTERFISH LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS PAINES QC

Sitting in public in London on 10 February 20012

Jonathan Peacock QC, instructed by Deloitte LLP, for the Appellant

Paul Shea, Appeals and Reviews Unit, for the Respondents

DECISION

1. On 13 May 2010 I gave a decision provisionally dismissing the appeal of the Appellant ("Interfish") against a decision of HMRC that certain payments made by Interfish to Plymouth Albion Rugby Football Club were not deductible from Interfish's profits under section 74 of the Income and Corporation Taxes Act 1988. My findings of fact and the reasons for so deciding can be found in that decision. In summary, at least the bulk of the payments was, on the evidence, made in order to improve the trading position of the Club in order that those involved with the Club (who included influential local business people) would thereby be induced to look favourably on Interfish in ways that would assist Interfish's trade. I decided that sums paid for that purpose were not paid 'wholly and exclusively' for the purposes of the trade of Interfish, as required by section 74, since benefitting the Rugby Club was not only an inevitable consequence of the payments but also a purpose of Interfish in order to gain what Mr Thornhill QC for Interfish had described as 'reciprocal support'.

2. At the same time, it appeared to me that the sums paid might have included sums expended for direct promotion of Interfish to the public: there was, for example, evidence that Interfish's logo had appeared on players' shirts, on tickets and on hoardings at the pitch. I did not have full evidence on the make-up of the sums for which deduction was claimed. I said in my decision that if the parties were unable to decide on the correct tax treatment of the deductions claimed by Interfish in the light of my decision, I would hear further argument.

3. I heard further argument on 10 February 2012. In the meantime, Interfish had sought and obtained permission from the Upper Tribunal to appeal against my decision. There had also been unsuccessful attempts by the parties to agree on what, if any, sums might be deductible in accordance with my decision. Interfish understandably wished to have my further decision on deductibility, both against the eventuality that its appeal did not succeed and also in order that the Upper Tribunal might be in a position to understand fully the line of demarcation between deductible and non-deductible expenditure that I was drawing. I was asked to decide the amounts that would be deductible both on the basis (i) that my previous decision was correct and (ii) that it was not; this was in order to forestall the need for a further hearing if the appeal to the Upper Tribunal succeeded.

4. At the resumed hearing I received a further witness statement from Mr Jan Colam, the controlling shareholder of Interfish, who was not cross-examined. The statement pointed out that the total of the payments to which the appeal had related – some £311,000, £389,00 and £529,000 in each of the tax years – amounted only to between 1.15% and 3.22% of Interfish's turnover in the tax years in question. It said that the payments had been to promote the trade of Interfish not merely by obtaining advertising or direct promotion but by obtaining the commercial advantages that a long term commitment to the Club would produce; Mr Colam had thought of the payments not in terms of what the benefits to Interfish might have cost, but of what they were worth.

5. The statement proceeded to give reasoned estimates of the annual value that Interfish obtained from the payments. It is sufficient to list these without going into Mr Colam's reasons for the values he ascribed.

(i)	Hoardings at the ground	£25,000
(ii)	Logos on players' shirts	£25,000-£50,000
(iii)	Promotion of Interfish on Club's tickets, programmes, marketing materials and website	£10,000
(iv)	Access to the Club's best hospitality facilities	£10,000
(v)	Availability of players to promote Interfish's Retail fish counters	£125,000-£250,000
(vi)	Being known locally as a significant supporter of the Club	£25,000
(vii)	Being known locally for strong local community involvement	£100,000
(viii)	Being able to promote itself nationally and internationally as having strong local social responsibility	£50,000
(ix)	Access to key local and regional business figures	Intangible

6. It was agreed at the hearing that promotion on hoardings had been separately paid for and the expenditure allowed by HMRC as deductible. Item (v) is further explained in my previous decision at [26].

7. It is convenient to reach a decision first on basis (i) (as described in paragraph 3 above). For Interfish Mr Peacock QC submitted first that it was not open to HMRC to say that in incurring expenditure for the purposes of his business a taxpayer had made a bad bargain; if a taxpayer paid 100 for a benefit which he valued at 100, it was irrelevant whether the true value of the advantage was (say) 700 or only 70. It could only be otherwise if the disparity between what the taxpayer had paid and what the advantage could ever be worth was so great as to call the taxpayer's motives in question. Similarly, he submitted, it was not open to HMRC to say that the taxpayer might have obtained the same advantage for less. Since Mr Colam estimated the value of the advantages at an amount at least as great as the amounts paid, the whole of the payments were deductible.

8. In the alternative, Mr Peacock focussed in his submissions on items (i) to (v) in the above list, being what might be described as the 'visible' promotion that Interfish derived from the payments. Mr Colam had estimated those as having an annual value of between £195,000 and £345,000 (being the totals of items (i) to (v) taking respectively the lower and the higher ends of the ranges that Mr Colam had specified). Mr Peacock submitted that it was proper to apportion the amounts paid: see *Copeman v Flood & Sons Ltd* [1941] 1 KB 202. I could properly take the mid points of the ranges, which by my calculations gives a total of £260,000.

9. Acknowledging that a separate charge had been made, and its deductibility accepted by HMRC, in respect of the advertising hoardings (item (i)), Mr Peacock

accepted in the further alternative that I should allow the deduction of the mid-range value of items (ii) to (v), which by my calculations would be £235,000.

10. For HMRC Mr Shea submitted that section 74 permitted the apportionment of expenditure part of which was incurred wholly and exclusively for trade purposes (such as a telephone bill for a mixture of business and private calls), but not of expenditure the whole of which was incurred both for trade and private purposes (such as the cost of a journey made for both purposes). He accepted that visible promotion of Interfish at the Club furthered the trade of Interfish and that any separate payments in respect of that would be deductible, but submitted that there was no evidence to demonstrate that any part of the disputed payments had been made exclusively for visible promotion, as opposed to the dual purpose of obtaining visible promotion and of furthering the interests of the Club with a view to obtaining 'reciprocal support'. He also disputed that the deductible amount could be based on the perceived value to Interfish of the promotional benefits rather than what Interfish would have had to pay for them.

11. Mr Shea nevertheless accepted that Interfish had obtained advertising and promotion that could have been separately purchased and the cost of which would have been disallowable if it had been. HMRC was prepared to settle the case on the basis of allowing deduction of 5% of the expenditure, based on an estimate of the cost at which the advertising and promotion could have been purchased on the basis of the Club's published rates.

12. In reply Mr Peacock appeared to accept in principle that it was the cost rather than the value of a benefit to a taxpayer's trade that was deductible, but submitted that where there was no evidence of a market price, the next best approach was to decide what would be a reasonable market price; the taxpayer's perception of the value of the benefit was an indicator of a reasonable market price, being what it would be appropriate for a taxpayer to pay.

13. *Copeman v Flood* was the only authority to which I was taken. There a family-owned company had paid extravagant amounts of directors' remuneration to two children of the family. The General Commissioners allowed the whole amount as deductible, holding that they could not interfere with the prerogative of the company in paying such remuneration as it thought fit. Lawrence J held that it did not follow from the fact that the money had been paid as directors' remuneration that it had been wholly and exclusively expended for the purposes of the company's trade; while the Commissioners could not interfere with the company's prerogative to pay what it thought fit, they nevertheless had to consider whether the money was expended wholly for the purpose of the company's trade (as opposed to some other purpose, such as for example a disguised distribution of profits).

14. He remitted the case to the Commissioners to find as a fact whether the money was wholly and exclusively expended for the purpose of the company's trade and, if not, to find how much of the money was so expended. The case is of no assistance on how the Commissioners should approach that task, but, it is implicit in the judgment that if they should find that £*x* was paid to obtain the directors' services and the

balance for some other purpose, the two amounts could be separated and the former allowed as deductible.

15. In the present case (apart from the advertising hoardings, as to which see paragraph 9 above), there was no evidence that any part of the disputed payments had been charged by the Club in respect of the visible promotion, nor as to the terms, if any, upon which the Club made the visible promotion available or as to the precise periods within Interfish's period of sponsoring the Club over which any of the visible promotion was given. All I know is that Interfish made certain payments – tailored to the Club's financial needs as described in my previous decision – and that, over and above the influence and expectation of reciprocal benefits that Interfish gained within the local business community, it obtained items (ii) to (v) of the visible promotion at no extra charge.

16. The evidence falls short of enabling me to find that any part of Interfish's payments was for the purpose of obtaining any of the visible promotion. Mr Colam's estimates in his witness statement of the value of its components are expressed in the present tense. His evidence falls short of saying (for example) that he placed a particular value on any element at the time of making any of the payments, expected Interfish to receive particular items of visible promotion at that time or feared that, unless payment was made, any visible promotion would be withdrawn. I cannot therefore find that any part of the payment was made wholly and exclusively for the purpose of obtaining the visible promotion.

17. Assuming in Interfish's favour that a part of its purpose in making the disputed payments was to obtain the visible promotion, another part of its purpose must have been to obtain the reciprocal benefits that I discussed in my previous decision. I therefore consider that Mr Shea must be right in submitting that the whole of the payments had, at best, the 'dual purpose' of obtaining the visible promotion and the reciprocal benefits; it is not possible to say that any part of the sums paid was incurred wholly and exclusively in respect of the visible promotion.

18. Moreover, if I was right in deciding that expenditure for the purpose of obtaining the reciprocal benefits was not expenditure wholly and exclusively for the purposes of Interfish's trade, the fact (if it be the case) that the purposes for which the sums were paid also included obtaining the visible promotion cannot displace the conclusion that I have already reached, that the expenditure was not deductible.

19. HMRC's preparedness to allow deduction of a proportion of the payment equal to the estimated reasonable cost of obtaining the visible promotion sits awkwardly with Mr Shea's submission that the whole amount was disallowable as being at best paid for a dual purpose. The conclusion that apportionment cannot take place unless it is possible to segregate a payment, pound for pound, into payments exclusively for the purposes of the trade and other payments is well founded in authorities such as *Bowden v Russell and Russell* 42 TC 301, to which I referred in my previous decision at[42]. I therefore conclude that the true position is that the whole amount of the disputed payments is non-deductible. The separate payment for advertising hoardings was properly allowed as deductible by HMRC.

20. I turn to the second basis on which I was invited to rule on the amount deductible by Interfish. Mr Peacock QC submitted that, if (contrary to my earlier decision) the purpose of obtaining what for convenience I shall continue to describe as 'reciprocal support' was sufficient to make the payments deductible, then the whole of the payments would be deductible. Mr Shea for HMRC agreed in principle (as I do), but not as regards any amounts specifically disallowed by any provision of law. He said that item (iv) in the list at paragraph 5 above was disallowed under s 577 of ICTA 1988, which disallows 'expenses incurred in providing business entertainment' and (by section 577(7)) 'expenses incurred in providing anything incidental thereto'.

21. Mr Peacock pointed out that item (iv) did not relate to the expense of providing hospitality, which according to Mr Colam's evidence was separately paid for and not claimed to be tax-deductible; it related to the additional benefit, over and above the tickets and the hospitality itself, of guaranteed access to the best hospitality facilities that the Club could offer. In his submission under basis (i) above, Mr Peacock had likened it to a debenture at some other rugby grounds, such as Twickenham, which command a fee even though they do not include provision of a seat at the ground but merely give priority in reserving and paying for one.

22. Section 577 disallows (even if expended wholly and exclusively for the purposes of a taxpayer's trade) 'expenses incurred in' providing 'hospitality' and 'anything incidental thereto'. It does not seem to me to be necessary in this case to decide whether expenditure in connection with a debenture of the sort referred to by Mr Peacock amounts to expenditure incurred in providing hospitality or anything incidental to it. I find that no part of Interfish's payments falls foul of section 577 for much the same reasons as I find that no part of them was exclusively expended for the purposes of Interfish's trade.

23. All that one finds in this case is substantial sponsorship payments, fixed by reference to Mr Colam's estimate of the Club's reasonable financial needs from time to time, as an indirect result of which Mr Colam was, not surprisingly, given the best of the hospitality facilities; Interfish paid separately for the hospitality it enjoyed. I cannot identify within those sponsorship payments any element of expenditure that was incurred in providing hospitality or anything incidental to it. Accordingly, if I was wrong to exclude payments to the Club with a view to receiving 'reciprocal benefits' from deductibility, then the whole of the disputed payments would be deductible.

24. Accordingly my conclusion is that on basis (i) in paragraph 3 above none of the payments in issue in this appeal are deductible and on basis (ii) all of them are.

25. This document contains full findings of fact and reasons for my 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.

NICHOLAS PAINES QC
TRIBUNAL JUDGE

RELEASE DATE: 4 April 2012