



TC02127

Appeal number: TC/2011/05063

INCOME TAX - Seafarers' earnings; ships; offshore installation; whether vessel offshore installation; Income Tax (Earnings & Pensions) Act 2003, Sections 378, 384 and 385. Income & Corporation Taxes Act 1988, Section 837C. Whether vessel "stationed" – yes. Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**GRAHAM PATERSON LIMITED
AND GRAHAM PATERSON**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS,
IAN M P CONDIE, CA**

Sitting in public at Edinburgh on 8 June 2012

Miss Kanika Bawa for the Appellant

**Mrs Chris Cowan, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. This is an Appeal by Graham Paterson Limited. It became clear at the outset of the hearing that the Appellant was in fact Graham Paterson (“GP”) as an individual and the correspondence in relation to this matter between the Appellant and the Respondents had been in the name of GP. The Tribunal for the purposes of clarity and with the agreement of the Appellant and the Respondents directed that the hearing should proceed as an appeal by GP.
2. GP’s Appeal was against a closure notice issued on 27 October 2010 for 2006-2007 requiring repayment of a claim for Seafarers’ Earnings Deduction (“SED”) for the period 6 April 2006 to 10 December 2007 whilst he was on board a vessel “Edda Fjord”. The total amount of tax claimed was £6,500.18.
3. HMRC state that the criteria for making a claim for SED has not been met.

Facts

4. No witnesses were present at the hearing.
5. Reference was made to the unusual circumstances whereby the issue of SED in relation to the Edda Fjord during the same period as under this Appeal had been the issue of a First-tier Tribunal case, *Graham Gouldson and HMRC* (TC/2009/106551) (“the Gouldson case”), which in turn had been the subject of an Upper Tribunal Appeal (“the Gouldson Appeal”) 2011 [UKUT]238.
6. GP was a seafarer between 6 April 2006 and 10 December 2006 during which time he served on board the Edda Fjord.
7. The Edda Fjord’s official classification is as a multi purpose supply vessel (“MPSV”).
8. During the relevant period, the Edda Fjord worked in conjunction with the semi-submersible rig called Thunderhorse in the Gulf of Mexico.
9. Thunderhorse was in the process of being constructed as part of a drilling platform/storage facility anchored to the seabed.
10. It was accepted by the parties that whereas Thunderhorse was not in use in the exploitation of mineral resources at the relevant period it was *to be* used for a specific purpose, principally “for the purposes of exploiting mineral resources by means of a well” when its construction was complete.
11. The Edda Fjord had previously been utilised in conjunction with a floating storage tank called Bonga off the Nigerian coast and, during this period and whilst in the Gulf of Mexico, the vessel had accommodation units attached to it which housed several hundred construction workers who were working on the construction of the

rigs/storage tanks. It was established that the number of accommodation units which had been available when the vessel was off the Nigerian coast had been considerably increased for its work in the Gulf of Mexico.

5 12. Construction work on Thunderhorse continued round the clock and the role of the Edda Fjord was to provide accommodation for several hundred construction workers and ferry them backwards and forwards to Thunderhorse and provide supplies. There was some dispute as to whether the transfer was by way of a gangway or by a basket transfer otherwise known as a “Billy Pugh”.

10 13. GP provided evidence from the shipping company which owned the Edda Fjord that there was no gangway whereas HMRC, relying on the Gouldson judgement, stated that there was.

14. Extracts from the logbook produced by employees of the Norwegian owners of the Edda Fjord, Østensjø Rederi (“OR”), showed evidence of constant activity in the ferrying of construction workers.

15 15. Reference was made to the 500 metre area around Thunderhorse into which the Edda Fjord had to enter in order to carry out the basket transfer task. An example of a log book on 1 November suggested that at 0820, the 500 metre checklist was completed, at 0827 the vessel entered the 500 metre zone, that the basket transfer took place between 0857 and at 0907 the vehicle exited the 500 metre zone. This appeared to be repeated throughout the day and, on that particular date, basket transfers took place at 0525, 0625, 2350, in addition to the 0855 transfer.

16. A review of other pages from the log book suggested this was a typical daily task of the Edda Fjord.

25 17. When the basket transfer process took place, the vessel was not anchored but instead relied on “dynamic positioning” (“DP”) which is a computer controlled system which automatically maintains a vessel’s position and heading by using her own propellers and thrusters. It was understood that position reference sensors combined with wind sensors, motion sensors and gyrocompasses provide information to the computer pertaining to the vessel’s position and the magnitude and direction of environmental forces affecting its position. The aim is to keep the vessel steady and in one place.

18. It was suggested that the Edda Fjord had to remain outwith the 500 metre zone or, presumably radius, of Thunderhorse for safety reasons and, furthermore, that the vessel stayed within the vicinity of Thunderhorse by sailing.

35 19. GP did not work on Thunderhorse but on the Edda Fjord where he was a pipe fitter and was involved in construction work. No clear evidence was produced as to the amount of each day that was devoted to this kind of work.

40 20. In addition to a certain amount of construction work, another role of the Edda Fjord was to provide fresh water and supplies to Thunderhorse and based on the Gouldson case this would probably be once a week.

21. Although no direct evidence was available, it was accepted by the parties that the Edda Fjord did not supply itself by travelling from the Thunderhorse area, which was approximately 150 miles from the shore, to a nearby port. Instead, it was accepted that other vessels would come and supply the Edda Fjord, which would then in turn supply Thunderhorse.

22. HMRC supplied copies of internet articles confirming the use of the Edda Fjord as a dynamically positioned “floatel” (floating hotel), that the vessel was fitted with approximately 330 beds whilst in Nigeria and later 450 beds for BP’s Thunderhorse platform in the US Gulf of Mexico; this included statements such as the Edda Fjord being utilised to transfer personnel to and from offshore installations as well as providing accommodation in remote areas of the world.

23. Photographs and pictures of the Edda Fjord, both in its condition as a MPSV, and as a MPSV with the accommodation attached, were submitted.

24. Letters or emails were submitted from OR. One such communication dated 6 August 2010, confirmed that the Edda Fjord was provided to BP for construction support services of Thunderhorse and that the services included general and liquid cargo supply and accommodation.

25. OR said the Edda Fjord was never connected to Thunderhorse by moorings nor at anchor during the duration of the contract.

26. A further OR communication dated 22 July 2010 stated that “Graham Person (sic) was on board the Edda Fjord during our stay at the BP Thunderhorse project as shown in his service sea book. During this time, the Edda Fjord was never fixed to the platform by mooring lines or gangway, just stayed alongside on DP during the transfer of people, general cargo and bulk cargo”.

27. HMRC referred to a fax from OR dated 7 April 2008 which said “Edda Fjord was finished, demobilising from an accommodation unit and into a supply vessel 19 December 2006”.

28. Reference was made to the fact that the word “ship” is not defined in the Income Tax (Earnings and Pensions) Act (“ITEPA”) 2003 other than at Section 385 which says “it is not a ship if it is an offshore installation”.

29. “Offshore installation” is defined at Section 837C of the Income and Corporation Taxes Act (“ICTA”) 1988.

30. It was established that neither Thunderhorse rig nor the well were in production until June 2008 because as a result of shoddy workmanship and poor weather it was unfit for use until then.

31. Reference was made to guidance produced by the RMT union issued on 26 March 2009 which stated that the Inland Revenue had accepted that “vessels that might be treated as offshore installations under the Inland Revenue guidance are in fact multi purpose vessels which can be used for navigation and, in addition, that

other vessels may have been constructed with a particular purpose in mind but, subsequently, changed for different users”.

5 32. RMT also claimed to have persuaded the Inland Revenue that a claim for SED should not be ruled out on the basis that the vessel on which a seafarer might be engaged remains stationed for more than five days.

10 33. Reference was also made to the Inland Revenue guidance which stated that “when applying the legislation, the rule of thumb was that a vessel standing or stationed for more than three days was regarded as standing and stationed for the purposes of the definition of offshore installation, whereas a vessel that was standing or stationed for three days or less did not satisfy the definition. In a small number of cases, this rule of thumb was used in claims to SED”.

34. The HMRC guidance states that this is not a statutory rule and has no legal basis but HMRC accepted that, as a broad guide, it may be helpful in some borderline cases and that during the relevant period the test was five days.

15 35. GP claimed that the vessel sailed within a period of five days or at times less than five days for the purpose of conducting engine trials or burning soot from exhausts or funnels. This involved sailing several miles away from the platform and was clearly navigation and not a mere movement in deep water.

20 36. Reference was made to an OR letter dated 20 April 2012 by Havad Melvaer which stated that GP “was not directly hired by OR and worked on the vessel on a contractual basis hired by a third party. Edda Fjord was, in this period, not permanently attached nor on DP and was only approaching the 500 metre zone to send personnel back and forth between Thunderhorse and the vessel. Please also be advised that Edda Fjord used to sail at least every five days either for engine trials and/or burning suite (sic) from exhausts or funnels etc. This is verified from some scans from the ship’s logs attached to the letter”.

37. Mr Melvaer was not the master at the time but had provided copy logs.

Legislation

38. Section 29 Taxes Management Act 1970 states that -

30 “29 (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

35 (b) that an assessment to tax is or has become insufficient, or –

(c) that any relief which has been given is or has become excessive

The officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or

further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.”

“29 (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above –

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

Unless one of two conditions mentioned below is fulfilled.”

“29 (4) The first condition is that the situation mentioned in subsection (1) above is attributable to the fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.”

“29 (5) The second condition is that at the time when an officer of the board –

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer’s return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return;

The officer could not have been reasonably expected on the basis of the information made available to him before that time, to be aware, of the situation mentioned in subsection (1) above.

39. Section 378(1) ITEPA 2003 states -

“A deduction is allowed from earnings from an employment as a seafarer if: -

(a) the earnings are relevant taxable earnings,

(b) the duties of the employment are performed wholly or partly outside the United Kingdom, and

(c) any of those duties are performed in the course of an eligible period.”

40. Section 384 ITEPA 2003 gives the meaning of employment “as a seafarer” -

“In this chapter employment ‘as a seafarer’ means an employment (other than Crown employment) consisting of the performance of duties on a ship or of such duties and others incidental to them”.

41. Section 385 ITEPA 2003 gives the meaning of “ship” stating -

“In this chapter ‘ship’ does not include an offshore installation.”

42. Section 837C ICTA 1988 gives the meaning of “offshore installation” -

“837C(1) For the purposes of the Corporation Tax Acts unless the context otherwise requires, ‘offshore installation’ means a structure

which is, is to be, or has been, put to a use specified in subsection (2) while –

(a) standing in any waters

(b) stationed (by whatever means) in any waters, or

5 (c) standing on the foreshore or other land intermittently covered with water.”

“837C(2) The uses are:

(a) use for the purposes of exploiting mineral resources by means of a well;

10 (b) use for the purposes of exploration with a view to exploiting mineral resources by means of a well;

(c) use for the storage of gas in or under the shore or the bed of any waters;

(d) use for the recovery of gas so stored;

15 (e) use for the conveyance of things by means of a pipe;

(f) use mainly for the provision of accommodation for persons who work on or from a structure which is, is to be, or has been, put to a use specified in any of paragraphs (a) to (e) while –

(a) standing in any waters

20 (b) stationed (by whatever means) in any waters, or

(c) standing on the foreshore or other land intermittently covered with water.”

Cases Referred To

25 *Torr v HMRC* 2008 Spc 00679

Spowage & Ors v Revenue & Customs [2009] UKFTT 142 (TC)

Graham Gouldson v Revenue & Customs [2010] UKFTT 349 (TC)

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Graham Gouldson v HMRC [2011] UKUT 238 (TCC)

John Davies v Revenue & Customs [2012] UKFTT 127 (TC)

GP's Submissions

43. GP says that HMRC has classified Edda Fjord as an offshore installation and not a ship, which he says, is an incorrect and/or narrow description of the task the vessel was performing.

44. GP says that the Edda Fjord qualified as a ship and was not standing or
40 stationed in heavy waters.

45. GP says that a ship must be capable of navigation and this means ordered movement across the water; that Edda Fjord was used to sail within a period of at least five days or at times less for conducting engine trials and burning soot from the exhaust or funnels and this has been verified by OR.

5 46. GP says the Edda Fjord sailed several miles away from Thunderhorse and, whilst doing so, used its navigating equipment and that this was not a mere movement in deep water due to weather but regular events.

47. GP says that Edda Fjord was never fixed to Thunderhorse by mooring lines or a gangway and that this is confirmed by OR and, at other times, it was always moving
10 and was neither wholly static nor anchored.

48. GP says that the GP positioning was primarily used while transferring personnel by the basket transfer method to Thunderhorse.

49. GP accepted during the hearing that an offshore installation could include a vessel that was mainly for the provision of accommodation for persons who work on
15 or from a structure which is to be put to a use for exploiting mineral resources by means of a well and/or exploration with a view to exploiting mineral resources by means of a well but went on to say that the Edda Fjord was a MPSV and was not mainly for the provision of accommodation because it could be used for navigation; was performing multiple services other than accommodation and that it would not be
20 fair to consider only one service and ignore others in a way which would narrow the description of use.

50. GP says that neither the platform nor the well were in production until June 2008.

51. GP says that the Edda Fjord was not mainly for accommodation and was not
25 stationed and, accordingly, was not an offshore installation and so SED should be allowed.

HMRC's Submissions

52. HMRC say that the Edda Fjord was an offshore installation and not a ship. It was designed as an accommodation unit and it was used as an accommodation unit
30 and that this was its main use.

53. The use in this form continued until 19 December 2006 when it was demobilised from an accommodation unit into a supply vessel as verified by OR.

54. HMRC say that as the Edda Fjord was mainly used for accommodation it fits the definition in Section 837C(2)(f) of the Income and Corporation Taxes Act 1988.

35 55. HMRC refer to the Gouldson case in relation to the same vessel over the same period and to the Tribunal's decision that the SED should not be allowed as the Edda Fjord was an offshore installation.

56. HMRC say that GP was aboard during this period, that he was aware of the Gouldson case and he had not disputed any of the findings in any correspondence with HMRC prior to the Tribunal hearing.
57. HMRC rely on the evidence in relation to Edda Fjord whilst in the Gulf of Mexico based on the statements made in the *Gouldson* case.
58. HMRC distinguish the *Spowage* case because the vessels in that case were floating toolboxes so that their main or primary function was providing tool services even although they also provided accommodation.
59. HMRC say that whilst the Edda Fjord may have performed other tasks it was mainly accommodation and the other tasks were minimal.
60. HMRC refer to the *Gouldson* Appeal in relation to the contention that the Edda Fjord was an offshore installation as a structure in the course of construction which on completion would be used for mineral exploitation.
61. HMRC say that their guidance notes are simply guidance and state only a rule of thumb in relation to the length of period a vessel is standing or stationed.
62. HMRC say that the relevant test is whether a structure is an offshore installation by reference to Section 837C(1)(b) and in particular, whether it is stationed by whatever means in any waters.
63. HMRC refer to the *Torr* case which stated as follows:-
- “I have no hesitation in deciding that the use was whilst standing or stationed.
- The new shorter Oxford English Dictionary gives the following meaning for stationed:-
- ‘1.Assign a post, position or station to (a person, troops, ships etc); place, post.
2. To take up one’s station, post oneself.’
- It would be absurd to suggest that a ship can only be stationed if it is either secure by anchors or hawsers.
- A ship can clearly be stationed in deep water.
- While the context, in which the word ‘stationed’ is used, is an alternative to ‘standing’, the word clearly envisages the ship being substantially stationary.
- I am satisfied that, when dynamically positioned, the Pride of South America was stationed”.

64. HMRC say that the Edda Fjord was not standing but that it was stationed, relying on Judge Colin Bishopp’s statement in the *Gouldson* appeal:

“There can in our judgement be no doubt that when Edda Fjord was in position close to Bonga and Thunderhorse it was ‘stationed (by whatever means) in any waters’:

5 On that point, we agree with the Special Commissioner in *Torr* and with his reasons: ‘stationed’ does not require a vessel to be fixed rigidly in one immovable position but allows a minor movement in relation to a fixed point. There can equally be no doubt that Bonga and Thunderhorse, when their construction was complete, were to be used ‘for the purposes of exploiting mineral resources by means of a well’, since each would perform a role in the commercial exploitation of oil extracted from a well”.

65. HMRC say the dictionary definition of stationed is “a place or position where a person or thing stands or is assigned to stand; a place or area where a person is required to work”.

66. HMRC say that stationed can refer to an area and not to a specific spot; that Thunderhorse is the centre of the area, that the Edda Fjord does not need to be fixed to one spot and that by sailing or circling around or in close vicinity to that spot, it was in the area and, therefore, stationed.

67. HMRC say that as the Edda Fjord did not move away from this area during the period under dispute, it was stationed and was not, therefore, a ship.

20 **Reasons for Decision**

68. Subsequent to the Hearing, the Tribunal sourced a further case on SED which was heard on 25 January 2012 being *John Davies v HMRC*.

69. The Tribunal had the benefit of both the *Gouldson* case and the *Gouldson* Appeal in relation to the Edda Fjord during the period under appeal and Mr Gouldson was on the Edda Fjord at the same time as GP.

70. These cases had decided that the Edda Fjord was mainly for the provision of accommodation, for persons who worked on a structure which was to be put to a specified use, being specifically for the purposes of exploiting mineral resources by means of a well and this was accepted by the Tribunal.

71. This left the issue before the Tribunal, based on the facts placed before it at this instance, of whether the Edda Fjord was -

- a. standing in any waters
- b. stationed (by whatever means) in any waters

This question is one of fact and degree.

72. In view of the previous judgements, it was incumbent on GP to provide evidence that would show the Edda Fjord was not stationed in any waters (by whatever means) nor standing.

73. The Tribunal found on the facts before it that the Edda Fjord was not standing in any waters.
74. The more difficult decision was whether, based in particular on the logs and information provided by the masters or former masters or employees of OR, whether
5 there was sufficient movement of the Edda Fjord to evidence that it was navigating rather than being stationed.
75. The *Torr* case had held that the word “stationed” meant substantially stationary and that this could be the case while a structure was using its dynamic positioning facility.
- 10 76. The evidence produced at this hearing from OR indicated that the Edda Fjord only used dynamic positioning for the basket transfers and that the Edda Fjord would sail several miles away from the Thunderhorse site for the purpose of burning soot from the exhaust or funnels but this had to be seen in the context that Thunderhorse was approximately 150 miles from the nearest shore.
- 15 77. The Tribunal found that the Edda Fjord was “stationed” next to Thunderhorse whilst it was circling it.
78. The *Gouldson* Appeal stated that “stationed” does not require a vessel to be fixed rigidly in an immovable position but allowed “minor movements in relation to a fixed point”.
- 20 79. In this case, evidence was led that the Edda Fjord would normally keep at least 500 metres away from the Edda Fjord for “health and safety” reasons and so, accordingly, would be at least that distance away from Thunderhorse for the greater part of each day and evidence, which may not have been available in either the *Gouldson* case or the *Gouldson* Appeal, that the ship travelled several miles away.
- 25 80. In the *Davies* case, where the SED was allowed, the Tribunal were considering a more versatile vehicle which was not mainly for the purpose of accommodation. On a regular basis, it travelled approximately five miles between two rig installations and was in transit on over 20 occasions in each month. It also made additional small
30 movements almost daily in order to move its position. In addition, the vessel, in this case had to go in for repairs and was substantially absent for a period of months.
81. Similarly, in the *Spowage* case, the vessels were found to be constantly moving around the oil field which was made up of five major fields with approximately 160 platforms.
- 35 82. Although sympathetic to the submissions made by GP, there was sufficient evidence before the Tribunal to establish on a balance of probabilities that while operating during the period under the Appeal, the principle purpose of the Edda Fjord was the provision of accommodation and that, whilst operating as such, the vessel was stationed and although it was moving around, it was not moving around to a sufficient extent to be considered to have moved away from the area.

5 83. The Edda Fjord was not roving; it was circling, albeit at a number of miles radius from Thunderhorse throughout the whole period; it did not return to shore to obtain supplies but was instead supplied *in situ* in the area around Thunderhorse and would need to be in that area so that it could consistently ferry employees backwards and forwards three or four times every 24 hours.

84. Its main purpose was to provide accommodation for those workers and it needed to be nearby in order for them to be transported to their place of work.

10 85. The Tribunal accepted that the Edda Fjord may have travelled several miles away for the purpose of burning soot and for other practical and likely mechanical purposes but, based on the evidence of the frequency of transfers, it followed that it remained within a certain radius of it so that it could ensure it was able to transport the workers from Thunderhorse to their only home in that area.

86. The Appeal is dismissed.

15 87. 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)”
20 which accompanies and forms part of this decision notice.

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**W RUTHVEN GEMMELL WS
TRIBUNAL JUDGE**

RELEASE DATE: 10 July 2012

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