



**TC02628**

**Appeal number: TC/2011/01213**

*CORPORATION TAX – Whether sum included as a ‘bad debt’ in accounts was an allowable deduction – Whether assessable on payment made to another company in settlement of litigation – Whether expenditure incurred on business entertainment could be deducted – Whether presumption of continuity applicable to business entertainment – Appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**AEROASSISTANCE LOGISTICS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN BROOKS  
SUSAN HEWETT OBE**

**Sitting in public at 45 Bedford Square, London WC1 on 21 and 22 March 2013**

**Bernard Sintes (director of Aeroassistance Logistics Limited and Stéphanie Alves (former personal assistant to Mr Sintes) for the Appellant**

**Simon Foxwell of HM Revenue and Customs, for the Respondents**

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## DECISION

### *Introduction*

1. This is an appeal, by Aeroassistance Logistics Limited (“ALL”), against an assessment issued by HM Revenue and Customs (“HMRC”) on 15 September 2010 in respect of its accounting period ended 29 February 2004 (2003-04) and a discovery assessment, issued by HMRC on 15 September 2010, in respect of its accounting period ended 28 February 2005 (2004-05).

2. By way of background we note that ALL was incorporated on 23 November 2000. Its main business is to provide logistical solutions for airline companies and arrange worldwide transport of spare parts required for their aircraft and it is the only business in Europe to offer this service.

3. Before us, ALL was represented by M Bernard Sintes (through an interpreter) and Mme Stéphanie Alves. M Sintes has been the director and shareholder of ALL since its incorporation and Mme Alves was employed as a personal assistant to M Sintes from September 2002 to June 2007. Both also gave oral evidence on its behalf, M Sintes in French through an interpreter and Mme Alves in English. HMRC was represented by its advocate, Mr Simon Foxwell.

4. It was agreed that the following issues arise as a result of these assessments:

(1) Whether a deduction of £64,795, included as a “bad debt” in the accounts for the accounting period ended 29 February 2004, is an allowable deduction;

(2) Whether ALL should be assessed on a third share of a payment of £82,856.75 (ie £27,618) made to Aeroassistance Cargoway Limited (“ACW”) by Safair Limited (“Safair”), a South African Company;

(3) Whether a deduction of £54,601, described as “Sponsoring” in the accounts for the accounting period ended 29 February 2004 and as “Consultancy fees” in the accounts for the accounting period ended 28 February 2005, is actually business entertainment; and

(4) Whether there is a presumption of continuity in respect of the Consultancy fees/business entertainment into the period ended 28 February 2005.

5. In considering these issues we note that, under s 50(6) of the Taxes Management Act 1970, it is for the appellant to establish that, on the balance of probabilities, it has been overcharged by the assessments. In the decision of the Court of Appeal in *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to a previous incarnation of s 50(6), said, at 667:

“... it is quite plain that the [Tribunal is] to hold the assessment as standing good unless the subject – the Appellant – establishes before the [Tribunal], by evidence satisfactory to them, that the assessment ought to be reduced or set aside.”

6. We now turn to the issues.

*Bad Debt*

7. M Sintes told us that in early 2002 ALL entered into an agreement with the then Government of Madagascar to provide equipment for its airport. ALL placed an order with a French company, Aerostock which, on 14 February 2002 issued a proforma invoice in the sum of €5,283. Although it paid a 10% deposit to Aerostock, due to political upheaval in Madagascar ALL was unable to complete the transaction with the Madagascan Government. It therefore agreed to sell the equipment to Home Invest Limited, a company controlled by M Sintes. An invoice in the sum of €104,707.58 (£64,795) was issued by ALL to Home Invest Limited on 28 February 2002. However, the invoice was not paid by Home Invest Limited as the goods were never received by ALL or delivered to Home Invest Limited.

8. Also despite not receiving the goods, ALL made an abortive attempt to sell the goods to Euroteck.

9. ALL claimed a deduction of the £64,795 as a bad debt for the accounting period ended 29 February 2004. M Sintes accepted that this was an incorrect treatment of the sum as the transaction had not in fact occurred and suggested that the sales figure should be reduced by £64,795 to reflect the actual position.

10. Although HMRC questioned the account given by M Sintes in relation to the circumstances surrounding the failed transaction, it is clear, on his evidence, that any amendment to sales as a result should have been made in the accounting period ending 28 February 2002 when the events occurred and not that ending 29 February 2004.

11. In the circumstances we find that the deduction of £64,795, included as a “bad debt” in the accounts for the accounting period ended 29 February 2004, is not an allowable deduction and dismiss this part of the appeal.

*Safair Payment*

12. HMRC have assessed ALL in respect of its third share of £82,856 (ie £27,618) paid under an agreement in settlement of litigation.

13. M Sintes explained that the litigation arose because ALL, ACW and Aeroassistance Logistics SARL (a French company controlled by M Sintes) were owed a significant sum for work undertaken for Air Lib and that two of its aircraft engines were stored at a warehouse belonging to ALL. M Sintes told us that under French law ALL was entitled to withhold assets belonging to Air Lib until settlement of the debt. However, following the withdrawal of its operating licence and the compulsory liquidation of Air Lib, ALL was informed that the engines actually belonged to Safair.

14. Safair commenced proceedings in the Commercial Court in Bordeaux and the High Court in London against ALL, ACW and Aeroassistance Logistics SARL to recover the engines and it obtained freezing orders which prevented ALL from using its bank accounts.

15. However, on 17 June 2003 a settlement was reached between the parties under which Safair was to pay the sum of US\$140,000 (£82,856.75 at the then rate of exchange) into the HSBC account held by ACW. This agreement was signed by M Sintes in his personal capacity and also in his capacity as a director for and on behalf of ALL as well ACW and Aeroassistance Logistics SARL.

16. In our view it is clear from this agreement that payment was to be made into the bank account of ACW at the request of ALL, Aeroassistance Logistics SARL and M Sintes.

17. On 19 June 2003 Safair paid £82,856.75 into an HSBC account held by ACW. M Sintes explained that the money had been paid into ACW's account as this was the only bank account held by companies he controlled that had not been frozen as a result of the dispute with Safair. Despite the fact that ACW was controlled by M Sintes ALL did not receive its share of the £82,856.75.

18. M Sintes contended that as payment had never been received from ACW it should not be treated as turnover of ALL.

19. However, it is well established that if a creditor requests a debtor to pay the debt to a third party, such a payment is equivalent to payment direct to the creditor, and is a good discharge of the debt (eg see *Roper v Bunford* (1810) 3 Taunt 76). Therefore, it must follow that the payment by Safair into the bank account of ACW at the request of M Sintes as director of ALL is equivalent to a payment directly to ALL of the £27,618 to which it was entitled.

20. In the circumstances we do not find the argument advanced by M Sintes to be sustainable and, as such, we find that HMRC were correct to assess ALL on this sum and dismiss the appeal against this part of the assessment.

#### 25 *Sponsorship/Business Entertainment*

21. On 15 December 2003 ALL entered into an "Event Marketing Agreement" with a French company, Offshore Executive. According to the English translation of the agreement:

Offshore Executive is organising a grand prix in Tunisia in October 2004 as part of the P1 Offshore Powerboat World Championship. This event will bring together the local Tunisian authorities and notably the members of the Ministry of Sport, Tourism and Finance.

As part of its development in Tunisia and North Africa, [ALL] would like to invite its Tunisian and Libyan clients, particularly Nouvelair, EADS and Afriqiyah. The event will create an opportunity to make friendly economic links with different economic partners.

[ALL] asks Offshore Executive to organise hospitality for its clients at the hotel as well as the team stands.

Hospitality will include: access to the Royal Hammameth Hotel; catering in the morning, at midday and in the evening; and

accommodation for 3 nights. Hospitality will also cover [ALL's] representative on site.

[ALL's] guests will be able to take part in the gala evening organised at the hotel in the presence of the Minister for Tourism and the President of the Republic of Tunisia, His Excellency Zin Alabidin Ben Ali.

A total budget of €62,000 has been agreed for these services.

22. The power boat Grand Prix Tunisia took place on 3 – 5 September 2003 at Port Yasmine Hammamet. It was not disputed that hospitality was provided by ALL and the cost of this, as recorded in the accounts for the period ending 29 February 2004, was £54,601.

23. M Sintes explained that ALL incurred this expenditure for a “one off” event in order to promote its business in Tunisia and North Africa. He said that it had a “direct and significant” benefit for ALL which was able to strengthen its partnership with existing customers, sign new agreements with Tunisian airline companies and establish ALL's logistical service on the market.

24. We accept that the expenditure was incurred by ALL to further its business and note that the legislation applicable in 2004, the time the expenditure was incurred by ALL, s 74(1)(a) of the Income and Corporation Taxes Act 1988 (“ICTA”), provides that no sum shall be deducted in respect of any “*expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade.*”

25. M Sintes and Mme Alves contended that the £54,601 expended by ALL was wholly and exclusively for the purposes of its trade and therefore it should be an allowable deduction. That may well be the case were it not for s 577(1)(a) ICTA which provides:

No deduction shall be made in computing profits chargeable to tax ... for any expenses incurred in providing business entertainment, and such expenses shall not be included in computing any expenses of management in respect of which relief may be given under the Tax Acts.

“*Business entertainment*” is defined in s 577(5) ICTA as “*entertainment (including hospitality of any kind) provided by a person, or by a member of his staff, in connection with a trade carried on by that person.*”

26. Although we accept that this expenditure did benefit ALL, as a “person” includes a company and hospitality of the type provided by ALL at the power boat grand prix falls with the statutory definition of “business entertainment” it is precluded by s 577 ICTA from being an allowable expense.

27. Therefore, this part of the appeal cannot succeed.

*Presumption of Continuity*

28. As one would expect, ALL's profit and loss accounts for the accounting period ended 28 February 2005 show, in addition to the income and expenditure figures for that year, the income and expenditure figures for the previous accounting period, ie  
5 for that ending 29 February 2004.

29. However, unlike the 2004 accounts the profit and loss for the accounting period ending 28 February 2005 does not refer to "Sponsoring". The £54,601 shown in respect of this item in 2004 has, in the 2005 profit and loss account, been added to "Consultancy fees". The "Consultancy fees" shown in the 2005 profit and loss  
10 account amount to £109,464.

30. HMRC contend, based upon a presumption of continuity, that the amount described in 2005 as "consultancy fees" also includes expenditure on business entertainment. Under this principle it is presumed that any discovered failures in the year selected for enquiry are unlikely to have occurred in that year only and are likely  
15 to have occurred in other years as well.

31. The principle was addressed by Walton J in *Jonas v Bamford* [1973] Ch 1 at page 25:

20 "… once the Inspector comes to the conclusion that, on the facts which he has discovered, [the appellant] has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly upon the taxpayer."

32. However, as Judge Sinfield noted in *Guide Dogs for the Blind Association v HMRC* [2012] UKFTT 687 (TC) at [16] the presumption of continuity is only a  
25 presumption which may be rebutted.

33. In this regard we agree with the observations of the Tribunal (Judge Hellier and Mr Williams) in *Dr I Syed v HMRC* [2011] UKFTT 315 (TC) on this point at [38] that:

30 "In our view this quotation [from *Jonas v Bamford*] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A, it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery  
35 in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been  
40 followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one

off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present.”

34. In the present case, the evidence was that expenditure incurred on business entertainment by ALL was in relation to a one off event, the power boat grand prix in Tunisia. In our judgment this is sufficient to rebut the presumption of continuity.

35. We therefore allow this part of the appeal

*Summary of Conclusions*

36. We dismiss the appeal against the 2003-04 assessment and confirm the assessment in the sum of £147,015 which is made up as follows:

- (1) £64,795 disallowed bad debt;
- (2) £27,618 being ALL’s share of a payment of £82,856.75 made by Safair; and
- (3) £54,601 disallowed business entertainment expenditure.

However, as we have found the presumption of continuity to have been rebutted we allow the appeal against the 2004-05 discovery assessment.

*Right to Apply for Permission to Appeal*

37. 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.

**JOHN BROOKS  
TRIBUNAL JUDGE**

**RELEASE DATE: 4 April 2013**