[2018] UKUT 0096 (TCC)

Appeal number: UT/2016/0132

INCOME TAX – PAYE – National Insurance - employees working for different companies – which entities are "employer" for PAYE and NI purposes - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

GRAND UK LIMITED
KEPPELS LIMITED
KEPPELS CUISINE LIMITED
KENTISH CUISINE LIMITED
MICHAEL AND DORIS STAINER
KENTISH ESTATES LIMITED

Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Timothy Herrington

Sitting in public at the Royal Courts of Justice, Strand, London WC2 A2LL on 12 October 2017

Timothy Brown, counsel, instructed by Clapham Collinge, solicitors, for the Appellants

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. The Appellants appeal against a decision of the First-tier Tribunal (Tax Chamber) ('FTT') released on 25 February 2016 and re-released with amendments on 7 April 2016, [2016] UKFTT 0138 (TC), ('the Decision'). Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

2. The Appellants (and The Grand Folkestone Limited, now in liquidation and no longer pursuing its appeal) carried on a variety of business activities at the premises of the Grand, a former hotel, in Folkestone ('the Grand'). A number of people worked at the Grand as employees under contracts that did not identify any Appellant as their employer. The Respondents ('HMRC') considered that the Appellants were liable to account for income tax through pay as you earn ('PAYE') and National Insurance contributions ('NICs'). HMRC issued various determinations and assessments, including for penalties, in respect of the tax years 2005-06 to 2010-11. The Appellants appealed to the FTT. It was common ground that payments had been made to the employees and the total amount of PAYE and NICs payable was not in dispute. The issue before the FTT was how should the amount due by way of PAYE and NICs be apportioned between the Appellants. That turned on who was or was to be treated as the employer of the employees for the purposes of PAYE and NICs and to what extent each Appellant was liable to account for and pay PAYE and NICs.

3. In the Decision, the FTT held that HMRC's assessments on Mr and Mrs Stainer for 2005-06 and 2006-07 should be reduced by 34.4%. Apart from that reduction and an increase in one of the penalties, the FTT confirmed the assessments and dismissed the Appellants' appeals.

4. For the reasons set out below, we have decided that the Appellants' appeals must be dismissed.

Factual background

5. The Appellants carried on different businesses at the Grand during the tax years 2005-06 to 2010-11. The businesses carried on by each Appellant (and The Grand Folkestone Limited) were as follows:

(1) The Grand Folkestone Limited – Catering

(2) Kentish Estates Limited – Rental collection

(3) Grand UK Limited – Catering

(4) Keppels Cuisine Limited – Keppels restaurant

(5) Keppels Limited– Bar and refreshments

(6) Kentish Cuisine Limited – Tea room

(7) Mr and Mrs Stainer (partnership) – Rental apartments

6. In each of the relevant years, approximately 100 employees worked at the Grand. The employees were mainly paid in cash weekly, with a small number being paid by cheque. Cheque payments to employees were made from the bank account of Kentish

Estates Limited which had been set up to manage credit card payments for the rental business operated by Mr and Mrs Stainer in partnership at the Grand.

7. The employees' contracts of employment purported to be with "The Grand" but no such entity existed and so that could not be their employer. The contracts did not specify who employed the employees. The employees' pay slips were generated in the name of Heritage Hotels UK Limited ('Heritage Hotels') but that company had been dissolved on 9 January 2007. When, in 2009, it was realised that Heritage Hotels no longer existed, payslips were produced in the name of "The Grand Folkestone Hotel".

8. Following meetings between HMRC and Mr Stainer between April 2009 and March 2011, HMRC came to the view that the Appellants were liable to account for PAYE and NICs in respect of the employees and in varying amounts. On 14 June 2011, HMRC made formal determinations of the PAYE obligations of each Appellant under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ('the PAYE Regulations') and decisions under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 determining the Appellants' liabilities for NICs. HMRC allocated PAYE and NICs liabilities between the Appellants on a percentage basis calculated by reference to their 2008 accounts and the information provided by Mr Stainer about the Appellants' profits and the way wages were paid out of cash takings.

9. HMRC also assessed the Appellants for fixed rate and tax geared penalties under section 98A of the Taxes Management Act 1970 for the failure to make PAYE returns for tax years ending 5 April 2006 to 5 April 2010 and those ending 5 April 2006 to 5 April 2008 respectively.

Legislative framework

10. Section 4(1)(a) of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') provides that "employment" includes, among other things, any employment under a contract of service. This definition is incorporated in the PAYE Regulations by regulation 2(1) which provides:

> "(1) In these Regulations, unless the context otherwise requires—
>
> …
>
> 'employment', subject to regulations 10 to 12, has the meaning given in sections 4 and 5 of ITEPA; and 'employer' and 'employee' have corresponding meanings.
>
> …
>
> 'other payee' means a person receiving relevant payments in a capacity other than employee, agency worker or pensioner;
>
> 'other payer' means a person making relevant payments in a capacity other than employer, agency or pension payer;
>
> …"

11. The obligation to deduct tax under PAYE in respect of relevant payments arises under regulation 21(1) of the PAYE Regulations which provides:

> "On making a relevant payment to an employee during a tax year, an employer must deduct or repay tax in accordance with these Regulations by reference to the employee's code, if the employer has one for the employee."

12. Regulation 4 of the PAYE Regulations defines 'relevant payments' as "payments of, or on account of, net PAYE income" subject to some irrelevant exceptions. Regulation 3 defines "net PAYE income" as PAYE income less any allowable pension contributions and allowable donations to charity. Section 683(1)(a) of ITEPA defines "PAYE income" for a tax year as including any PAYE employment income for the year, which is defined as any taxable earnings and taxable specific income from an employment in the year determined in accordance with section 10(2) and (3) of ITEPA.

13. Regulations 10 to 12 of the PAYE Regulations set out three situations in which a relationship between two persons which is not employment is treated as employment for the purposes of the PAYE Regulations. The material regulation for this appeal is regulation 12 which provides:

> "(1) For the purposes of these Regulations—
>
> (*a*) other payers are treated as employers;
>
> (*b*) other payees are treated as employees; and
>
> (*c*) an other payee's 'employment' with an other payer starts when relevant payments start and ends when relevant payments end."

14. The construction of regulation 12 of the PAYE Regulations was considered by the Court of Appeal in *R (on the application of Oriel Support Ltd) v HMRC* [2009] STC 1397 ('*Oriel Support*'). Oriel Support provided services to labour providers who employed workers either under contracts of employment or under an agency arrangement. As part of its services to the labour providers, Oriel Support paid the workers their wages after deductions of PAYE and NICs. Oriel Support recharged the labour provider the expense of payments made by Oriel Support to the employees of the labour provider. HMRC ruled that Oriel should account for the PAYE using each labour provider's individual PAYE reference rather than Oriel Support's own PAYE reference. Oriel Support challenged HMRC's decision by way of judicial review. Oriel Support argued that it was an "other payer" within the meaning of regulation 12 of the PAYE Regulations and thus entitled and required to account for PAYE under its own reference. Oriel Support accepted (and the Court of Appeal confirmed) that 'other payee' is the mirror of 'other payer' and a payment made by someone to a worker cannot be made by someone who is an 'other payer' unless the recipient is an 'other payee'. The Court of Appeal held that, when it made a payment to a worker, Oriel Support did so as an intermediary, as defined in section 687(4)(a) ITEPA, of the labour provider who was the employer. Accordingly, the payment was received by the worker in his capacity as employee and not in a capacity other than employee. As regulation 12 only applied to relevant payments received by a person in a capacity other than employee (or other than agency worker or pensioner which are irrelevant to the case), Oriel Support could not be regarded as an "other payer" and did not fall to be treated as the employer.

15. Both parties accept that the Appellants' liability for NICs should follow their liability for PAYE: see regulation 67(1) of the Social Security (Contributions) Regulations 2001 (SI 2001/1004).

The Decision

16. The FTT grouped the tax years covered by the determinations and assessments into three periods because different facts and submissions applied to each.

17. The first period was 2005-06 and 2006-07. In relation to that period, the Appellants argued that, until it was dissolved in January 2007, Heritage Hotels was the employer of all the employees. HMRC contended that Heritage Hotels could not be an employer because it did not have a trade. HMRC argued that, during that period, Mr and Mrs Stainer, acting in partnership, were the employers because they had overall control of the property and the businesses in it but that the other businesses then operating at the Grand were also employers and the PAYE and NIC obligations should be split between Mr and Mrs Stainer and the companies by reference to the information provided by Mr Stainer and the companies in their 2008 accounts.

18. The next period was 2007-08 and 2008-09. The Appellants argued that, during this period, the hotel was run on a day to day basis first by Mr Purchault and then by Mr Silk, who should be treated as the employers of all the employees. HMRC submitted that the liability for PAYE and NICs should fall on Mr and Mrs Stainer and the companies on the same basis as for 2005-06 and 2006-07.

19. For the last period, 2009-10 and 2010-11, the Appellants accepted that The Grand Folkestone Limited should be treated as the employer from the time it took responsibility for issuing payslips but disputed the amount for which the company was liable. Again, HMRC contended that the liability for PAYE and NICs should be apportioned between the Appellants on the basis of the information provided by Mr Stainer and the companies in their 2008 accounts.

20. The FTT read the witness statements of and heard evidence from Mr Stainer, Mrs Stainer and Mrs Kobylarz who worked initially as a receptionist but, from May 2009, worked in the accounts department at the Grand. The FTT also saw documents and notes of meetings between HMRC and the witnesses as well as others, including Mr Purchault.

21. In the FTT, the overarching submission of Mr Brown, who appeared for the Appellants, was that the person who physically paid the employees should be treated as the employer for the purposes of PAYE and NICs. He submitted (see [42]) that, until it ceased to exist in January 2007, Heritage Hotels was liable for PAYE and NICs "because it was the entity in whose name payslips were generated and the entity which made physical payment to the employees". Between 2007 and 2009, Mr Purchault and Mr Silk should be treated as the employers liable to pay PAYE and NICs because each of them had day to day responsibility for running the relevant businesses at the Grand. The Appellants' case was that none of them could properly be treated as employers liable for PAYE in the period before April 2009 when The Grand Folkestone Limited became the employer of all the staff at the Grand and liable for PAYE and NICs from that date.

22. The FTT made the following findings of fact at [59] – [65]:

> "59. Mrs Kobylarz believed that she reported to Mr Stainer and treated him as her employer when she was employed in autumn 2008.
>
> 60. Mr Purchault described Mr Stainer as the manager of the Grand in 2009 and as the person who engaged employees.
>
> 61. Employees' wages were mainly paid in cash from the takings of the various catering operations.

> 62. A small number of employees were paid by cheque [by Kentish Estates Limited].
>
> 63. Each of the Appellant entities claimed deductions for the cost of wages in their accounts for the 2008 period for which accounts were seen.
>
> 64. Until 2009 payslips were generated in the name of Heritage Hotels UK Limited.
>
> 65. Employment contracts which existed were in the name of "The Grand"."

23. Having made its findings of fact, the FTT noted, in [72], that it was for the Appellants to demonstrate that HMRC's assessments were not correct. In [73], the FTT held, relying on *Booth v Mirror Group Newspapers plc* [1992] STC 615 ('*Booth v MGN*'), that it is only if an actual employer and employee relationship cannot be identified that a person making relevant payments in a capacity other than employer can be treated as an employer liable for PAYE and NICs under Regulation 12 of the PAYE Regulations. Applying that approach to the different periods, the FTT reached the following conclusions.

24. In relation to the first period of 2005-06 and 2006-07, the FTT rejected, in [74], HMRC's argument that Heritage Hotels could not be an employer because it did not have a trade on the ground that the PAYE code's definition of an employer was broad and did not restrict the status of employer to entities carrying on a trade. HMRC have not appealed against that conclusion. The FTT accepted the Appellants' arguments and concluded, in [76], that Heritage Hotels should be treated as an employer during this period until its dissolution in January 2007 but only in relation to the payments made to its share of the employees at the Grand. The FTT applied HMRC's allocation in relation to a subsequent period when The Grand Folkestone Limited had taken over responsibility for the employees and held that, during this period to January 2007, Heritage Hotels should be regarded as the employer of 34.4% of the employees for PAYE and NICs purposes. This had the effect of reducing Mr and Mrs Stainer's share of liability for the PAYE and NICs and any related penalties to 17%.

25. For the second period of 2007-08 and 2008-09, the FTT found, in [78] – [79], that in the absence of Heritage Hotels and on the evidence of Mrs Kobylarz and HMRC's records of their meetings with Mr Purchault and Mr Stainer in 2009:

> "… it is reasonable for HMRC to treat Mr Stainer as the de-facto employer of staff at the hotel who were treated as employed by the defunct entity and that in his capacity as a partner in the partnership with his wife, he should be liable for PAYE and NI as the employer for all payments made during that time other than those which can be specifically allocated to other entities, amounting to 34.4% of the total liabilities for this period.
>
> 79. We do not accept that, having identified Mr Stainer and Mrs Stainer's partnership as the 'employer' for these purposes, there is any reasonable basis on which either Mr Purchault or Mr Silk, who were themselves employees, could be treated as the 'employer' under the PAYE Regulations in place of any of the other entities operating at the Grand as the Appellants suggest. However wide the scope of the definition of an 'employer' for PAYE purposes under Regulation 12 might be, it cannot extend to employees in their personal capacity. If either Mr Purchault or Mr Silk were making taxable employment payments to employees that was in the capacity as employees and representatives of their employing entity, not in a personal capacity."

26. The FTT found that, during the last period of 2009-10 and 2010-11, although the Grand Folkestone Limited was operating the payroll, HMRC's allocation of the employees between the entities, which was based on information provided by Mr Stainer, was reasonable and accepted it. The FTT noted that Mr Stainer had not provided any information to support a different allocation.

27. In relation to all periods, the FTT rejected the Appellants' submission that Kentish Estates Limited made the payments by cheque to employees as agent and so should not be liable for PAYE and NICs. The FTT found that the Appellants had not established that Kentish Estates Limited made the payments on behalf of another entity. Applying Regulation 12 of the PAYE Regulations, the FTT held, in [77], that Kentish Estates Limited should be treated as an employer to the extent of the payments as shown in the 2008 accounts and allocations provided by Mr Stainer.

28. Subject to the reduction of Mr and Mrs Stainer's liability for penalties in relation to the first period of 2005-06 and 2006-07, the FTT confirmed the penalties.

Appeal to the Upper Tribunal

29. This case first came before the Upper Tribunal for hearing on 3 February 2017. Following discussions with the parties, we adjourned the hearing to receive amended grounds of appeal and an amended response pursuant to oral directions made at the hearing. The Appellants' amended grounds of appeal, are as follows:

(1) the FTT erred in its interpretation of what constitutes an employer in [72] and [73] of the Decision and, as a result, further erred when it decided that certain entities were responsible for PAYE on a pro-rata basis; and

(2) Even if Mr Stainer was the de-facto employer for 2007-08 and 2008-09 (as the FTT found at [78]), the FTT was wrong to hold that his individual liability transferred to a partnership of which he was an alleged partner.

Discussion

30. The Appellants' first ground of appeal addresses two distinct but overlapping issues. The first issue is whether the FTT correctly interpreted "employer" including a deemed employer under regulation 12 of the PAYE Regulations.

31. As developed before us, the Appellants' case was that the FTT had not interpreted regulation 12 of the PAYE Regulations correctly to determine who should be treated as the employer for PAYE purposes. Mr Brown accepted that the employees must have had an employer or employers but contended that, in this case, no person could be identified as an employer. Mr Brown submitted that, viewing the PAYE Regulations in context, there could only be one person liable as an "employer" for PAYE in relation to a particular relevant payment. He contended that where the employer could not be identified with any legal certainty then regulation 12 must be applied across the board to treat all payers of the "relevant amount" to the employees as an employer for PAYE purposes. He argued that it does not matter whether the paying person is the contractual employer or some other person otherwise there would be no need for regulation 12. On that analysis, Mr Brown submitted that the person liable was:

(1) until January 2007, Heritage Hotels because it issued payslips and paid the wages net of PAYE;

(2) between 2007 and 2009, the persons (ie Mr Purchault and Mr Silk) who physically operated the PAYE scheme in the same manner as Heritage Hotels had done, except for payments made to employees by cheque by Kentish Estates Limited; and

(3) from 2009, The Grand Folkestone Limited which paid the employees' wages (and on that basis, has been accepted as the employer by HMRC from 2011 onwards).

32. Mr Brown also criticised the FTT for applying regulation 12 in relation to some payments to employees but not others. He stated that, in [74], the FTT accepted the Appellants' arguments, recorded in [42], that Heritage Hotels should be treated as an employer for 2005-06 and 2006-07. Mr Brown submitted that the FTT then erred when it failed to conclude, in [76], that Heritage Hotels should be treated as the employer in respect of all payments to employees during the period. Mr Brown contended that the FTT went wrong when it accepted that Mr and Mrs Stainer, in partnership, were liable as an employer for 17% of the total wage bill.

33. Mr Brown also submitted that the FTT incorrectly interpreted *Booth v MGN* in [73] when it held that the PAYE Regulations were directed primarily "at an actual employer and employee relationship" which meant that it was only legitimate to treat the person physically making payment as the employer and liable to PAYE if an actual employer/employee relationship could not be identified. *Booth v MGN* concerned whether MGN was entitled to deduct income tax from payments to a person who was not an employee of MGN but was employed by a related company. Mr Brown observed that there did not appear to have been any dispute about whether a person paying an emolument was an employer because the relevant definition in regulation 2 of the Income Tax (Employment) Regulations 1973 stated that "employer" means any person paying emoluments.

34. Ms Choudhury, who appeared for HMRC, acknowledged that the FTT's conclusion in [72] that the PAYE Regulations "impose an obligation both on the person who is an employer under a contract of service or any person who pays to an employee (not necessarily their own employee) any taxable employment income" could lead to two entities, ie the employer and an "other payer", being treated as liable for the tax payments. She said that passage from [72] suggested that the FTT had made an error of law in that the FTT considered that a person making a relevant payment was always an "other payer", and potentially liable to be treated as an employer and required to deduct and account for PAYE. This view was contrary to that of the Court of Appeal in *Oriel Support*. Ms Choudhury submitted that the error was not relevant as the FTT found that the payees all received the payments in their capacity as employees.

35. We do not accept Mr Brown's submissions that no person could be identified as an employer and regulation 12 must be applied across the board to treat the payer of relevant amounts to the employees as an employer for PAYE purposes. We agree with Ms Choudhury that, notwithstanding that the FTT erred in its interpretation of the PAYE Regulations, that error was immaterial in view of the FTT's findings. The FTT correctly set out the applicable definitions of "employed", "employee" and "employer" in [8] – [10]. The FTT noted, at [18], that:

> "It was accepted that all of the payments in question were made to employees and were payments made as part of their employment for these purposes."

On that basis and applying *Oriel Support*, the issue of whether any person was an "other payer" and deemed to be an employer by regulation 12 of the PAYE Regulations did not arise. Further, we agree that it did not affect the decision of the FTT which clearly had those definitions and the status of the payments in mind when it considered who should be liable to account for PAYE in the different periods.

36. In [74], the FTT clearly finds that Heritage Hotels was an employer notwithstanding the use of the words "can be treated as" in the final sentence. The fact that this was a finding that Heritage Hotels was an employer and not merely deemed to be one by virtue of being an "other payer" can be seen from [75] where the FTT holds, in the alternative, that Heritage Hotels could be regarded as an "other payer" and treated as an employer under regulation 12 of the PAYE Regulations. That conclusion is not consistent with *Oriel Support* and, in our view, cannot be regarded as correct. That, however, does not undermine the FTT's finding in [74].

37. Although not expressly stated in [76], the implication of the FTT's findings and the reference in that paragraph to the allocation method applied by HMRC is that the FTT found that the Appellants were employers in relation to those employees working in their respective businesses and they, rather than Heritage Hotels, made, ie bore the cost of, the cash payments to their employees in the period 2005-06 and 2006-07 in the proportions set out in [52]. We agree with Ms Choudhury that, as in *Oriel Support*, when Heritage Hotels made a payment to a worker who was not its employee, it did so as an intermediary of the employer. Accordingly, the payment was received by the worker in his capacity as employee and not in a capacity other than employee. As regulation 12 only applied to relevant payments received by a person in a capacity other than employee, Heritage Hotels did not fall to be treated as the employer under that regulation. As for the subsequent periods of 2007-08 to 2010-11, the FTT accepted HMRC's allocation of the employees between the different Appellants which had been based on information provided by Mr Stainer.

38. In conclusion, we consider that the FTT correctly identified the employers and was entitled to find that they were responsible for the payments to the employees in the amounts stated in [76] and, by reference to HMRC's allocations, in [52]. Accordingly, we dismiss the Appellants' appeal on this ground.

39. In [78] and [79], the FTT rejected the contention that Mr Purchault and Mr Silk were employers and held that they were employees of Mr and Mrs Stainer's partnership and any payments made by Mr Purchault and Mr Silk were made in that capacity on behalf of the partnership. The Appellants submit that the FTT made an error of the type described in *Edwards v Bairstow* [1956] AC 14 when it found, in [78] and [79], that neither Mr Purchault nor Mr Silk could be treated as the employer under the PAYE Regulations for the period 2007-08 and 2008-09 and that the partnership of Mr and Mrs Stainer was an employer and liable for PAYE on all payments made to employees during the period except for the payments which were specifically allocated to other Appellants by HMRC in [52].

40. In summary, Mr Brown submitted that there was an identifiable link between Mr Purchault and, later, Mr Silk and the payments made to the employees between 2007 and 2009. Mr Brown also contended that even if the payments to the employees were not linked with Mr Purchault and Mr Silk, the FTT was not entitled to find that such a link existed between Mr and Mrs Stainer and the payments to the employees. He

contended that there was no evidence that Mr Purchault and Mr Silk were employees of Mr and Mrs Stainer.

41. In making its findings, the FTT relied on the evidence of Mrs Kobylarz, set out in [32], and found, at [59], that she believed that she reported to Mr Stainer and treated him as her employer when she was first employed in autumn 2008. The FTT also relied on HMRC's notes of their meetings with Mr Stainer and Mr Purchault in April 2009. The FTT set out an extract from the note of the meeting on 15 April 2009 at [35]:

> "[HMRC officer] asked how many employees there currently were, Mr Stainer replied about 30, including part-timers, [HMRC officer] asked who paid these employees. Mr Stainer replied that he paid about 12 of these as they were sub-contractors involved in building work and maintenance. The catering operations paid all other workers including key workers. Mr Stainer believes this is just taken from the takings for wages of these workers.
>
> …
>
> Mr Stainer left the meeting and allowed [HMRC officer] to speak to Mr Purchault alone. Mr Purchault is the assistant manager of the Grand. [HMRC officer] asked who was the manager. Mr Purchault replied that Mr Stainer was … [HMRC officer] explained that Mr Stainer had stated he was involved in the engaging of employees, Mr Purchault confirmed that this was correct … [HMRC officer] asked what the rate of pay was or who decided it. He replied minimum wage or as decided by Mr Stainer."

42. At [60], the FTT found that:

> "Mr Puchault [sic] described Mr Stainer as the manager of the Grand in 2009 and as the person who engaged the employees."

43. Mr Brown submitted that the FTT made an error of fact in [60] as there was no evidence to support the finding that it was Mr Stainer who engaged employees. Ms Choudhury contended that that the FTT did not make any error of fact in [60]. She said that the note showed that Mr Purchault agreed that he was involved in engaging employees but not that he did so alone. Further, the note later states that Mr Stainer set the rate of pay. Mr Brown also submitted that there was no evidence to show that Mr Purchault and Mr Silk were employed by Mr Stainer or by him and Mrs Stainer in partnership.

44. In our view, nothing much turns on who actually interviewed applicants for a job and offered them employment. The material issue is not the identity of that person but the identity of the employer of the persons previously employed by Heritage Hotels once that company had ceased to exist. The evidence of who employed these persons was very thin but there was some on which the FTT was entitled to base its conclusion. Mr Stainer's evidence, set out at [27], was that the businesses had been run by Mr Silk and Mr Purchault and that Mr Stainer had only become involved in 2009 on learning of Heritage Hotels' dissolution to protect the position of the existing employees. It is clear that the FTT did not accept this evidence even if it did not expressly reject it in terms. The FTT expressly relied on the evidence of Mrs Kobylarz who worked in accounts and reported to Mr Stainer. Mrs Kobylarz's evidence, see [32], was that she assumed that Mr Stainer was responsible for PAYE. There was no other evidence, eg employment contracts, to show that Mr Silk and Mr Purchault were the employers. The FTT found that Mr Silk and Mr Purchault were themselves employees of the partnership of Mr and Mrs Stainer and, in so far as they made payments to employees, they did so in their capacity as employees and on behalf of their employer, the partnership. We consider

that, there was sufficient evidence before the FTT on which it was entitled to accept HMRC's view that Mr and Mrs Stainer's partnership was the employer of the employees not specifically allocated to the other Appellants in their accounts. On this ground of appeal, we consider that the FTT was entitled to find that Mr and Mrs Stainer were liable as an employer rather than Mr Purchault and Mr Silk for the relevant payments during the period 2007-08 and 2008-09.

Disposition

45. For the reasons given above, the Appellants' appeal against the Decision is dismissed.

Costs

46. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and should include a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Greg Sinfield
Judge of the Upper Tribunal

Judge Timothy Herrington
Judge of the Upper Tribunal

Release date: 28 March 2018