



Tax update

June 2017

In this update we report on the scope of the Criminal Finances Bill as it receives Royal Assent; HMRC guidance updates for businesses, individuals and agents on how to make disclosures of unpaid tax; and HMRC's further consultation on Making Tax Digital. We also comment on three recent cases involving an application to the FTT for a direction requiring HMRC to issue closure notices by a specified time; an application by HMRC to vary directions; and the FTT's jurisdiction to amend tax returns.

News items

Criminal Finances Bill receives Royal Assent

The Bill, which has now received Royal Assent, will extend law enforcement agencies' ability to recover the proceeds of crime, tackle money laundering, tax evasion and corruption. [more>](#)

HMRC updates disclosure guidance for unpaid tax

HMRC has updated its guidance on who needs to make voluntary disclosure in circumstances where they are not eligible for one of HMRC's current campaigns. The guidance covers how individuals and companies can use the digital disclosure service to report their failure to pay the correct amount of income tax, capital gains tax, National Insurance contributions, or corporation tax. Agents are also able to notify clients' disclosures via the digital disclosure service. [more>](#)

Taxation of employee expenses consultation

HM Treasury has opened a consultation in order to determine if the current rules, or the administration of the rule around employee expenses, could be made clearer and simpler; whether the tax rules for expenses are fit for purpose in the modern economy and why the cost to the Exchequer of tax relief for expenses which are not reimbursed has increased. [more>](#)

Case reports

BCM – Tribunal grants taxpayers' application for closure notices

In *BCM Cayman LP and others v HMRC*, the First-tier Tribunal (FTT) directed HMRC to issue closure notices within specified time periods in respect of its enquiries into certain of the applicants' tax returns, pursuant to section 28B, Taxes Management Act 1970 (TMA) and paragraph 33, Schedule 18, Finance Act 1998 (FA 1998). [more>](#)

Any comments or queries

Adam Craggs Partner

+44 20 3060 6421

adam.craggs@rpc.co.uk

Robert Waterson Legal Director

+44 20 3060 6245

robert.waterson@rpc.co.uk

Michelle Sloane Senior Associate

+44 20 3060 6255

michelle.sloane@rpc.co.uk

About this update

The Tax update is published on the first Thursday of every month, and is written by members of [RPC's Tax Disputes team](#).

We also publish a VAT update on the final Thursday of every month, and a weekly blog, [RPC Tax Take](#).

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ABL – FTT dismisses HMRC’s application to vary direction staying related cases

In *ABL (Holding) Ltd and Tania Properties Ltd v HMRC*, the FTT dismissed HMRC’s application to vary the FTT’s direction staying over 100 related cases until the determination of the lead appellants’ appeals by the Upper Tribunal (UT). [more>](#)

Walker – UT confirms FTT has jurisdiction to amend tax return

In *HMRC v Eric Walker*, the UT has confirmed that the FTT has the power, under section 50, TMA, to amend a return if it decides the taxpayer is entitled to a smaller repayment than the one claimed. [more>](#)

News items

Criminal Finances Bill receives Royal Assent

The Bill, which has now received Royal Assent, will extend law enforcement agencies' ability to recover the proceeds of crime, tackle money laundering, tax evasion and corruption.

It contains important new provisions including:

- unexplained wealth orders (UWOs), which can require those suspected of serious crime or corruption to explain the sources of their wealth
- two new criminal offences in relation to corporations who fail to prevent their staff from facilitating tax evasion in the UK and abroad.

Further provisions enable the seizure and forfeiture of proceeds of crime as well as extensions to the moratorium period to investigate suspicious transactions.

A copy of the Home Office press release can be found [here](#).

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HMRC updates disclosure guidance for unpaid tax

HMRC has updated its guidance on who needs to make voluntary disclosure in circumstances where they are not eligible for one of HMRC's current campaigns. The guidance covers how individuals and companies can use the digital disclosure service to report their failure to pay the correct amount of income tax, capital gains tax, National Insurance contributions, or corporation tax. Agents are also able to notify clients' disclosures via the digital disclosure service.

As well as covering how to self-report, the guidance also sets out the implications of disclosures on PAYE, tax credits and inheritance tax, including the penalty regime. For those who are found to have taken a "significant period" to correct non-compliance (for these purposes this means over three years, or less where the overall disclosure covers a longer period), it is unlikely that HMRC will reduce the penalty by more than 10 percent above the minimum of the statutory range.

A copy of the guidance can be found [here](#).

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Taxation of employee expenses consultation

HM Treasury has opened a consultation in order to determine if the current rules, or the administration of the rule around employee expenses, could be made clearer and simpler; whether the tax rules for expenses are fit for purpose in the modern economy and why the cost to the Exchequer of tax relief for expenses which are not reimbursed has increased.

The request calls for evidence on current employer practice in relation to employee expenses in order to develop future policy.

The consultation is open until 10 July 2017.

A copy of the consultation document can be found [here](#).

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Case reports

BCM – Tribunal grants taxpayers' application for closure notices

In *BCM Cayman LP and others v HMRC*¹, the First-tier Tribunal (FTT) directed HMRC to issue closure notices within specified time periods in respect of its enquiries into certain of the applicants' tax returns, pursuant to section 28B, Taxes Management Act 1970 (TMA) and paragraph 33, Schedule 18, Finance Act 1998 (FA 1998).

Background

Bluecrest conducts a fund management business in the UK with businesses incorporated in the Cayman Islands. HMRC opened tax enquiries into different aspects of the business between 2007/08 and 2013/14. In relation to the Cayman businesses, issues concerned transfer pricing, thin capitalisation, and restriction of tax relief for interest on unallowable purpose loans. HMRC was also investigating a partnership incentive plan (PIP).

The applicants cooperated with HMRC during its enquiries and provided a significant amount of information and documentation. However, some documents were withheld from HMRC on the basis that they attracted legal professional privilege (LPP). HMRC did not accept that all of the withheld documents attracted LPP.

After a process that had extended over seven years, the applicants felt HMRC had exhausted its enquiries. HMRC had provided precise estimates of the tax it claimed was due and had issued accelerated payment notices. The applicants applied to the FTT for a direction that HMRC issue closure notices within a specified timeframe, pursuant to section 28B(5), TMA and paragraph 33(1), Schedule 18, FA 1998.

The burden of proof was on HMRC to demonstrate, on the balance of probability, that there were reasonable grounds for the FTT to refuse the application (section 28B(7), TMA and paragraph 33(3), Schedule 18, FA 1998).

FTT's decision

HMRC argued that the enquiries were factually and legally complex, with significant amounts of tax at stake and denied it had not delayed the progression of the enquiries. HMRC claimed that it needed more time to complete the final stage of the enquiry process. In reaching its decision, the FTT sought to balance the parties interests by taking into account the following factors:

- complexity of the enquiries
- length of the enquiries
- degree of cooperation from the taxpayer
- information that had been provided to HMRC
- amount of tax at stake
- risk of evidence becoming stale, in particular any relevant oral evidence
- whether HMRC had enough information to reach an "informed judgment"
- whether further enquiries were proportionate.

The FTT was not persuaded by HMRC's arguments. In respect of the Cayman businesses, the application was granted. The FTT was of the view that there was no reason to delay the closure notices. If HMRC wanted to disallow interest then it was perfectly legitimate for it to do so and it

1. [2017] UKFTT 0226 (TC).

should state its reasons in the closure notice. The FTT did not see how further investigation by HMRC was likely to provide any material assistance.

In relation to the PIP, the application was granted in part. The FTT accepted HMRC would need further time to calculate adjustments for up to 175 partners and also accepted HMRC's estimate that a realistic timeframe for the exercise was three months. In the circumstances, the FTT concluded that the appropriate final date for the issue of the closure notice would be 31 May 2017, approximately three months after the date of the hearing.

Comment

One of the keenest areas of contention between HMRC and taxpayers is the length of time enquiries take before they are concluded. Sadly, it is not uncommon for enquiries to become protracted (as appears to have happened in this case) and a long-running enquiry can become commercially disruptive, time consuming and expensive. There will, therefore, be occasions when a taxpayer decides that an enquiry has gone on long enough and wishes to bring it to an end. Increasingly, taxpayers, like the applicants in this case, are adopting a more proactive approach and seeking an appropriate direction from the FTT requiring HMRC to bring its enquiries to an end within a specified time period.

This decision highlights how effective such a strategy can be and provides useful guidance on the factors the FTT will take into account when determining whether it is appropriate to direct HMRC to issue a closure notice.

A copy of the decision can be found [here](#).

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ABL – FTT dismisses HMRC's application to vary direction staying related cases

In *ABL (Holding) Ltd and Tania Properties Ltd v HMRC*², the FTT dismissed HMRC's application to vary the FTT's direction staying over 100 related cases until the determination of the lead appellants' appeals by the Upper Tribunal (UT).

Background

A large number of taxpayers had participated in certain arrangements involving the transfer of loan notes to employees and directors in a manner that was said not to give rise to any PAYE or national insurance liability. The arrangements were challenged by HMRC and the taxpayers appealed to the FTT.

The FTT issued a direction, under Rule 18 of the Tribunal Rules, specifying four appeals as lead cases and designating the other cases as related cases. The related appeals were stayed pending resolution of the lead cases.

The Rule 18 direction specified a number of related questions of fact and law which, to the extent determined in the lead appeals, would be binding on the related appellants. In July 2016, the FTT released its decision in *Cyclops Electronics Limited and Graceland Fixing Limited v HMRC*³, dismissing the appeals of the lead appellants. The FTT sent copies of its decision to the related appellants, as required by Rule 18(3) of the Tribunal Rules.

The lead appellants subsequently requested permission to appeal against the decision and the FTT gave permission for the lead appellants to appeal to the UT in September 2016. After

2. [2017] UKFTT 220 (TC).

3. [2016] STFD 842.

granting permission to appeal, the FTT issued directions which stayed the related cases until 60 days after disposal of the lead appellants' appeals to the UT and extended the deadline by which the appellants in the related cases could apply for their appeals to be "unbound" from those of the lead appellants, pursuant to Rule 18(4) of the Tribunal Rules, until 60 days after disposal of the lead appellants' appeals by the UT.

In October 2016, HMRC made an application to the FTT to vary the directions made by the FTT in relation to the related cases, arguing that the FTT's decision in relation to one of the common or related issues was binding on the related appellants (subject to any successful application by the appellants for their appeals to be unbound pursuant to Rule 18(4) of the Tribunal Rules on the grounds that the facts of their appeals could be distinguished from those of the lead appellants) and was sufficient to enable the FTT to make a determination under Rule 18(5) of the Tribunal Rules dismissing all of the related appeals.

FTT's decision

The FTT concluded that the existing FTT directions should remain in place and dismissed HMRC's application for its directions to be varied for the following reasons:

- the FTT's overriding objective is to deal with cases fairly and justly. The stay directions ensured that the related appeals would be disposed of with the full benefit of the UT's decision on appeal
- although the stay directions deferred the point at which the binding nature of the FTT's decision on one of the issues would have a tangible effect, they still acknowledged the binding effect of that decision. Even with the stay directions in place, once the UT's decision in the *Cyclops* appeal is known, there would be nothing to prevent the FTT following HMRC's suggested approach for disposing of the related appeals
- there is scope for any prejudice that HMRC may suffer in being kept out of the additional tax allegedly due until the conclusion of the lead appeals by the UT to be fully mitigated. For example, HMRC is entitled to interest on any tax that is determined to have been underpaid and/or are entitled to apply under section 55(4)(a), TMA, for a direction that the postponement of tax should cease, owing to a change in circumstances (although, of course, HMRC would need to satisfy the FTT on this issue). By contrast, if the FTT adopted HMRC's proposal and the appeal of a related appellant was wrongly disposed of based on a flawed appreciation of the law, that related appellant would need to appeal to the UT for the mistake to be corrected and would incur costs in doing so and would incur further costs if the matter were then remitted back to the FTT
- finally, although neither party referred to this authority, the FTT was reinforced in its conclusion by the approach taken in *HMRC v RBS Deutschland Holdings GmbH*⁴, which suggested that the FTT should consider whether the UT's decision will be of "material assistance" in resolving the related appeals and whether it is expedient to stay the proceedings. The FTT considered both limbs of this test to be satisfied in the instant case.

Comment

It is surprising that HMRC made the application it did and the FTT's decision was predictable. The FTT arrived at its decision on the basis that it was necessary to uphold fairness and justice in relation to the Rule 18 direction and avoid additional costs being incurred. Given the increasing use of the Rule 18 lead case procedure, this decision provides welcome clarification of the approach to be adopted when lead appellants appeal to the UT.

A copy of the decision can be found [here](#).

Walker – UT confirms FTT has jurisdiction to amend tax return

In *HMRC v Eric Walker*⁵, the UT has confirmed that the FTT has the power, under section 50, TMA, to amend a return if it decides the taxpayer is entitled to a smaller repayment than the one claimed.

Background

In the tax year 2011/12, Mr Walker (the taxpayer) was engaged as a sub-contractor in the construction industry. His tax return for that year showed a repayment due to him of £6,040. He claimed to have been paid net under the rules of the Construction Industry Scheme. Included in his tax calculation was £6,627.25 of tax which he claimed had been deducted by three contractors when making payments to him.

Under its policy of “process now, check later”, HMRC gave effect to the return and paid the taxpayer £6,040.

HMRC opened an enquiry into the return on 14 March 2013 and subsequently issued a closure notice under section 28A, TMA, amending the return to, amongst other things, reduce the amount claimed for overpaid tax from £6,040 to £821.07. The taxpayer’s Self-Assessment Statement was also updated to reflect this change, which recorded that the taxpayer was due to pay HMRC £3,983.39.

The taxpayer appealed against the closure notice.

The FTT found in favour of the taxpayer and allowed his appeal. The FTT concluded that the taxpayer was entitled to treat as deducted the full amount which he had entered on his tax return. However, because of amendments to the amount of deductible expenses agreed between the taxpayer and HMRC, the FTT concluded that the taxpayer was entitled to a smaller repayment than the one actually made to him but that amount was larger than the amount of repayment shown as due on his amended self-assessment.

The FTT calculated that the taxpayer was entitled to a repayment of £3,781, under section 59B, TMA. The taxpayer had therefore been overpaid £2,259 (being the difference between £6,040 and £3,781).

Notwithstanding these findings of fact, the FTT concluded that it had no power to further amend the return in order to reflect what, on its findings, were the correct figures, because the amendments previously made by HMRC had not resulted in the taxpayer being either overcharged or undercharged, for the purposes of section 50(6) and (7), TMA.

HMRC did not challenge the FTT’s finding as to the level of tax deducted, but it disagreed with the FTT’s conclusion concerning its lack of power to amend the return and appealed its decision.

UT’s decision

The UT allowed HMRC’s appeal.

In the view of the UT, section 50(6) and (7) should be construed so as to enable the FTT to amend a self-assessment return to give effect to the decision which it has made in relation to an appeal before it.

5. [2016] UKUT 32.

It had been within the appellate jurisdiction of the FTT to make the decisions of fact which it did, as those findings were made in an appeal “against ... any conclusion stated or amendment made by a closure notice under section 28A”. It would therefore be surprising if the FTT was then unable to give effect to its findings by amending the return.

The UT also considered section 59B, TMA, which is concerned with the payment and collection of tax, and accepted that it was not justiciable before the FTT. However, in the view of the UT, once an amendment is made to a self-assessment return by section 50(6) and (7), section 59B then applies to the amended return just as it does to an original return, or to an amendment following a closure notice which is not appealed.

Comment

This decision is helpful in that it confirms that once the FTT decides, as a matter of fact, as it did in this case, what the correct figures are, it must give effect to its conclusions by amending the self-assessment return pursuant to section 50(6) and (7) TMA. Once the amendment has been made, the position is no different in principle from that which exists in relation to any other amendment to a return, in particular, an amendment made as a result of a closure notice.

A copy of the decision can be found [here](#).

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