Tax update

July 2017

In this month's Update we report on draft provisions for a EU wide cross-border tax planning disclosure requirement; changes to HMRC's guidance on the WDF and announcements in the Queen's Speech in relation to the next Finance Bill. We also comment on three recent tax cases.

News items

EU disclosure

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HMRC worldwide disclosure facility

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Queen's speech

It was announced in the Queen's Speech that the next Finance Bill will be introduced in 2017 and will include a raft of measures intended to combat tax avoidance. more›

Case reports

Rendall – Tribunal reduces penalties imposed for failure to file a partnership return to nil

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Pitcher – Tribunal finds in favour of taxpayer in APN penalty appeal

In *Graham Pitcher v HMRC* [2017] UKFTT 0406 (TC), the FTT allowed the taxpayer's appeal against a penalty for non-payment of an Accelerated Payment Notice (APN) due to defects in the APN. more›

Rai – Tribunal quashes penalties for non-payment of PPNs

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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's Tax Take.

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News items

EU disclosure

The European Commission has published new proposals which, if enacted, will require the compulsory reporting of cross-border tax planning arrangements. The reporting requirements will fall upon "intermediaries" in circumstances where the arrangements fall into a broadly defined set of "hallmarks".

The proposals, which will amend the existing Directive for Administrative Cooperation, is yet to be adopted by the European Council, however, it is expected that the new legislation will come into force from January 2019.

The Commission's press release can be found here.

HMRC worldwide disclosure facility

HMRC has amended its guidance to include a provision relevant to "complex cases" where, in "exceptional circumstances", taxpayers can be given an additional 90 days from notification to make a disclosure. This would increase the total time limit to 180 days. It is critical that taxpayers understand and prepare thoroughly when making a notification under the WDF so as not to be caught out by the restrictive time limit built in to the system.

HMRC's guidance can be found here.

Queen's speech

It was announced in the Queen's Speech that the next Finance Bill will be introduced in 2017 and will include a raft of measures intended to combat tax avoidance. Little detail has been provided, but it appears likely that many of the provisions removed from the Finance Act 2017 in order to respect convention surrounding general elections, will be reintroduced.

There will also be a National Insurance Contributions Bill designed to simplify the NICs system. It is also intended that there will be a "Customs Bill" which will replace EU customs legislation.

A copy of the Speech can be found here.

Back to contents

Case reports

Rendall – Tribunal reduces penalties imposed for failure to file a partnership return to nil

In *Rendall v HMRC* [2017] UKFTT 356 (TC), the First-tier Tribunal (FTT) has reduced penalties imposed on partners for failure to file a partnership return on time to nil as the requisite information had already been disclosed to HMRC in the partners' personal self-assessment returns.

Background

Mrs Rendall (the Appellant) appealed against penalties imposed on her and her husband, as partners in the partnership of Mr I J and Mrs R I Rendall, for failing to file a partnership return for 2011/12 on time, pursuant to paragraphs 3-5, Schedule 55, FA 2009.

The Appellant and her husband had been issued with a notice by HMRC, pursuant to section 12AA, TMA 1970, requiring the Appellant, as the 'representative partner', to file a partnership return by 31 October 2012.

On 12 February 2013, HMRC issued a notice informing each partner that an initial penalty of £100 had been assessed on them for the Appellant's failure to file the return by the due date. On 25 June 2013, HMRC issued a further notice informing each partner that a penalty of £900 had been assessed on them for the Appellant's failure to file the return by a date three months after the due date. HMRC also informed each partner that a penalty of £300 had been assessed on them for the Appellant's failure to file the return by a date six months after the due date. On 11 June 2013, the partnership return was filed with HMRC.

The Appellant argued that she had entered all partnership income and expenses on the individual partners' tax returns, which had been filed with HMRC on time and had not appreciated that that did not constitute a "partnership return".

FTT's decision

All penalties assessed on both partners were cancelled.

The FTT held that there was no reasonable excuse for the failure to file a partnership return on time. The notice sent to the Appellant made it clear that a partnership return was required, using either a form attached to the notice or using commercial software on the internet.

However, HMRC's decision that there were no special circumstances, for the purposes of paragraph 16, Schedule 55, FA 2009, enabling the penalties to be reduced was flawed. HMRC had not considered, or properly taken into account, the fact that it had been given, in the individual personal returns which had been made on time, all the information that the partnership return required, including the share allocated to each partner. Nor had it taken into account that a partnership return does not in itself disclose any income chargeable to tax about which HMRC would otherwise be ignorant.

In the FTT's view, the purpose of paragraph 25, Schedule 55, FA 2009 and section 12AA, TMA 1970, is to encourage timely submission of the amounts of income on which partners in a partnership are to be assessed to income tax. In the circumstances of the present case, the Appellant had complied with those requirements and accordingly the penalties would be reduced to nil.

Comment

Whilst this decision will no doubt be welcomed by partnership taxpayers, it is somewhat surprising as it arguably renders partnership returns obsolete if the information is provided to HMRC in an alternative format. In the present case, the partnership was between two spouses who historically shared partnership profits on an equal basis. Application of the decision to larger partnerships with more complex profit sharing arrangements could create practical difficulties for HMRC and therefore it would not be surprising if it was to seek to appeal the decision to the Upper Tribunal.

A copy of the decision can be found here.

Back to contents

Pitcher – Tribunal finds in favour of taxpayer in APN penalty appeal

In *Graham Pitcher v HMRC* [2017] UKFTT 0406 (TC), the FTT allowed the taxpayer's appeal against a penalty for non-payment of an Accelerated Payment Notice (APN) due to defects in the APN.

Background

The taxpayer had participated in two tax planning arrangements registered under the disclosure of tax avoidance schemes (DOTAS) regime. The first was a loss generation scheme called Liberty 2 (Syndicate) and the second was Icebreaker. An enquiry was opened by HMRC in December 2009, in relation to the 2007/8 tax year and his participation in Liberty 2.

Mr Pitcher (the Appellant) found himself in Highpoint Prison having been convicted of conspiracy to defraud in relation to a separate and unconnected matter. Whilst the Appellant was in prison, HMRC opened an enquiry in relation to the 2006/7 tax year and his participation in Icebreaker.

On 23 July 2015, HMRC issued an APN to the Appellant in respect of the 2007/8 tax year which it sent to Highpoint Prison (believing him to still be in prison). However, by that time the Appellant had been released from prison and was residing elsewhere. As a consequence, he did not receive the APN.

The APN contained a number of errors. First, it made reference to the wrong statutory provisions. It incorrectly stated that the amount demanded in the notice was set by reference to section 219(4)(b), FA 2014. That section has nothing to do with the amount demanded in an APN (it should have referred to section 220(4)(b)).

Secondly, the APN provided an imprecise definition of "understated tax" and failed to make reference to the relevant statutory provisions.

Thirdly, the APN stipulated two different payable amounts. The first, under the heading "Amount due in respect of this notice", indicated that £56,905.20 was payable, however, in the "How to pay" section the "Amount due" was stated to be £53,063.70.

Having not received the original APN, the first the Appellant knew of the APN was when a reminder communication was sent to his home address on 9 September 2015. His evidence before the FTT was that he did not act when he received this reminder because he thought the letter related to the ongoing enquiries into the Icebreaker arrangements and did not realise it related to an APN which he had not received.

HMRC, having received no payment, issued a penalty to the taxpayer of 5% of the larger sum demanded in the APN. It was at this point that the Appellant realised what had happened and wrote to HMRC to explain that he had not received the APN and to ask for a calculation of how HMRC had arrived at the sum it was demanding.

HMRC responded by saying the 90 day period for representations under section 222, FA 2014, had expired and it could not review the matter. It did, however, include a copy of the APN with its reply and a one page summary of its calculation.

The calculation contained further errors. First, it revealed that HMRC had intended to demand the sum of £53,065.46 (£1.76 more than the lesser sum demanded in the APN) and second that HMRC had included £39,641 of losses which had been withheld by HMRC under section 59B(4A), TMA 1970, and consequently had never been in the possession of the Appellant.

When informed of this, HMRC accepted that the APN ought to have demanded the sum of £13,422.55. However, rather than withdrawing the original APN and issuing a new one, the officer modified the existing APN. This meant that HMRC could then withdraw its penalty notice but replace it immediately with a new one for 5% of £13,422.55, on the basis that the Appellant was still out of time for paying the sum demanded by the APN.

The Appellant appealed to HMRC but his appeal was rejected and the subsequent review upheld that decision. He then appealed to the FTT.

FTT's decision
The appeal was allowed.

The FTT was of the view that although the APN had been sent to the prison in which the Appellant was no longer incarcerated, HMRC had nevertheless issued the notice to the last known address and had therefore satisfied the requirements of section 7, Interpretation Act 1978, and section 115, TMA 1970.

HMRC argued that the Appellant could not challenge the sum(s) demanded by the APN because the only mechanism he had to do so was by way of representations to HMRC made under section 222, FA 2014, and he was out of time to do so, or by way of judicial review, which he had not done. The FTT agreed and citing the recent decision in *Nijjar v HMRC* [2017] UKFTT 0175 (TC), confirmed that the FTT has no authority under statute to consider whether the circumstances for the valid issue of an APN have been satisfied (such a challenge must be brought by way of judicial review proceedings).

HMRC maintained that the difference in the sums demanded in the APN itself and the subsequently amended sums were a minor error and as such could be saved by section 114, TMA 1970 (want of form or errors not to invalidate assessments etc) and that accordingly the APN was valid.

HMRC also argued that although the APN contained two figures, one of them was correct, based on their understanding at the time. The fact that the notice contained another, incorrect, figure was irrelevant and could not prevent it from issuing penalties.

In the FTT's view, the legislation specifies, in the singular, that the APN should explain "the payment" the taxpayer is to make. Faced with two figures the Appellant was put in the

impossible position of having to guess which of the two amounts was correct and run the risk of selecting the wrong one. The APN could not therefore be said to be in "substance and effect in conformity with or according to the intent and meaning of the Taxes Acts" and accordingly section 114 did not assist HMRC and the penalty was quashed.

Comment
There is a concern that in its haste to issue APNs on an industrial scale, HMRC will inevitably make mistakes. This case demonstrates what can go wrong when proper care and attention is not applied by HMRC in the issuing process.

HMRC's position in this case appears to have been that the Appellant is bound by an APN which he did not receive, which included incorrect figures and in respect of which he was out of time to make representations.

It is disappointing that HMRC forced the Appellant to take his case all the way to the FTT. This appeal could have been avoided if it had adopted a sensible and pragmatic approach once the facts became known and worked with the Appellant to remedy the situation.

A copy of the decision can be found here.

Back to contents

Rai – Tribunal quashes penalties for non-payment of PPNs

In *Rai v HMRC* [2017] UKFTT 0467 (TC), the FTT was critical of HMRC's conduct and cancelled assessments to penalties which it had issued for failure to pay on time amounts demanded in partner payment notices (PPNs), as the statutory payment period had not expired.

Background
In the tax year 2007/8, Dr Balvinder Rai (the Appellant) entered into a tax mitigation scheme and became a partner in Invicta Film Partnership No 43 LLP (the partnership). HMRC gave notice in 2009 and 2010, that it intended to enquire into the partnership's tax returns for 2008, 2009 and 2010, under section 12AC(1), TMA 1970.

On 3 May 2016, HMRC issued three PPNs, under Part 4, Chapter 3 and Schedule 32, FA 2014, to the Appellant.

Under the accelerated payment regime, HMRC can issue a PPN where certain conditions are satisfied. Where the sum referred to in a PPN is unpaid by the due payment date, HMRC can impose penalties for non-payment under section 226, FA 2014.

There is no right of appeal to an independent tribunal against a PPN. However, a recipient of a PPN may make written representations to HMRC (paragraph 5, Schedule 32, FA 2014) within 90 days of the day the notice is given. On receipt of such representations, HMRC must either confirm, amend or withdraw the notice. Should a notice be upheld by HMRC, the payment deadline is extended by 30 days from the date of notification of HMRC's determination.

Within the statutory time frame for making written representations, the Appellant's accountants wrote to HMRC on 1 August 2016, purporting to make representations under paragraph 5, Schedule 32, FA 2014. In a letter dated 24 August 2016, HMRC refused to accept the Appellant's representations, claiming that it was unable to treat the letter as containing valid

representations because the taxpayer had not objected to the PPNs on the grounds that one or more of Conditions A, B, or C had not been met and/or to the amount specified in the notices. HMRC subsequently issued three assessments to penalties under section 226, FA 2014, for non-payment of the sums claimed in the PPNs within the statutory time frame. The Appellant appealed against the assessments.

FTT's decision
The appeal was allowed and the FTT cancelled the penalties pursuant to paragraph 15, Schedule 56, FA 2009.

The FTT considered whether what was given to the Appellant was a PPN, that is was given by virtue of paragraph 3(2)(a), Schedule 32, FA 2014 and that its content was that required by paragraph 4 of that Schedule.

The FTT concluded that the PPNs satisfied all the statutory requirements as to form and content.

The further and key question for the FTT to determine was whether the PPN amounts were unpaid at the end of the relevant payment period.

Under paragraph 6(5), Schedule 32, FA 2014 (imported into section 226 by paragraph 7(c), Schedule 32), the end of the payment period is different according to whether representations are made under paragraph 5, Schedule 32, or not.

The Appellant claimed that he had made representations and had not yet been notified of HMRC's determination in relation thereto.

The FTT was of the view that the accountant's letter of 1 August 2016 was not as clear as it might have been, but its thrust was obvious. The FTT therefore found that the Appellant had made written representations within the time limit for doing so, which objected to the amount of the PPNs and that HMRC had not determined whether a different amount ought to have been specified. HMRC had not notified the Appellant of the confirmed or amended amount, as required by paragraph 5(4)(b), Schedule 32. It followed that the payment period had not ended and the Appellant had not failed to pay the unpaid amount by the end of that period and therefore no penalty was due.

Comment
The FTT was critical of HMRC's conduct in this case. The judge accused HMRC of "nitpicking pedantry" in claiming that the accountant's letter did not make representations objecting to the amount referred to in the PPNs and thought HMRC were "looking for any possible hook on which to hang a refusal to accept representations made close to the end of the permitted period of 90 days".

As there is no appeal against a PPN, representations are the closest substitute for an appeal. HMRC is enjoined by its own manual to regard as an appeal anything which might conceivably be one and yet here, where there is a substitute for an appeal which does not provide the same rights as an appeal, HMRC adopted the opposite approach.

Not only did HMRC not treat the Appellant's representations as representations, it also informed

him that the legislation requires him to inform it why the amounts shown in the notices are not correct, what he considers the correct amounts to be and why. This is not what the legislation says and the judge commented that:

"HMRC are therefore setting their own rules about what should be in representations. This is not the way they should act."

A copy of the decision can be found here.

Back to contents

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