Tax update

October 2017

In this update we report on HMRC's recently published guidance concerning the new offences of failing to prevent the facilitation of tax evasion; HMRC's new powers to refuse to register or de-register master trust pension schemes; and new guidance on investors' relief in the CGT context. We also report on three recent cases on penalties; business property relief; and the Senior Accounting Officer regime.

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HMRC guidance on the new offences of failing to prevent the facilitation of tax evasion

HMRC has published guidance concerning the two new offences relating to the failure to prevent the facilitation of tax evasion. more›

New HMRC powers in relation to master trust pension schemes and schemes for dormant companies

HMRC is to receive new powers to enable it to refuse to register and to de-register master trust pension schemes and schemes for dormant companies which are not authorised by The Pensions Regulator. more›

Capital Gains Manual updated to cover investors' relief

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Vigne – HMRC lose business property relief case

In *The Estate of Maureen W Vigne (deceased) v HMRC*, the FTT determined that the estate of the late Maureen Vigne (the deceased) was entitled to business property relief (BPR), as provided for in section 105, Inheritance Tax Act 1984 (IHTA). more›

Any comments or queries

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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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Thathiah – HMRC unsuccessful in first Senior Accounting Officer penalty appeal

In *Kreeson Thathiah v HMRC*, the FTT allowed an appeal against penalties which had been assessed on the finance director of a group of companies under the Senior Accounting Officer (SAO) regime, contained in Schedule 46, Finance Act 2009 (FA 2009). more>

News items

HMRC guidance on the new offences of failing to prevent the facilitation of tax evasion

HMRC has published guidance concerning the two new offences relating to the failure to prevent the facilitation of tax evasion. The offences were introduced by the Criminal Finances Act 2017 and came into force on 30 September 2017.

The guidance details six principles for businesses to follow. It will be a defence for the company or organisation to show that it had in place procedures designed to prevent tax evasion at the time when the offence was committed.

The guidance aims to:

- provide guidance on how to assess the risk of the organisation's representatives facilitating evasion
- help businesses to adopt effective systems to mitigate the risk of associated persons facilitating tax evasion
- provide assistance in considering whether the reasonable procedures defence would be available
- establish a greater understanding of the expectations in government so that businesses can assess the adequacy of their existing systems
- assist trade bodies in the formulation of more detailed sector-specific procedures.

The guidance can be found here.

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New HMRC powers in relation to master trust pension schemes and schemes for dormant companies

HMRC is to receive new powers to enable it to refuse to register and to de-register master trust pension schemes and schemes for dormant companies which are not authorised by The Pensions Regulator.

The draft legislation is contained in Finance Bill (No.2) (amending FA 2004) and it is expected that the new powers will come into force from 6 April 2018.

The Policy Paper and draft legislation can be found here.

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Capital Gains Manual updated to cover investors' relief

HMRC's CGT manual was updated on 7 September 2017 to provide guidance in relation to investors' relief. The guidance sets out the relevant legislation and provides helpful examples covering part disposals, multiple disposals and disposals by trustees and partnerships.

The update to the CGT manual can be found here.

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Case reports

Hickey Plant Hire – Taxpayer successfully challenges HMRC's narrow reading of penalty rules

In *M J Hickey Plant Hire and Contracts Ltd v HMRC*[1], the Upper Tribunal (UT) allowed the taxpayer's appeal and in a carefully considered judgment set out the correct approach to the penalty rules applicable to 'normal' and 'delayed tax' cases, contained in Schedule 24, Finance Act 2007 (FA 2007).

Background

The taxpayer used software to keep its records and prepare its quarterly VAT returns. It decided to adopt a 'default' setting in relation to the return dates which stopped the period one day short of the required period and put that day at the beginning of the next period. The result was that tax which should have been declared for that last day was declared as part of the return for the next period. This was intended to help the taxpayer's cash-flow. This shifting occurred in respect of 15 returns (from 1 December 2009 to 31 August 2013). Nine produced an underpayment of VAT and the remainder an overpayment.

On discovering what had happened, HMRC required the then current period to be dealt with properly and raised a separate assessment for the last day of the previous period (31 August 2013) which would otherwise not have fallen within any return. HMRC also issued a penalty in the final sum of £149,186.

HMRC imposed penalties under paragraph 5, Schedule 24, FA 2007 and took, as a base for the penalty, the tax that was under-declared for each period for which there had been an under-declaration and then aggregated those under-payments. This was done on a quarter by quarter basis, ignoring the fact that the tax under-declared in one period was declared in a return (and in substance accounted for and paid) in the next period.

The taxpayer disputed the method of calculation of the penalty and therefore the amount. In its view, the penalty should have been imposed under paragraph 8, Schedule 24, FA 2007, to reflect the fact that the tax was delayed but not avoided.

The point in issue was therefore whether the penalty should be assessed under paragraph 5 (standard penalty) or paragraph 8 (delayed tax).

The taxpayer appealed the penalty assessment to the First-tier Tribunal (FTT), which dismissed its appeal. It then appealed to the UT.

The legislation

Paragraphs 5 and 8, Schedule 24, FA 2007, provide as follows:

"**Potential lost revenue: normal rule**

5 (1) 'The potential lost revenue' in respect of an inaccuracy in a document [(including an inaccuracy attributable to a supply of false information or withholding of information)] or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment ...

1. [2017] UKUT 308 (TCC).

Potential lost revenue: delayed tax
8 (1) Where an inaccuracy resulted in an amount of tax being declared later than it should have been ('the delayed tax'), the potential lost revenue is –
(a) 5% of the delayed tax for each year of the delay, or
(b) a percentage of the delayed tax, for each separate period of delay of less than a year, equating to 5% per year ..."

UT decision
The taxpayer's appeal was allowed.

HMRC argued that paragraph 5 referred to an 'inaccuracy' in a 'document', which meant that every inaccuracy in each separate return had to be considered in isolation. The correcting of the position in the next return was itself an 'inaccuracy' in that 'document', however, the fact that it was in a sense correcting the position was irrelevant for the purpose of assessing the level of penalties under paragraph 5.

In support of this argument, HMRC referred to various HMRC guidance and practice statements which supported its approach.

The taxpayer argued that the correct approach was that set out in paragraph 8, on the basis that there was one inaccuracy in each quarter, which owing to the nature of the inaccuracy was split over two returns.

The UT accepted the taxpayer's arguments. It did not agree with HMRC that penalties had to be applied on a strict return by return basis without reference to the surrounding circumstances.

While it was true that a strict reading of paragraph 5, in isolation, would tend toward HMRC's interpretation, paragraph 8 existed as an alternative to paragraph 5 in circumstances where the facts made that paragraph relevant.

In the view of the UT, because there was a causal link between the errors between two returns which led to an under-declaration in one and declaration of the missing amount in the next, paragraph 8 was relevant.

Comment
Two important points arise from this case. The first is that the penalty regime operates in a way which is designed to fit the penalty to the factual and causative nature of events rather than the other way around. The causal connection in the error was critical to the application of paragraph 8 and the UT distinguished the case of *Miah v HMRC*[2], where no such causal link was present.

The second is a general reminder that HMRC's guidance and practice notes do not have the force of law. In this case, both before the FTT and the UT, HMRC attempted to use such internal documentation in support of its interpretation of the law. The circularity of such an argument is obvious and perhaps not surprisingly this argument was given short shrift by the UT.

A copy of the decision can be found here.

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2. [2016] UKFTT 644 (TC).

Vigne – HMRC lose business property relief case

In *The Estate of Maureen W Vigne (deceased) v HMRC*[3], the FTT determined that the estate of the late Maureen Vigne (the deceased) was entitled to business property relief (BPR), as provided for in section 105, Inheritance Tax Act 1984 (IHTA).

Background

The deceased died on 29 May 2012. At the time of her death, she was the sole owner of a livery business with approximately 30 acres of land. Following her death, the deceased's personal representatives (the Appellants) claimed:

- BPR on the basis that the asset constituted 'relevant business property', for the purposes of section 105, IHTA; and/or,
- agricultural property relief (APR) on the basis that the asset constituted 'agricultural property', for the purposes of section 116, IHTA.

HMRC issued a determination under section 221, IHTA, refusing both claims.

The Appellants appealed the determination.

FTT decision

The appeal was allowed.

It was common ground that the deceased operated a business and that there was property that could properly be described as 'business property' associated with and necessary for the carrying on of that business. The issue between the parties was whether the business was a business which consisted mainly of holding investments. HMRC's position was that if a livery business was operated, which necessitated land being available for it to be viable, that is nonetheless the holding of an investment and the entire business should be characterised as a business of holding investments. The Appellants' position was that the deceased did not operate an investment business, nor did her business consist of 'holding investments'.

HMRC argued that the deceased had run a business and that the property was 'business property associated with and necessary for carrying on that business'. In support of its contentions, HMRC relied on the hours worked by the yard manager, the labour costs incurred and the profitability of the business. In the view of HMRC, these activities were insufficient to constitute anything more than 'holding investments'.

The Appellants contended that the services provided were over and above those included at the lower scale of livery provision. These extra services included the provision of worming products for the horses; providing horses with hay feed during the winter with a hay crop grown on the land; removing horse manure from the fields; and a daily health check of the horses.

The FTT was in no doubt that the business was a genuine livery business which was developed so as to be a recognisable livery business offering significantly more than the mere right to occupy a particular parcel of land. It was satisfied that a business was being run from and on the land which did provide services to those who kept their horses on the land and that no properly informed observer would have said that the deceased was in the business of 'holding investments'.

3. [2017] UKFTT 632 (TC).

The Appellants' appeal in relation to the APR claim was unsuccessful. In the FTT's view, an 'objective observer' would not have thought agricultural activities were taking place on the land and equine activities are not usually characterised as agricultural for the purpose of section 115(4), IHTA.

Comment

This decision will be welcomed by taxpayers. Many landowners may now benefit from BPR in circumstances where previously HMRC would have rejected a claim for BPR, so long as it can be demonstrated that valuable services are provided. The facts of this case are of course specific and care will therefore need to be taken when seeking to apply the decision to other fact patterns.

A copy of the decision can be found here.

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Thathiah – HMRC unsuccessful in first Senior Accounting Officer penalty appeal

In *Kreeson Thathiah v HMRC*[4], the FTT allowed an appeal against penalties which had been assessed on the finance director of a group of companies under the Senior Accounting Officer (SAO) regime, contained in Schedule 46, Finance Act 2009 (FA 2009).

Background

The SAO regime was introduced by FA 2009, and requires large companies and groups to identify the individual who is responsible for certifying to HMRC each year that they have in place "appropriate tax accounting arrangements". The SAO has personal liability to take reasonable steps to ensure that this is the case, with a breach of the rules resulting in a personal penalty of £5,000.

Mr Kreeson Thathiah (the Appellant) was the finance director and SAO of the Lenlyn group of companies, a privately owned group which included International Currency Exchange (ICE). The group's activities included the provision of currency exchange and other financial services.

The Appellant provided SAO certificates to HMRC for a number of group companies, including ICE, for the financial years ending 28 February 2011 to 2013, inclusive.

The Appellant ceased working for the Lenlyn group in March 2014, although his employment did not formally cease until 1 May 2014. Following his departure, the group's tax advisors, KPMG, informed HMRC of errors they considered had been made in the VAT returns for one of the group's companies, representing VAT underpayments of around £1.36 million. These errors gave HMRC reason to believe that the Appellant had failed in his SAO duties and it imposed two £5,000 penalties in relation to two of the periods he had provided SAO certificates.

The Appellant disputed the penalties and appealed the assessments to the FTT.

FTT decision

The appeal was allowed and the penalties cancelled.

HMRC argued that the Appellant had breached his SAO duty by failing to put in place a system for selective testing or sampling of figures in the company's VAT returns to ensure the figures

4. [2017] UKFTT 0601 (TC).

were correct and had relied excessively on comparing figures with those in previous VAT returns. It was also argued that the Appellant had been unable to provide a reasonable excuse for the failure.

The Appellant argued that he had taken all reasonable steps, within the resources available to him, to comply with his statutory duties.

The FTT considered that HMRC had incorrectly focused on whether the Appellant had a reasonable excuse for the failure, rather than whether he had breached his main duty by failing to ensure that the company established and maintained appropriate tax arrangements. In the view of the FTT, in order for a breach to be established under the SAO regime, it must be shown that there has been a failure by the SAO to take "reasonable steps" to ensure the company establishes and maintains appropriate tax arrangements. The FTT considered that whether "reasonable steps" had been taken is an objective test which must be determined by reference to all the circumstances.

The FTT concluded that the Appellant had made a number of improvements in the group, including establishing an internal tax team, increased automation to reduce errors, expansion of the tax risk register and he had introduced a comprehensive tax policy document. In addition, KPMG was engaged to conduct a substantive yearly audit. In these circumstances, the FTT agreed with the Appellant that he had done what he reasonably could with the resources available to him.

In rejecting HMRC's argument that the absence of selective testing of VAT invoices lead to a conclusion that the Appellant had not undertaken reasonable steps, the FTT noted that whilst sampling of invoices would be a desirable step, the absence of such sampling did not necessarily lead to a breach of the SAO duty.

Comment

As far as we are aware, this is the first time the SAO regime has been considered by the FTT. The decision provides helpful guidance as to what constitutes "appropriate tax arrangements" for the purpose of the regime. What constitutes "reasonable steps" in order for an SAO to comply with the regime will depend on the size of the business and the resources available to the SAO. It is not a case of one size fits all.

It is also worth noting that the FTT was critical of HMRC's conduct in this case, commenting that it had failed to take account of the fact that the Appellant received no support from the Lenlyn group and had no access to the KPMG error correction notice (due to HMRC's concerns in relation to taxpayer confidentiality) until it was provided as an exhibit to a witness statement during the course of the appeal. HMRC also failed to draw a distinction between what could be expected in terms of steps taken by a smaller organisation compared with a larger organisation.

A copy of the decision can be found here.

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