Tax update

March 2019

In this month's update we report on (1) clarification from HMRC on time limits for discovery assessments into tax returns where the loss of tax is due to avoidance; (2) HMRC's updated guidance for settling disguised remuneration schemes; and (3) confirmation in Spotlight 48 that taxpayers who have taken out disguised remuneration loans do not need to obtain a deed of release or exclusion of the loan from the lender before HMRC will agree a settlement. We also comment on three recent decisions relating to (1) information notices issued by HMRC under Schedule 36, Finance Act 2008; (2) revocation of a taxpayer's fixed protection pensions certificate; and (3) whether a law firm is a relevant data holder for the purpose HMRC's data gathering powers.

News items

Time limits for discovery assessments into tax returns clarified

HMRC has clarified the rules on time limits for making a discovery assessment into a tax return where the loss of tax is due to avoidance. It has updated its internal manual: SALF411 - Enquiries into Tax Returns: time limits for discovery assessments, to amend its guidance on sections 34(1), 36(1) and 36(1A), Taxes Management Act 1970 (TMA). more›

Disguised remuneration: settling your tax affairs – HMRC extends payment period

On 1 and 4 February 2019, HMRC published amendments to its guidance on settling disguised remuneration loan tax liabilities before the April 2019 loan charge arises. The amendments include an extension to the time period over which taxpayers can pay what they owe. more›

HMRC publishes Spotlight 48 and policy paper

On 14 February 2019, HMRC published Spotlight 48 and updated its policy paper on disguised remuneration and the loan charge. more›

Case reports

Hegarty – HMRC's information notices were invalid

In *Hegarty v HMRC* [2018] UKFTT 0774 (TC), the First-tier Tribunal (FTT) has held that HMRC issued invalid information notices under paragraph 1, Schedule 36, Finance Act 2008 (FA 2008), as it had not provided sufficient evidence to support its suspicion that the taxpayers had paid insufficient tax. more›

Any comments or queries

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About this update

Our Tax update is published on the first Thursday of every month, and is written by members of RPC's Tax 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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Hymanson – HMRC's decision to revoke the taxpayer's fixed protection was unreasonable

In *Gary Hymanson v HMRC* [2018] UKFTT 667, the FTT has held that HMRC's decision to revoke the taxpayer's fixed protection was unreasonable and directed that it be reinstated. In so finding, the FTT applied the equitable maxim "that which should be done should be treated as having been done". more›

Wilsons – HMRC unable to obtain law firm's records

In *Wilsons Solicitors LLP v HMRC* [2018] UKFTT 627 (TC), the FTT has held that the obligation to keep records under the Money Laundering Regulations 2007 (MLR) does not make a law firm a relevant data-holder for the purpose of HMRC's data-gathering powers. more›

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Time limits for discovery assessments into tax returns clarified

HMRC has clarified the rules on time limits for making a discovery assessment into a tax return where the loss of tax is due to avoidance. It has updated its internal manual: SALF411 - Enquiries into Tax Returns: time limits for discovery assessments, to amend its guidance on sections 34(1), 36(1) and 36(1A), Taxes Management Act 1970 (TMA).

In relation to section 34(1), the manual confirms that:

"in any case of incomplete disclosure without careless or deliberate conduct the time limit for a discovery assessment is not later than four years after the end of the tax year to which it relates".

With regard to sections 36(1) and 36(1A), the manual provides that:

"in any case involving a loss of tax brought about carelessly, the time limit for making a discovery assessment is not later than six years after the end of tax year to which the assessment relates".

The manual also stresses that the time limit for making a discovery assessment is not later than 20 years after the end of the tax year to which it relates where the loss of tax is:

- brought about deliberately
- attributable to a failure to notify liability under section 7, TMA
- attributable to an avoidance scheme notifiable under the Disclosure of Tax Avoidance Schemes (DOTAS) regime and the person making the return has not complied with their obligations under the DOTAS regime to inform HMRC they have used that scheme, or
- attributable to an avoidance scheme promoted by a Monitored Promoter under the Promoters of Tax Avoidance Schemes regime and the person making the return has failed to include the Promoter Reference Number on their return.

The manual also confirms that under section 59B(6), TMA, the due date for tax charged by a discovery assessment is 30 days after the notice of the assessment is given.

A copy of the manual can be viewed here.

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Disguised remuneration: settling your tax affairs – HMRC extends payment period

On 1 and 4 February 2019, HMRC published amendments to its guidance on settling disguised remuneration loan tax liabilities before the April 2019 loan charge arises. The amendments include an extension to the time period over which taxpayers can pay what they owe.

HMRC originally launched the settlement opportunity in 2017 and announced in 2018 that taxpayers could pay what they owe over a period of up to five years, provided their earnings are less than £50,000 and they are no longer participating in tax avoidance arrangements.

The updated guidance now states that:

- there is no need to provide detailed financial information for a payment arrangement of up to seven years, if the taxpayer's income for the current year is less than £30,000
- there is no need to provide detailed financial information for a payment arrangement of up to five years for taxpayers earning less than £50,000
- there is no maximum time period for payment arrangements, so if a taxpayer earns £50,000 or more, or needs a longer time to pay, they should contact HMRC. Taxpayers must provide detailed financial information in these circumstances.

The updated guidance also states that although the deadlines for registering an interest in the settlement opportunity and providing HMRC with information have passed, taxpayers wishing to settle before the loan charge takes effect should contact HMRC as soon as possible before 5 April 2019.

A copy of the guidance can be viewed here.

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HMRC publishes Spotlight 48 and policy paper

On 14 February 2019, HMRC published Spotlight 48 and updated its policy paper on disguised remuneration and the loan charge.

Spotlight 48 states that some advisers have mistakenly advised taxpayers who have taken out disguised remuneration loans that the lender needs to execute a deed of release or exclusion of the loan before HMRC will agree a settlement.

The Spotlight confirms that HMRC does not require such a deed to be executed.

The updated policy paper sets out the background to the 5 April 2019 loan charge, the courses of action open to taxpayers and HMRC's settlement opportunity.

A copy of Spotlight 48 can be viewed here.

A copy of the policy paper can be viewed here.

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Case reports

Hegarty – HMRC's information notices were invalid

In *Hegarty v HMRC* [2018] UKFTT 0774 (TC), the First-tier Tribunal (FTT) has held that HMRC issued invalid information notices under paragraph 1, Schedule 36, Finance Act 2008 (FA 2008), as it had not provided sufficient evidence to support its suspicion that the taxpayers had paid insufficient tax.

Background

Mr and Mrs Hegarty (the taxpayers) jointly owned a property which was gifted to their son who also lived at the property. The taxpayers retained the land surrounding the property for continued use in their business.

The taxpayers' son later sold the property to a developer with the sale price being listed at four times the market value stated in the taxpayers' capital gains tax (CGT) calculations at the time of the transfer to their son.

The taxpayers later sold the land they had retained (plus additional adjacent land they had purchased over the years) to the same developer. The taxpayers benefitted from CGT relief after claiming that their land was used as a car yard in their CGT calculation in their 2006/07 tax return.

HMRC questioned the value used when transferring the property to their son and also the relief in respect of the car yard. HMRC subsequently wrote to the taxpayers on 31 March 2016, informing them that they were being investigated under Code of Practice 9 for alleged tax fraud.

Following a meeting between HMRC and the taxpayers on 17 November 2016, HMRC requested information and documents in relation to the taxpayers' CGT returns for the 2006/07 tax year. On 16 January 2017, the taxpayers refused to supply the requested information and documents.

On 1 February 2017, HMRC issued information notices to the taxpayers, pursuant to paragraph 1, Schedule 36, FA 2008.

The information notices were appealed to the FTT.

HMRC decided not to defend the appeals and an FTT clerk wrote to the taxpayers stating that the FTT had allowed their appeals.

On 1 May 2018, HMRC issued further information notices to the taxpayers, requesting almost identical information (the Second Notices).

The taxpayers appealed the Second Notices to the FTT.

FTT decision

The appeals were allowed and the Second Notices were set aside under paragraph 33(3)(c), Schedule 36, FA 2008.

The taxpayers argued that HMRC was estopped from issuing or enforcing the Second Notices on the grounds of *res judicata* or because of abuse of process by HMRC as the notices had originally been issued and then withdrawn by HMRC. The FTT rejected this argument. In the view of the FTT, *res judicata* could not apply as the clerk had been mistaken in informing the taxpayers that the appeals had been allowed by the FTT, which had not considered the original information notices as they had been withdrawn by HMRC. Similarly, there had been no abuse of process as HMRC could have achieved the same result by varying the original information notices and HMRC had reserved the right to issue further information notices in its withdrawal letter.

However, the Second Notices were only valid if an HMRC officer had reason to suspect an under-assessment of tax. HMRC did not call the relevant officer to give evidence and therefore the FTT had insufficient evidence to conclude that this condition had been satisfied. The FTT noted that if HMRC had provided appropriate evidence, it might have been able to agree that HMRC had reason to suspect an under-assessment of tax.

This was sufficient to dispose of the appeals, but the FTT went on to consider whether in order for an information notice to be valid, there had to be a "sensible or practical" possibility of a discovery assessment being issued. The FTT expressed the view that there did have to be such a possibility.

Comment
HMRC frequently issue information notices and there is a suspicion that on occasion such requests are little more than a "fishing expedition". It is important that taxpayers who receive an information notice give careful consideration to whether the notice satisfies all of the statutory criteria.

The FTT also confirmed that in circumstances such as in this case, HMRC can only issue a valid information notice when there is a sensible or practical possibility of a discovery assessment being issued.

This case also illustrates how a case before the FTT can be lost if a party does not properly prepare for the appeal hearing and adduce all necessary evidence. If HMRC had called appropriate witnesses the outcome of the appeal may have been very different. Although litigation before the FTT is less formal than litigation in the High Court, certain rules of evidence still have to be complied with and it is therefore sensible to seek advice and assistance from a lawyer with the necessary experience and expertise in this area when embarking on such litigation.

A copy of the decision can be viewed here.

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Hymanson – HMRC's decision to revoke the taxpayer's fixed protection was unreasonable

In *Gary Hymanson v HMRC* [2018] UKFTT 667, the FTT has held that HMRC's decision to revoke the taxpayer's fixed protection was unreasonable and directed that it be reinstated. In so finding, the FTT applied the equitable maxim "that which should be done should be treated as having been done".

Background
The Lifetime Allowance (LTA) is the total amount of tax-relieved pension savings that an individual can build up over their lifetime without incurring an additional tax charge.

Fixed Protection 2012 was introduced to allow individuals to maintain a LTA of £1.8 million when it reduced, on 6 April 2012, from £1.8 million to £1.5 million. In exchange for Fixed Protection, contributions to a defined contribution arrangement by, or on behalf of, the individual had to cease and an individual could not build up additional defined benefit pension above an allowable "relevant percentage". If the conditions are not met, Fixed Protection is lost.

Mr Hymanson (the taxpayer) made a number of contributions into his pension schemes. In 2012, on the advice of his actuary, he applied for and was granted a "certificate of fixed protection" (the certificate), pursuant to paragraph 14, Schedule 18, Finance Act 2011.

Having obtained the certificate, the taxpayer failed to stop monthly direct debits in relation to two of his pension schemes until April 2015. HMRC therefore revoked the certificate. This was on the basis that paragraph 14 had ceased to apply because there had been "benefit accrual in relation to the individual under an arrangement under a registered pension scheme" (paragraph 14(4)).

The taxpayer argued that he had made a mistake when he made the additional contributions and that therefore those payments should be set aside and treated as if they had not occurred.

HMRC rejected the taxpayer's contentions and revoked the certificate.

The taxpayer appealed to the FTT.

FTT decision
The appeal was allowed.

In determining the appeal, the FTT considered:

1. whether the taxpayer would be granted the remedy of rescission of the payments made after April 2012, were he to take his case to the High Court? and
2. if the taxpayer would be able to obtain such relief from the High Court, should the FTT apply the equitable maxim "that which should be done should be treated as having been done" and proceed on the basis that the additional payments should be ignored for the purposes of paragraph 14?

Rescission
The taxpayer contended that he had made a mistake as to the tax consequences of the payments to the pension funds and so the transactions should be set aside.

The FTT considered *Pitt v Holt* [2013] UKSC 26, which confirmed that a voluntary disposition (such as the additional contributions to the pension schemes) may be set aside on the grounds of mistake. It is necessary to examine the nature and seriousness of a mistake in order to establish if it is appropriate to set aside the transactions in question. The mistake must be causative of the disposition ie but for the mistake, the disposition would not have been made and sufficiently serious. The gravity of the mistake must be assessed by a close examination of the facts including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.

The FTT concluded that, on the balance of probabilities, the taxpayer's explanations for the failure were inconsistent and that he had not cancelled the direct debit payments because he had a genuine belief that it would be acceptable to continue making the monthly payments to the pension schemes.

The consequences of the taxpayer's mistake were serious. The payments made totaled £7,000 but his tax loss (resulting from the reduction in his lifetime allowance) was estimated at £50,000. The FTT said:

"This is clearly a totally disproportionate loss of tax and the question I must ask is: if Mr Hymanson had understood the tax consequences of his making the additional contributions would he have done so? Undoubtedly the answer must be that he would not.

I therefore find that if Mr Hymanson were to take his case to the High Court then they would issue an order for rescission of these additional contributions because of his mistaken belief as to the tax consequences of the payments."

The FTT therefore concluded that if the taxpayer were to take his case to the High Court, it would issue an order for rescission of the additional contributions.

The equitable maxim
Having established that the equitable maxim would be applied by the High Court to rescind the additional payments, the FTT had to decide whether it had jurisdiction to apply the maxim in the present case.

The taxpayer relied on the decision of the Upper Tribunal in *Lobler v HMRC* [2015] UKUT 152 (TCC), where Mrs Justice Proudman said:

"... although the FTT did not itself have power to order rectification, it could determine that if rectification would be granted by a court who does have jurisdiction to grant it, Mr Lobler's tax position would follow as if such rectification had been granted."

HMRC attempted to distinguish *Lobler*, and argued that *Lobler* concerned rectification whereas the instant case related to rescission. The FTT noted, however, that Proudman J had been at pains to point out in her decision that her approach could be applied to any equitable remedy, and in fact implied that she was exploring the boundaries of what was permitted by applying rectification rather than one of the more conventional remedies, such as specific performance or rescission. Proudman J referred to rescission specifically at [68] of her decision, where she said:

"the tax consequences of a transaction may, in an appropriate case, be sufficiently serious to warrant rescission and thus rectification."

The FTT noted HMRC's admission that it would have been prepared to rescind the payments if they had been made by a bank in contravention of an instruction from the taxpayer, but it had not considered the possibility that the payments could be rescinded because of the taxpayer's mistake. In the view of the FTT, this was a relevant factor which HMRC had failed to take into account. HMRC's decision was therefore unreasonable.

The FTT allowed the appeal and directed HMRC to issue a new certificate.

Comment

Notwithstanding the fact that HMRC had stressed during the course of the appeal hearing that if the FTT allowed the taxpayer's appeal such a decision would cause it serious issues in relation to the way in which it administers the fixed protection rules, the FTT found in favour of the taxpayer commenting that any such practical difficulties could no doubt be overcome by HMRC.

This decision confirms that taxpayers can, in appropriate cases, rely on equitable maxims to achieve a just result before the FTT without the need to seek an appropriate order from the High Court. This should be borne in mind in cases where taxpayers are fiscally worse off as a result of an innocent mistake.

A copy of the decision can be viewed here.

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Wilsons – HMRC unable to obtain law firm's records

In *Wilsons Solicitors LLP v HMRC* [2018] UKFTT 627 (TC), the FTT has held that the obligation to keep records under the Money Laundering Regulations 2007 (MLR) does not make a law firm a relevant data-holder for the purpose of HMRC's data-gathering powers.

Background

Schedule 23, Finance Act 2011 (Schedule 23) enables HMRC to require a relevant data holder to provide it with certain information.

Paragraph 17, Schedule 23, provides that relevant data holders include those who maintain a "register" and defines register as including "any record or list that any other person is required or permitted to maintain".

HMRC's view was that as solicitors are under a duty to keep records under the MLR, they maintain a register, for the purposes of paragraph 17.

HMRC required certain information from Wilsons Solicitors LLP (Wilsons), which related to its clients who sought advice in relation to offshore structures. HMRC issued a notice to Wilsons under paragraph 1, Schedule 23 (the Notice), requesting details of beneficial owners of offshore companies and persons who had beneficial interests in offshore partnerships.

Wilsons appealed the Notice.

FTT decision

The appeal was allowed.

The issue for the FTT to determine was whether the requirement under the MLR for Wilsons to keep copies of documents in relation to the identity of its clients and evidencing the purpose and nature of the business relationship meant that Wilsons was a relevant data holder for the purposes of Schedule 23.

The appeal turned on whether Wilsons was a person by whom a "register" was maintained.

The FTT disagreed with HMRC's submission that the singular term "register" equates to the plural term "records". A person who keeps records is not a relevant data-holder unless each record is an individual register. In the view of the FTT, records kept in accordance with the MLR were not individual registers because they were not "maintained", which the FTT considered meant kept up-to-date and altered over time. Records kept under the MLR were required to be preserved unaltered, with further records potentially added.

Accordingly, the FTT concluded that the MLR does not require law firms to maintain a register and they are not therefore a relevant data holder for the purposes of Schedule 23.

Comment

This decision is to be welcomed. Had the FTT agreed with HMRC, all law firms would be relevant data holders and liable to receive notices under Schedule 23. HMRC had issued ten law firms with "test" notices, with the intention of issuing similar notices to other law firms. Presumably, following this decision, all such notices will be withdrawn.

A copy of the decision can be viewed here.

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