Tax update

October 2019

In this month's update we report on (1) the independent review of the disguised remuneration loan charge; (2) HMRC's guidance on preparing for the off-payroll working changes which come into effect from April 2020; and (3) HMRC's updated guidance on the tax registration of non-resident companies. We also comment on three recent cases relating to (1) an application for final and partial closure notices; (2) the validity of an enquiry; and (3) pre-entry loss rules.

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Disguised remuneration loan charge: independent review to take place

An independent review of the disguised remuneration loan charge is to take place. The review will be led by Sir Amyas Morse and will provide independent recommendations to the Government by mid-November 2019. more›

Working through an intermediary (IR35): HMRC updates existing guidance and publishes new guidance to assist taxpayers prepare for the off-payroll working changes

HMRC has updated six pieces of existing guidance and published five new guides to assist taxpayers prepare for the off-payroll working changes which will come into force in April 2020. more›

Updated HMRC guidance on registering a non-resident company for corporation tax

HMRC has updated its guidance on the corporation tax registration of non-resident companies who have sold, gifted or transferred interests in UK land or property. more›

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Levy – Tribunal rejects taxpayer's application for final and partial closure notices

In *The Executors of Mrs R W Levy v HMRC* [2019] UKFTT 418 (TC), the First-tier Tribunal (FTT) has held that HMRC was not required to issue either a final or partial closure notice. more›

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ANO – pre-ordained transactions avoided CGT losses being caught by pre-entry loss rules

In *ANO (No1) Limited v HMRC* [2019] UKFTT 406 (TC), the FTT has held that a pre-ordained series of transactions implemented to avoid the application of Schedule 7A, Taxation of Chargeable Gains Act 1992 (TCGA), to pre-entry losses were effective. 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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News items

Disguised remuneration loan charge: independent review to take place

An independent review of the disguised remuneration loan charge is to take place. The review will be led by Sir Amyas Morse and will provide independent recommendations to the Government by mid-November 2019.

The Government recognises that concerns have been raised about the loan charge policy and the review will consider whether the policy is an appropriate way of dealing with disguised remuneration loan schemes used by individuals who entered directly into these schemes to avoid paying tax.

The announcement of the review can be viewed here and the review guidance and terms of reference can be viewed here.

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Working through an intermediary (IR35): HMRC updates existing guidance and publishes new guidance to assist taxpayers prepare for the off-payroll working changes

HMRC has updated six pieces of existing guidance and published five new guides to assist taxpayers prepare for the off-payroll working changes which will come into force in April 2020.

The updated guidance and new guides can be viewed here.

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Updated HMRC guidance on registering a non-resident company for corporation tax

HMRC has updated its guidance on the corporation tax registration of non-resident companies who have sold, gifted or transferred interests in UK land or property. The aim of the update is to provide non-resident companies and their agents with clear information on what to report for the new corporation tax rules and outline key areas including who should register, when to register, relevant requirements, how to register, and post-registration activity.

The updated guidance can be viewed here.

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Case reports

Levy – Tribunal rejects taxpayer's application for final and partial closure notices

In *The Executors of Mrs R W Levy v HMRC* [2019] UKFTT 418 (TC), the First-tier Tribunal (FTT) has held that HMRC was not required to issue either a final or partial closure notice.

Background

Mrs Levy submitted to HMRC self-assessment tax returns in respect of tax years 2014/15 and 2015/16, within which she stated that she was not domiciled in the UK and claimed to be subject to the remittance basis of taxation.

HMRC enquired into Mrs Levy's returns, with a focus on her domicile status. Mrs Levy died in August 2018.

Mrs Levy's executors applied to the FTT for a direction that HMRC issue final closure notices in respect of its enquiries, pursuant to section 28A, Taxes Management Act 1970 (TMA).

HMRC concluded that despite being born in the US, Mrs Levy had acquired a domicile of choice and had been domiciled in the UK for the relevant tax years. HMRC's decision was conveyed to Mrs Levy's executors in a letter dated 29 January 2019. Despite this, the executors maintained their application and resisted the provision of information to HMRC concerning Mrs Levy's non-UK income and gains on the ground that she had been domiciled in the US in the relevant tax years and the information was therefore irrelevant to HMRC's enquiries.

HMRC subsequently issued an information notice, pursuant to paragraph 1, Schedule 36, Finance Act 2008, seeking the information. The notice also requested information for the tax year 2016/17, in relation to which HMRC had also opened an enquiry (the application for a direction that HMRC issue final closure notices did not extend to the enquiry in relation to tax year 2016/17). The executors appealed against the information notice on 2 April 2019.

The executors notified the FTT on 18 April and 4 May 2019, that if the application for final closure notices was to be dismissed, they wished, in the alternative, for the FTT to direct that partial closure notices be issued in respect of Mrs Levy's domicile status for tax years 2014/15 and 2015/16.

FTT decision

The applications for final and partial closure notices and the appeal against the information notice were dismissed.

With regard to the application for final closure notices, the FTT noted that HMRC had already reached a conclusion with regard to domicile, and so the continuation of the enquiry was to determine the amount of tax payable. It was not disputed that HMRC did not have sufficient information to calculate the increased amount of tax due for the relevant years if it was to conclude that Mrs Levy was not entitled to the remittance basis. In the view of the FTT, it would be difficult to determine how long it would be appropriate for the enquiry to continue and it was not unreasonable for HMRC to wish to consider the totality of the evidence once gathered. The FTT therefore concluded that HMRC had reasonable grounds to continue with its enquiries.

With regard to the executors' request for partial closure notices, the FTT was of the view that HMRC does not have the power, under section 28A, TMA, to issue a partial closure notice in relation to a matter where the amount of tax is unknown. In introducing the partial closure notice regime, the FTT could be assumed to have been aware of the decision in *R (Archer) v HMRC* [2016] EWHC 296, which determined that closure notices had to include the amount of tax claimed. In the view of the FTT, the legislative amendments made to accommodate partial closure notices were intended to operate in the same way as final closure notices.

As the FTT concluded that HMRC should not issue closure notices, it also directed that the executors should proceed to provide the information requested by HMRC in the information notice, and the appeal against the information notice was dismissed.

Comment

The FTT's conclusion that HMRC could not issue a partial closure notice without specifying the increased amount of tax due conflicts with the FTT's decision in *Embiricos v HMRC* [2019] UKFTT 0236, in which it was held that a partial closure notice could be issued in circumstances where the amount of tax that would be payable was unknown. Given these conflicting decisions and the importance of this area of the law, clarification of the law from a higher court would be welcome.

The decision can be viewed here.

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Tinkler – Notice of enquiry invalid

In *Tinkler v HMRC* [2019] EWCA Civ 1392, the Court of Appeal has allowed the taxpayer's appeal and held that HMRC's notice of enquiry under section 9A, TMA, was invalid.

Background

In January 2005, Mr Tinkler signed an engagement letter with BDO (the accountants), appointing the firm as his "tax agent and adviser". The accountants sent Mr Tinkler's completed Form 64-8 to HMRC in the usual way, thereby authorising HMRC to communicate with it in certain circumstances (as defined within the Form 64-8) regarding its client's tax affairs.

During the following six months, Mr Tinkler's address was changed on HMRC's system to an address where he no longer resided. The change was not made following notification from, or discussion with, Mr Tinkler or anyone on his behalf. HMRC wrote to Mr Tinkler at his old address, purporting to inform him that it intended enquiring into the tax return he had submitted for the tax year 2003/4.

The letter was headed as a notice under section 9A, TMA, and stated that a copy of the letter would be sent to his accountants. The letter was delivered to Mr Tinkler's old address, but he never received it because it was not forwarded on to his new address. HMRC duly wrote to the accountants enclosing a copy of the notice for its information. The accountants proceeded on the basis that a valid enquiry had been opened.

HMRC subsequently issued a closure notice under section 28A, TMA, disallowing a loss which Mr Tinkler had claimed in his return.

Mr Tinkler appealed against the closure notice on the basis that it was invalid because he had not been given a valid notice of enquiry.

The FTT and the Upper Tribunal dismissed Mr Tinkler's appeal and he appealed to the Court of Appeal.

Court of Appeal judgment
The appeal was allowed.

The issues to be determined in the appeal were:

1. whether valid notice of a section 9A enquiry was given by the copy notice sent to the accountants, and
2. if not, whether Mr Tinkler was estopped by convention from denying that HMRC had opened a valid enquiry.

Issue 1
Mr Tinkler disputed that a valid notice was given on three grounds:

1. The accountants did not have actual or apparent authority to receive a notice of enquiry on his behalf.
2. Even if the accountants had such authority, notice under section 9A must be given to the "taxpayer" and cannot be given to an authorised agent, absent an express agreement with HMRC.
3. Even if notice could be given to an authorised agent, notice was not validly given as the copy notice provided to the accountants for information purposes did not purport to be and was not a section 9A notice.

The Court held that a valid notice of enquiry was not given by the copy notice sent to the accountants. The Form 64-8 did not give the accountants authority to receive a notice of enquiry on Mr Tinkler's behalf because it referred to a webpage that stated that formal notices of enquiry must be sent to the taxpayer. The Court said, at [42]:

"In my judgment this is a clearly expressed limitation on the general authority being sought by HMRC and the corresponding represented authority of the agent. This is, moreover, a matter of deliberate decision in the light of the agreement made between HMRC and professional bodies."

The Court went on to say, at [43]:

"It is also understandable that there should be such a limitation. The giving of a notice of enquiry is an important step with serious and immediate consequences. The tax return can no longer be amended and the taxpayer's liability for the year in question will not be settled until the enquiry is closed which may, as in this case, take years. It is also a notice which has to be given within a specified time limit. It is therefore unsurprising that HMRC should refer to it as a "formal notice of enquiry" and treat it differently to other forms and pursuant to a specific regime agreed with professional bodies."

The Court also noted that HMRC did not in any event rely on it having that authority, as a purported notice was sent to Mr Tinkler and the accountants received a copy for information purposes only.

Issue 2

With regard to issue 2, the Court held that Mr Tinkler was not estopped by convention from denying that HMRC had opened a valid enquiry. The Court referred to Chitty on Contracts (32nd edition) which summarises the position, at 4-108, as follows:

"Estoppel by convention may arise where both parties to a transaction act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been materially influenced by the common assumption) to allow them (or one of them) to go back on it."

The conditions for estoppel, as set out in *HMRC v Benchdollar Limited and Others* [2009] EWHC 1310 (Ch) (and qualified in *Blindley Heath Investments Ltd & Anor v Bass* [2015] EWCA Civ 1023), are as follows:

1. it is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption
2. the expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it
3. the person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter
4. that reliance must have occurred in connection with some subsequent mutual dealing between the parties
5. some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

The Court concluded that on the facts of the case, the conditions for estoppel were not satisfied. In particular, there had been no expression of a common assumption by the accountants, such that Mr Tinkler assumed some element of responsibility.

In the view of the Court, any shared mistaken assumption was induced by HMRC's misrepresentation in the copy notice (i.e. that a valid section 9A notice had been sent to Mr Tinkler). The accountants had no reason to doubt the accuracy of that misrepresentation and had therefore proceeded on that basis. At no stage did the accountants endorse, affirm or address the truth or accuracy of what was said in the copy notice or do anything to demonstrate that the assumption reflected its own understanding. In concluding that the requisite unconscionability was not made out, the Court said at [69]:

"This is a case in which HMRC have only themselves to blame for what occurred. They were at fault in sending the notice of enquiry to the wrong address. They misled BDO into assuming that an enquiry had been validly opened. BDO did nothing to cause the adoption of the mistaken assumption. In all the circumstances of the present case, any acquiescence by BDO in HMRC's mistaken assumption is insufficient to found unconscionability."

Comment

This case is an important decision and confirms that HMRC must observe the formal requirements of the TMA when it wishes to open an enquiry. Unless a taxpayer receives a formal notice of enquiry indicating that HMRC is commencing an enquiry into its return, no valid enquiry will have been opened.

HMRC were unable to persuade the Court that Form 64-8 gave it authority to send a notice of enquiry to the taxpayer's agent. That form expressly excluded section 9A notices as a document which HMRC can send to a taxpayer's agent only.

The Court also rejected HMRC's appeal against the issue of estoppel by convention. The Court concluded that as HMRC was itself to blame for failing to follow the correct procedure, it could not rely on grounds of unconscionability in raising the defense.

The decision will no doubt lead to careful consideration by taxpayers of whether HMRC has opened a valid enquiry into their return.

The judgment can be viewed here.

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ANO – pre-ordained transactions avoided CGT losses being caught by pre-entry loss rules

In *ANO (No1) Limited v HMRC* [2019] UKFTT 406 (TC), the FTT has held that a pre-ordained series of transactions implemented to avoid the application of Schedule 7A, Taxation of Chargeable Gains Act 1992 (TCGA), to pre-entry losses were effective.

Background

Schedule 7A, TCGA, restricts the use of capital losses accrued by a company before it joins a group, but does not restrict the use of a group's losses against the capital gains of a company which joins the group after the losses have accrued.

ANO (No1) Limited (ANO) was the head of a loss-making group. It implemented a series of transactions with the intention of enabling the capital gains of companies in a group of companies (the O&H group) whose holding company was O&H Holdings Ltd (O&H), to be offset against the losses of companies in the group of companies whose holding company was headed by ANO (the ANO group).

O&H was the parent company of a property development group which disposed of some of its smaller companies, realising a capital gain against which no relief was available. Schedule 7A, TCGA, would prevent the OH group from acquiring a company with capital losses and offsetting those losses against the gains from the disposal of the smaller companies, but it would not prevent the offsetting of losses if a group with capital losses acquired a group with capital gains. In such a situation, the capital losses of the acquiring group could be offset against the capital gains of the acquired group.

The ANO group therefore implemented a series of transactions to offset the gains of the companies in the OH group against the ANO group's losses.

If ANO had acquired the O&H group, it was accepted the transactions would not have been caught by Schedule 7A. However, this was not what had happened. The O&H shareholders were concerned about their group being acquired by a loss group and so the transactions involved the insertion of a new holding company, Style Services Group Limited (SSG), above ANO before SSG acquired the O&H group. SSG was wholly owned by the shareholders of the O&H group.

In order for the transactions to achieve the desired result, paragraph 1(7), Schedule 7A, needed to apply to ensure that the group headed up by SSG was treated the same as the ANO group, otherwise the ANO group losses would be restricted by the pre-entry rules contained in paragraph 1(6), Schedule 7A.

HMRC issued a closure notice amending ANO's corporation tax return, stating that the losses of the ANO group were pre-entry losses to the SSG group and therefore the gains of the O&H group could not be offset against the losses of the ANO group. ANO appealed.

FTT decision
The appeal was allowed.

One of the conditions which has to be satisfied in paragraph 1(7), Schedule 7A, is that immediately after becoming the new principal of the ANO group, SSG had assets consisting entirely, or almost entirely, of shares comprised in the issued share capital of ANO (paragraph 1(7)(b)(ii)).

HMRC had relied on the *Ramsay* principle, to argue that paragraph 1(7)(b)(ii) was not satisfied because, when looking at the assets of the new holding company, SSG, immediately after it acquired ANO, you have to take into account the pre-ordained later step of the acquisition of the O&H group.

The FTT agreed with ANO. It noted that the language of Schedule 7A did not include any tax avoidance test and was specific enough so as to deny the use of losses in certain identified circumstances only.

The FTT considered the relevant case law on the meaning of the word 'immediately', and agreed with ANO that it meant 'the very moment after', and concluded that 'immediately after' SSG acquired ANO, SSG had assets consisting almost entirely of the shares in ANO. The FTT was of the view that at least one purpose for the exemption from paragraph 1(6), granted by paragraph 1(7), is for situations where there will be planned and virtually certain further transactions in the shares and/or the assets of the new holding company after the acquisition.

The transactions therefore satisfied the conditions in paragraph 1(7), and as such, paragraph 1(6) did not apply and the losses were not pre-entry losses.

Comment
This decision provides welcome clarity on the operation of paragraphs 1(6) and 1(7), Schedule 7A, TCGA, and when losses of a group which purchases a gain group will be considered pre-entry losses.

It is also refreshing to note that the FTT was of the view that, given the absence of any tax avoidance test in Schedule 7A and its detailed nature, it could not be construed as being suffused with the purpose of restricting the use of losses whenever a taxpayer implements arrangements designed to utilise them. On this occasion, HMRC's attempt to play its "get out of jail" card and rely on the *Ramsay* principle was unsuccessful.

The decision can be viewed here.

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RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

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