Tax update

September 2015

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Searching requirements when applying for search warrants

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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 general VAT update on the final Thursday of every month, and a weekly blog, RPC Tax Take.

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News

Bequeathing DOTAS

HMRC has published draft regulations which will extend the application of the disclosure of tax avoidance schemes (DOTAS) regime to inheritance tax (IHT) avoidance structures.

The draft regulations set out the circumstances in which arrangements will be required to be registered under the DOTAS regime. Registration will be required where (1) the main purpose (or one of the main purposes) of the arrangement is the obtaining of an IHT advantage; and either (2) it is unlikely somebody would enter into the arrangement but for the advantage; or the arrangement involves one or more contrived or abnormal steps which are required in order to obtain the IHT advantage.

The draft regulations provide for certain exemptions. The closing date for comments on the regulations is 10 September 2015.

The draft regulations can be read here.

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Probing the "hidden economy"

HMRC has launched a consultation on proposals to extend the powers it has to collect data from "online business intermediaries" and "electronic payment providers". The powers are designed to assist in tackling the "hidden economy" ie businesses which fail to register for tax. HMRC believes that the hidden economy accounts for around 17% of the so called "tax gap" in the UK.

Under the proposals, legislation will be enacted in order to provide HMRC with access to electronic payment systems which may be used to conceal business operations. Such information is likely to be held by advertising boards/platforms; App stores; booking agent companies; and payment providers.

The closing date for comments on the proposals is 14 October 2015.

The consultation can be read here.

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Simplification of tax on termination

HM Treasury and HMRC have published a consultation dealing with simplifying the tax and NIC treatment to be applied to termination payments. In recent years, the existing system has come under criticism from employers and employees alike, for being overly complex and uncertain.

Views are sought on removing the distinction which applies to contractual and non-contractual termination payments; new exemptions from income tax and NIC; whether tax and NIC treatments should be aligned; and, how the exemptions currently in place should be changed or amended. The consultation raises concerns about the affordability of introducing a blanket

exemption and the avoidance opportunities such an exemption may provide. The paper expresses a preference for a graduated system designed to reward lower paid longer serving employees, as well as introducing new anti-avoidance provisions.

The closing date for comments on the proposals is 16 October 2015.

The consultation can be read here.

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Cases

High Court dismisses investors' judicial review challenge to the legality of APNs in *Rowe and Others v HMRC*

The eagerly awaited judgment of the Administrative Court (Mrs Justice Simler) in *Nigel Rowe and Others v HMRC*[1], was handed down on 31 July 2015. The case concerned a judicial review challenge by a number of investors to the legality of Partner Payment Notices (PPN's) (a variant of accelerated payment notices (APNs)) issued by HMRC under new powers contained in Finance Act 2014 (FA 2014), which require the payment of sums representing disputed tax in advance of resolution of the underlying dispute.

The court dismissed the claimants' challenge.

Background

Nigel Rowe and Alec Worrall were nominated as lead cases from a group of investors all of whom had participated in film production arrangements established by Ingenious Media Plc.

The claimants were members of partnerships which were set up to carry on trades of producing films.

Losses were incurred by the partnerships and those losses were allocated to the individual partners who sought sideways loss relief by offsetting their losses against other income and gains in the year of the loss, or by carry back of the loss to the earlier year, or both.

The underlying substantive tax dispute is currently being litigated before the First-tier Tribunal (FTT) and the judicial review proceedings did not concern the merits of those appeals.

The legislation

The FA 2014, gave HMRC the power to require taxpayers, in certain circumstances, to pay a sum representing the tax in dispute in advance of the dispute being determined by an independent tribunal or court. Such accelerated payments are demanded by HMRC in APNs, or in the case of partnerships, in PPNs.

As there is no right of appeal against PPNs or APNs, they can only be challenged by way of judicial review proceedings.

The arguments

HMRC's case, in summary, was that the exercise of their discretion in issuing PPN's to the claimants was in accordance with the express language and purpose of the relevant legislative provisions contained in FA 2014.

The claimants, in contending that the PPN's were unlawful and of no effect, relied on the following five main grounds:

- Breach of the principles of natural justice.
- Ultra vires.
- Breach of legitimate expectation.
- Unreasonable/irrational.

1. [2015] EWHC 2293 (Admin).

- Breach of Article 1 of the First Protocol (A1P1) and Article 6 of the European Convention on Human Rights (the Convention).

The court's decision

Ground 1 – natural justice

The claimants contended that in exercising its statutory discretion, HMRC must take into account all relevant considerations, ignore all irrelevant considerations and comply with the principles of fairness and natural justice. This was not done in the present case. The "post-decision" reconsideration rights provided by the legislation are limited; the grounds on which representations can be made are too restrictive, involving no opportunity for any examination of the merits; and the internal review is accordingly insufficient. It was argued that, in effect, discretion was operated as a rule by HMRC.

The question for decision was whether the common law required the imposition of any additional non-statutory obligations on HMRC to explain the basis for the asserted liability and provide the taxpayer with a proper opportunity to rebut such claims before the PPN is issued.

In the view of the judge, Parliament had specifically addressed procedural fairness and prescribed a procedure whereby there is a right to make representations before any payment obligation arises. Moreover, the PPN's did not deprive the claimants of their statutory right to challenge the underlying tax liability by way of appeal to the FTT.

The mechanism by which representations can be made to HMRC (extending to the statutory basis for the PPN and the amount) is, in the view of the judge, adequate to ensure that fairness is preserved. This allows representations to be made challenging the rationality of the designated officer's determination.

Ground 2 – ultra vires

HMRC can issue a PPN if Conditions A to C are met. Condition B is that the return or claim, or as the case may be, appeal is made on the basis that a particular tax advantage results from particular arrangements. The claimants submitted that Condition B, contained in Schedule 32, paragraph 3(3), FA 2014, was not satisfied.

The judge rejected the claimants' argument that Condition B can only be satisfied for current year and not carry-back or stand-alone claims because those latter claims result from the separate claim made by the individual partner and not from the increase or reduction in the income or loss in the partnership return. In her view, claimants who received a repayment and those who received a set-off were in the same economic position. Both received a tax advantage whether the share of losses was used in a carry back claim or in a current year claim. Parliament defined "tax advantage", in section 201 FA 2014, to encompass both relief from tax as well as repayment of tax. Accordingly, Parliament intended the PPN to operate regardless of the mechanics in which a taxpayer obtains the tax advantage.

The judge also rejected the claimants' arguments that the PPNs specified an amount that was not "understated partner tax" because no tax could ever become "due and payable" on the carry back claims because HMRC had not opened enquiries into those claims and that was the only means by which HMRC could seek recovery of repaid tax.

The claimants relied upon the Supreme Court decision in *Cotter v HMRC*[2] in support of their contentions. However, the judge decided that, as a matter of judicial comity, she should follow

2. [2013] UKSC 69.

the Upper Tribunal (UT) decision in *The Queen (Jorge Manuel De Silva and Another) v HMRC*[3]. In *De Silva*, the judge concluded that an enquiry into the partnership return for the year of loss, because it gave rise to a deemed enquiry into each partners return under section 12AC(6) TMA 1970, was sufficient to challenge any claims for loss relief flowing from such a loss (whether sideways or carry back). The deemed enquiry into each relevant partner's self-assessment return identifying his share of the loss claimed was an appropriate and sufficient means of challenging the loss relief utilised by the partner, both by way of sideways relief or as a carry back claim to the earlier year.

Ground 3 – legitimate expectation
The claimants contended that because HMRC did not open enquiries into their carry back claims under paragraph 5, Schedule 1A, TMA 1970 and instead met the carry back repayment claims at the time, they reasonably assumed that they could postpone payment of any disputed tax until their appeal had been determined at first instance. In other words, they had accrued section 55 TMA 1970 postponement rights based on HMRC's conduct, and the PPN's breached their legitimate expectation that those accrued rights would continue until the underlying appeals had been determined.

This ground was rejected by the judge who said that it was only in an exceptional case that a claim that a legitimate expectation had been defeated would succeed in the absence of a clear and unequivocal representation. In rejecting the claimants' arguments, the judge said at paragraphs 94-95:

"First there is simply no evidence of a practice that was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to the claimants of continued treatment in accordance with it. Even if HMRC made "carry back" repayment claims in circumstances where it was open to HMRC not to do so, this did not prevent HMRC from opening (either then or subsequently) actual or deemed ... s.9A TMA enquiries into those losses contained in partner returns to challenge the efficacy of the tax planning ... simply because the claimants received a set-off or a repayment of tax did not give rise to any expectation that this was conclusive. Rather as they accept they "understood that the relief claimed could be disputed if enquired into". The position in relation to the tax represented by the repayment remained open to challenge, and there is no evidence of anything said or done by HMRC to suggest otherwise.

... since the new powers are contained in primary legislation, even if the claimants could have identified an expectation, based upon previous legislation or the practice adopted by HMRC, this cannot give rise to a common law right, enforceable in the Courts, constraining Parliament's constitutional power to enact primary legislation which changes the previous position: see *Wheeler v Office of the Prime Minister* [2008] EWHC 1409 (Admin), per Richards LJ at [41]. Once FA 2014 came into force following the democratic processes entailed in the passing of primary legislation, no common law "legitimate expectation" could trump that legislative power."

The judge was also of the view that a statutory discretion must be exercised consistently with and not run counter to, the primary legislation. The relevant legislation, on its face, makes it clear that it was intended to apply to existing as well as post-enactment arrangements.

Ground 4 – irrationality
The nub of the claimants' contention under this ground was that the discretion to issue PPN's was treated by HMRC as a rule so that there was in fact no exercise of discretion by HMRC and

3. [2014] UKUT 0170 (TCC).

no consideration was given to the reasonableness of giving a notice to an individual on the particular facts of his case. Instead, the issue of APNs/PPNs was being carried out by HMRC on an "industrial scale".

The claimants' submission was, in effect, that HMRC had adopted an approach whereby there was a presumption that participants in tax planning would receive a notice and it was simply a question of when they would do so rather than whether they should receive a notice.

The judge observed that the legislation did not identify the matters to be treated as relevant once the statutory pre-conditions were met, and thus Parliament has conferred a discretion on HMRC to decide what factors to take into account. The judge accepted that the claimants were correct that the approach adopted by HMRC demonstrates that in the overwhelming majority of cases where HMRC considers that the statutory conditions are satisfied, it will exercise its powers by issuing APN's or PPN's and the question is generally one of when, not whether, they will be given. However, in the view of the judge, this did not mean that HMRC's discretion had been fettered, or turned into a rule without exception. Given the nature and purpose of the legislation, there is nothing wrong with a general rule that when the statutory criteria are met, the discretion will be exercised by issuing the notice. Accordingly, the judge concluded that there was no irrationality and HMRC's discretion was lawfully exercised.

Ground 5 – Breach of Convention Rights
The claimants contended that the decisions to issue PPNs infringed their rights under Article 6 (the right to a fair trial) of the Convention and A1P1 (the right to peaceful enjoyment of property) to the Convention.

The first question to be determined was whether A1P1 was engaged. The legal test to apply is: has there been an interference with the claimants' "possessions". In the view of the judge, the question was whether the money representing the reduced tax liability (or the loss relief claim) held by the claimants pending the determination of the dispute, was an existing asset or possession for A1P1 purposes.

The judge pointed out that the claimants' claims to loss relief had not been established and depended on the application and interpretation of the relevant legislation to the arrangements entered into. Accordingly, in the view of the judge, the claimants had no legitimate interest amounting to a property right that had been interfered with by the PPN's, since it had not been established that the claimants were ever entitled to the tax deductions in the first place.

Although not necessary, the judge went on to consider the question whether there was an unlawful interference with A1P1 rights, and whether any such interference was proportional.

The judge observed that the PPNs were prescribed by law and as the legislation was precise in its terms, sufficiently foreseeable and could not operate in an arbitrary manner, the PPNs were not an unlawful interference with A1P1 rights. With regard to the issue of proportionality, in the judge's view, there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. There was nothing in the legislation, or its application, that was arbitrary.

The judge concluded, at paragraph 143, that the legislation "clearly falls within the wide margin of appreciation afforded to the democratically elected legislature".

With regard to the retrospectivity of the legislation, the judge accepted that the legislation was retrospective in the sense that it applies to schemes invested in in the past and to appeals already made. However, those elements were apparent on the face of the legislation and understood and recognised by Parliament and it was competent for Parliament "acting within the margin of appreciation", to enact the legislation.

In relation to Article 6 of the Convention, the claimants contended that PPN's were not tax but peremptory demands by HMRC for payment of monies that may or may not in the future give rise to liabilities, that are subject to a penalty regime for non-payment, and therefore they determine civil rights under Article 6 and do not concern liability to tax. The submission was that the claimants had therefore been deprived of a fair and public hearing before the FTT. Alternatively, the PPN's involved a criminal charge because they were a surcharge with a deterrent and punitive purpose, applicable to a definable group, and involving punitive consequences, within the meaning of *Jussila v Finland*[4].

The judge rejected both arguments. The amounts due under the PPNs were, in substance, payments on account of tax and accordingly the PPNs did not involve a criminal charge. So far as the penalties were concerned, there was a statutory right of appeal to the FTT against any penalty. In any event, the claimants had had access to an independent and impartial tribunal on judicial review. It followed that Article 6 obligations were satisfied.

Comment

This is clearly a very disappointing decision for the claimants concerned and the many other taxpayers who have (and will) receive APNs. HMRC were quick to publicise the decision and a press release was issued before the ink was dry on the judgment.

Given that a system of tax incentives was deliberately introduced by Parliament to encourage film investment, it is understandable that the claimants feel aggrieved that HMRC is not only challenging the underlying arrangements but is also forcing the claimants to pay the disputed tax liabilities up front before the dispute has been determined by the FTT.

The legislation is controversial as APNs/PPNs can be issued against taxpayers who participated in arrangements before the legislation came into force and there is no right of appeal against such notices.

Given the serious financial effect APNs/PPNs can have on recipients, it is not surprising that the claimants intend to appeal to the Court of Appeal. Many taxpayers and their advisers will watch developments with interest.

The judgment can be read here.

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Court of Appeal rejects HMRC's appeal and application for a stay in judicial review proceedings

The Court of Appeal (Lady Justice Arden, Lord Justice Black and Lord Justice Floyd) recently confirmed the circumstances in which the court will exercise its case management powers and grant a stay where a taxpayer is pursuing both an appeal before the FTT and judicial review proceedings in the Administrative Court.

4. [2009] STC 29.

Background

In *The Queen on the application of Veolia ES Landfill Limited and others v The Commissioners for Her Majesty's Revenue and Customs*[5], the taxpayers issued judicial review proceedings (the JR proceedings) and tax appeals concerning overpaid landfill tax. The issue in the tax appeal was whether the taxpayers were liable for overpaid landfill tax. The JR proceedings concerned whether the taxpayers had a legitimate expectation of being entitled to a repayment of overpaid landfill tax.

HMRC applied for the JR proceedings to be stayed whilst the tax appeal against the relevant assessments in relation to the same landfill tax were resolved. It considered the key point for the justice system to determine was whether there was a liability to tax in the first place, and the proper place for that issue to be resolved was in the FTT. The JR proceedings may therefore be unnecessary should it transpire that there is in fact no liability to tax.

In addition, HMRC submitted that if both the JR proceedings and tax appeal proceed at the same time, there may be different findings of fact. It also raised concerns about the division of resources if both proceed, for what might turn out to be a valueless duplication of effort.

On 7 July 2014, Mr Justice Thirlwall granted the taxpayers permission to proceed with their judicial review application. HMRC's application to stay the JR proceedings was refused on the basis that the stay would merely cause delay and the JR proceedings could proceed on the assumption that HMRC was right in law in respect of the underlying landfill tax liability.

The judge's decision to refuse a stay was appealed by HMRC and its appeal came before the Court of Appeal for determination.

Shortly before the appeal came on for hearing, HMRC applied for permission to amend its grounds of appeal in the JR proceedings and to rely on a new witness statement. It submitted that the change of case was due to developments in the FTT proceedings since the date of the court order refusing a stay. In its witness statement, HMRC also raised a logistical point noting the difficulties it was experiencing with resourcing due the overwhelming number and variety of claims for repayment being made by landfill site operators.

Court of Appeal's decision

The first question the court had to decide was whether to allow HMRC's application for fresh evidence and permission to amend its grounds. Taking into account all the circumstances, including the fact that this was an interim appeal and that the parties had made reasonably full submissions on the evidence, the court granted HMRC's applications.

The court then went on to consider whether there should be a stay of the JR proceedings. In reaching its decision on this issue, it considered there would have to be strong reasons for restricting the taxpayers' right to pursue both claims. In response to HMRC's contention regarding logistics and resourcing, the court considered that these difficulties could not possibly constitute strong reasons for restricting the taxpayers' right to pursue both claims.

Arden LJ commented that significant duplication of fact could be sufficient to justify a stay, as the same issues of fact should not be decided by different tribunals in disputes involving the same parties. Duplication wastes time and costs and is contrary to the interests of justice. She noted that in some cases the risk cannot be avoided, however, she did not consider the present case fell into that category. The question then was whether a decision to allow both

5. [2015] EWCA 747.

proceedings to proceed would result in the Administrative Court making findings of fact which would have to be determined in the tax appeal.

The court dismissed HMRC's appeal for the principal reason that it did not consider HMRC had made it clear precisely what its case would be in the JR proceedings. In the circumstances, it was not clear to the court whether there was any overlap between the JR proceedings and the tax appeal.

Comment

For most taxpayers in dispute with HMRC, pursuing their appeal to the FTT will be sufficient. However, in some cases, as in the present case, a taxpayer will have an issue that falls within the jurisdiction of the FTT, and another issue which should be determined by way of judicial review. It will of course depend on the facts and circumstances of the case which issue should be decided first[6]. However, it is clear from this case that where there are two sets of proceedings, HMRC will not be able to secure a stay of the judicial review proceedings by simply claiming lack of resources, or asserting duplication of fact.

The Court of Appeal made it clear that there has to be strong reasons for restricting a taxpayer's right to pursue both claims.

The judgment can be read here.

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Searching requirements when applying for search warrants

The Divisional Court (Lord Justice Davis and Mr Justice Hickinbottom) has confirmed, in *Chatwani*[7], that state agencies applying for search warrants have a duty to make full disclosure to the court and the court should take an inquisitive approach when considering any such application.

Background

The Chatwani brothers were under investigation by the National Crime Agency (NCA) for suspected money laundering. In the course of its investigation, the NCA devised a plan to capture "unequivocal evidence" of the suspected wrongdoing in order to enhance any future prosecution of the claimants. The plan was to arrest the claimants in a "deliberately boisterous way" in order (1) to remove them from premises which the NCA intended to search and (2) enable covert recording devices to be installed at their premises to capture self-incriminating comments which it was hoped they would make following release.

In order to obtain the search warrants, the NCA was obliged to make an application to a magistrates' court, pursuant to the requirements contained in Part 2 of the Police and Criminal Evidence Act 1984. In formulating its plan, the NCA had formed the view that it was critical that as few people as possible knew its details. Consequently, the applications for the warrants failed to include any detailed information on the investigation and simply asserted that the statutory test had been met.

Notwithstanding obvious failings, the magistrates granted the applications and issued the search warrants.

6. *R (on the application of Davies & Another) v HMRC* [2011] UKSC 47; R *(on the application of Gaines-Cooper) v HMRC* [2011] STC 2249.
7. *The Queen (on the Application of Chatwani & Ors) v The National Crime Agency & Anor* [2015] EWHC 1283 (Admin).

The judicial review application

The claimants commenced judicial review proceedings in the High Court to challenge both the arrests and the search warrants.

In the judicial review hearing, counsel for the NCA accepted that the approach taken by the officers showed a "fundamental misconception as to the role of the court" in applications for warrants and accepted that the search warrants were, therefore, unlawful. Nevertheless, as the NCA intended to apply for an order, pursuant to section 59 of the Criminal Justice and Police Act 2001 (CJPA), to retain the seized material, it asked the High Court for permission to retain the material pending such an application (under section 59(6) CJPA, a Crown Court judge may permit retention of material seized pursuant to an unlawful warrant, thereby allowing investigatory agencies a "second chance").

The court's decision

Hickinbottom J was of the view that the claimants' position had considerable force and that it was "difficult to believe" that an organisation such as the NCA would suffer from such "systemic ignorance" of the rules. On the evidence, however, the court was not satisfied that bad faith had been demonstrated, rather, there had been a "fundamentally misconceived approach to [the] warrants".

The court accepted that there existed grounds for the officers to believe that indictable offences had been committed, such that the issue of warrants may have been appropriate, but any such evidence had not been provided to the magistrates. It was the task of the magistrate (or in complex cases a circuit judge) to determine whether the requirements of the statutory test had been met. The NCA appeared to have, in the court's words, "abrogated that role to itself".

The court emphasised that the magistrate is not there simply to review the reasonableness of a decision of an officer that the statutory criteria are met. It is critical that the court itself is satisfied that the test is met. This will involve "detailed, anxious and intense scrutiny" by the court. The duty is on the state agency to place all relevant material before the court in order that this analysis can be carried out. This goes beyond the ordinary civil disclosure standard, and involves a duty of candour.

The failures in the instant case rendered the warrants unlawful. The court concluded that the conduct of the NCA was such that it would not be permitted to retain the benefit of the unlawful searches. Although the court did not conclude that the officers had acted in "bad faith" it considered that the NCA had acted with "patent and egregious disregard" or "indifference to the constitutional safeguards" in relation to the warrants. The "errors were grave, and went to the very root of the statutory scheme". Accordingly, the court compelled the NCA to return the seized material and deliver or destroy any copies, schedules or other work product derived from the seized material.

Comment

In his last Budget, the Chancellor of the Exchequer announced that HMRC is to be provided with £800m of extra funding over the next five years to combat tax evasion and non-compliance. HMRC hopes to treble prosecutions for tax evasion by the end of the current parliament. As raids on premises are often essential in order for HMRC to gather the necessary evidence it will need in a criminal prosecution, it is likely that it will be applying to the courts for ever increasing numbers of search warrants. In making such applications, HMRC must comply with its duty

to make full and proper disclosure to the court which is tasked with deciding the application. Failure to comply with this obligation will leave the legality of any warrants subsequently issued open to challenge by way of judicial review.

This case also acts as a timely reminder that the second chance provided by section 59 CJPA, will be denied to state agencies in circumstances where their failings are sufficiently egregious.

It is important that anyone who is the subject of a search warrant executed by HMRC obtains urgent advice from a lawyer with the appropriate expertise in this area.

The judgment can be read here.

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