Tax update

December 2017

In this month's update we report on HMRC's increased activity in respect of the so-called Panama Papers; HMRC's new guidance in relation to "enablers" of defeated tax avoidance schemes; new settlement terms concerning disguised remuneration; and HMRC's updated Litigation and Settlement Strategy. We also report on three recent cases on discovery assessments; the correct treatment of a purported amendment to a return; and information notices.

News items

Increase in HMRC investigations following publication of the "Panama Papers"

HMRC has confirmed that it has trebled the number of criminal and civil investigations it is undertaking in relation to the so-called Panama Papers, the 11.5m files obtained from the computer systems of the law firm Mossack Fonseca. more›

New guidance for "enablers" of defeated tax avoidance schemes

On 20 October 2017, HMRC published draft guidance in relation to the new regime for enablers of defeated tax avoidance schemes (Schedule 16, Finance (No.2) Act 2017). more›

Disguised remuneration – HMRC publishes new settlement terms

On 7 November 2017, HMRC published guidance entitled: "Disguised remuneration: settling your tax affairs". The guidance sets out new settlement terms in relation to disguised remuneration arrangements. Liabilities can be settled by employers, employees or self-employed contractors. more›

HMRC updates its Litigation and Settlement Strategy (LSS)

On 30 October 2017, HMRC published an updated version of its LSS entitled: "Resolving tax disputes: Commentary on the litigation and settlement strategy". more›

Case reports

Bekoe – Tribunal cancels discovery assessments and penalties issued to taxpayer

In *Edwin Bekoe v HMRC* [2017] UKFTT 772, the First-tier Tribunal (FTT) has held that the taxpayer was not liable to assessments and penalties where he had demonstrated that deposits paid into his brother's bank account were loans and not undeclared taxable trading income and HMRC's reliance on the "assumption of continuity" principle had been misplaced. 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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Benham – Upper Tribunal dismisses HMRC's appeal regarding the correct treatment of a purported amendment of a return relating to a failed rollover claim

In *Benham (Specialist Cars) Limited v HMRC* [2017] UKFT 389 (TCC), the Upper Tribunal (UT) dismissed HMRC's appeal upholding the decision of the FTT that section 153A(4), Taxation of Chargeable Gains Act 1992 (TCGA), does not provide a freestanding right for HMRC to make or amend an assessment in order to bring a rolled-over gain back into charge following the lapse of a declaration of intention to claim rollover relief made under section 153A(1), TCGA. **more›**

The Barty Party – HMRC's information notice was invalid

In *The Barty Party Company Ltd v HMRC* [2017] UKFTT 697, the FTT allowed the taxpayer's appeal against an information notice which HMRC had issued pursuant to Schedule 36, Finance Act 2008, on the basis that the information notice was invalid. **more›**

News items

Increase in HMRC investigations following publication of the "Panama Papers"

HMRC has confirmed that it has trebled the number of criminal and civil investigations it is undertaking in relation to the so-called Panama Papers, the 11.5m files obtained from the computer systems of the law firm Mossack Fonseca.

HMRC set up a taskforce in November 2016 to consider the position and in September 2017, Mel Stride MP, the Financial Secretary to the Treasury, said, in a written answer to a question posed by Dame Margaret Hodge, that so far civil and criminal investigations are ongoing in respect of 66 individuals and "Taskforce partners have made three arrests in relation to an organised crime group suspected of a £125m conspiracy to defraud pension investors, tax evasion and associated money laundering. They have also identified leads relevant to a major insider trading operation, in relation to which a number of individuals have been arrested and are on bail pending further activity."

The full written answer can be viewed here.

Back to contents›

New guidance for "enablers" of defeated tax avoidance schemes

On 20 October 2017, HMRC published draft guidance in relation to the new regime for enablers of defeated tax avoidance schemes (Schedule 16, Finance (No.2) Act 2017).

The draft guidance provides details on the circumstances in which someone will be considered an "enabler" for the purposes of the regime by reference to specific examples. It also seeks to explain how this legislation will interact with the GAAR.

The draft guidance can be viewed here.

Back to contents›

Disguised remuneration – HMRC publishes new settlement terms

On 7 November 2017, HMRC published guidance entitled: "Disguised remuneration: settling your tax affairs". The guidance sets out new settlement terms in relation to disguised remuneration arrangements. Liabilities can be settled by employers, employees or self-employed contractors.

The settlement opportunity relates to employment taxes (income and NICs) as well as capital gains tax, inheritance tax and corporation tax. Late payment interest applies and penalties may also be imposed, depending on the circumstances.

Although the settlement opportunity is open-ended, those considering settlement should be mindful that if liabilities in relation to loans are not settled before 5 April 2019, they will be subject to the loan charge arising on loans outstanding on that date. Once a 2019 loan charge has arisen, HMRC's guidance notes that the settlement opportunity may not be available.

The guidance can be viewed here.

Back to contents>

HMRC updates its Litigation and Settlement Strategy (LSS)

On 30 October 2017, HMRC published an updated version of its LSS entitled: "Resolving tax disputes: Commentary on the litigation and settlement strategy".

HMRC's LSS and associated commentary governs its approach to settling tax disputes, whether through negotiation or civil litigation. Corresponding revisions have been made to the detailed "Code of governance for resolving tax disputes". The core approach remains the same, although there are changes to take greater account of behavioural factors and shift the emphasis in some areas.

The commentary can be viewed here.

Back to contents>

Case reports

Bekoe – Tribunal cancels discovery assessments and penalties issued to taxpayer

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Background

Edwin Bekoe (the taxpayer) moved to the UK from Ghana and worked as an information technology specialist. He was employed full time by a large company but also worked as a consultant on a self-employed basis for his former employer.

HMRC opened an enquiry into the taxpayer's 2009/10 tax return based on the low level of his self-employed profits. It discovered that amounts totaling £20,900 had been paid into a bank account belonging to his brother and was not satisfied with his explanation for the deposits. It concluded that the sums were undeclared taxable trading income and raised an assessment and penalties for that year.

HMRC then applied the "assumption of continuity" principle, discussed in *Jonas v Bamford (Inspector of Taxes)* [1973] STC 519, to issue discovery assessments for the 2008/09, 2010/11 and 2011/12 tax years and penalty assessments for each of the four years. HMRC's basis for this was that the taxpayer's situation had been the same during those years. He had deliberately understated his taxable income in 2008/09 and had carelessly, or deliberately, failed to disclose additional taxable income in 2010/11 and 2011/12.

The taxpayer appealed.

FTT decision

The appeal was allowed.

The taxpayer argued that his brother had allowed him to use his bank account when he was short of funds, and the additional deposits in 2009/10 were loans from his friends and family. HMRC argued that his evidence was inconsistent with the deposit descriptions in the bank statements and his agent's statement that the account was set up to receive the taxpayer's self-employed income. It argued that he had not demonstrated that the deposits were anything other than trading income.

The FTT considered the 2009/10 tax year, and was satisfied that the taxpayer had demonstrated that the monies in his brother's account were not undeclared taxable earnings. The FTT concluded that:

- the taxpayer's explanation for the payments was reasonable and credible. These were informal family arrangements and the lack of formal documentation did not suggest, contrary to HMRC's view, that the arrangements were not as he had described them
- the taxpayer was not available for, nor interested in, the type of one-off supply of information technology services to clients that HMRC believed the payments had arisen from. He had been fully occupied with his full-time job and the consultancy work that he was involved in for his former employer

- the taxpayer had undertaken the consultancy work at a low profit margin on the basis that there were potential future commercial advantages for him in staying in contact with his former employer
- the fact that the taxpayer's agent had said that the account was set up to receive self-employed income did not necessarily mean that all sources of payment into that account should be assumed to be taxable self-employed income, particularly where the account was in another person's name and was used for a variety of other purposes
- the brief descriptions in the bank transfer details shown on the bank statements for the account were not sufficient to determine their character in the face of an alternative reasonable explanation provided by the taxpayer
- it did not have to be certain that the taxpayer's alternative explanation was correct; it merely had to be satisfied on the balance of probabilities that the deposits in question were something other than undeclared taxable income.

Given the conclusion reached that the taxpayer had not received additional taxable income in 2009/10, the FTT said he could not be treated, on the assumption of continuity, as deliberately failing to disclose taxable income in the 2008/09 tax year or being careless or deliberate in failing to disclose taxable income in the 2010/11 and 2011/12 tax years.

Comment

The FTT provided some helpful guidance on the "assumption of continuity" principle and confirmed that any such assumption has to depend on an established pattern of behaviour, or circumstances that might be assumed to continue because they formed a predictable pattern. In the present case, there was no basis for any such pattern.

The decision can be viewed here.

Back to contents>

Benham – Upper Tribunal dismisses HMRC's appeal regarding the correct treatment of a purported amendment of a return relating to a failed rollover claim

In *Benham (Specialist Cars) Limited v HMRC* [2017] UKFT 389 (TCC), the Upper Tribunal (UT) dismissed HMRC's appeal upholding the decision of the FTT that section 153A(4), Taxation of Chargeable Gains Act 1992 (TCGA), does not provide a freestanding right for HMRC to make or amend an assessment in order to bring a rolled-over gain back into charge following the lapse of a declaration of intention to claim rollover relief made under section 153A(1), TCGA.

Background

Benham (Specialist Cars) Ltd (the taxpayer) made a declaration for rollover relief, under section 153A, TCGA, in relation to business assets that ceased to take effect when no relevant business assets were acquired within the time limits against which to set the gain.

Following the lapse of the taxpayer's declaration for rollover relief, HMRC issued a notice of "Amendment of return" in form CT620 for the accounting period 1 January 2007 to 31 December 2007 (the 2007 Accounting Period), with a separate letter purporting to make an assessment for the tax. HMRC sought payment of corporation tax of £622,134 in respect of the 2007 Accounting Period.

The taxpayer appealed to the FTT and argued that HMRC should have raised a discovery assessment under paragraph 41, Schedule 18, Finance Act 1998. This would have allowed it to make a claim to carry back trading losses to offset against the gain and reduce its corporation tax liability for the relevant period to nil.

The FTT allowed the appeal and HMRC appealed to the UT.

UT decision
The UT agreed with the FTT and dismissed HMRC's appeal.

The UT considered the following two questions:

1. Does section 153A(4), TCGA, provide HMRC with a freestanding right to make or amend an assessment in order to bring gains into charge?
2. If there is no freestanding power of amendment and the only assessment power available to HMRC is a discovery assessment, did the disputed decision of HMRC amount to a discovery assessment?

On issue (1), the UT concluded that section 153A(4) does not provide HMRC with a freestanding right to make or amend an assessment in order to bring gains into charge. An influential factor in reaching this conclusion was the absence of a right of appeal against an amendment.

With regard to issue (2), the UT said that the disputed decision of HMRC did not purport to be a discovery assessment and as such it was not one. In the view of the UT, the wording of the disputed decision was "perfectly clear". It was, on its face, described as an amendment and not as an assessment.

Comment
This decision confirms that if a company makes a declaration under section 153A, TCGA, but fails to follow up with an actual claim, HMRC has to use its assessment or amendment powers contained in Schedule 18, Finance Act 1998, as appropriate. It cannot rely on section 153A(4) to amend the self-assessment independently of what Schedule 18 says. Section 153A(4) does not provide HMRC with a freestanding right to make or amend an assessment in order to bring a rolled-over gain back into charge.

The decision can be viewed here.

Back to contents>

The Barty Party – HMRC's information notice was invalid

In *The Barty Party Company Ltd v HMRC* [2017] UKFTT 697, the FTT allowed the taxpayer's appeal against an information notice which HMRC had issued pursuant to Schedule 36, Finance Act 2008, on the basis that the information notice was invalid.

Background
The Barty Party Company Ltd (the taxpayer) runs a public house business.

In May 2016, HMRC selected the taxpayer for a VAT check and made arrangements to visit the taxpayer's premises. After two postponements, the visit eventually took place on 12 July 2016. During the visit the taxpayer was unable to produce the specific information requested by HMRC including a current drinks price list and set of purchase invoices for the 04/16 VAT period.

An information notice was first issued to the taxpayer, pursuant to paragraph 1, Schedule 36, Finance Act 2008, on 21 July 2016. This notice was withdrawn on 9 November 2016, due to what HMRC described as an administrative error; no schedule setting out the information required had been attached to the information notice.

A replacement notice, including the missing schedule, was issued to the taxpayer on 10 November 2016 (the Information Notice). In this notice, HMRC requested statutory records for the period 1 February 2012 to 30 April 2016. The taxpayer appealed against the Information Notice on the basis that: the information requested was not reasonably required by HMRC (paragraph 1(1), Schedule 36, Finance Act 2008); the VAT periods covered by the Information Notice went beyond the four year enquiry window (section 77, Value Added Tax Act 1994;) and the requirement to provide non–statutory information, ie the drinks price list.

As at the date of the hearing, none of the information requested by HMRC had been provided by the taxpayer.

FTT decision

The appeal was allowed and the Information Notice was treated as invalidly issued.

The FTT noted that in normal circumstances HMRC can only go back four years to issue an assessment, therefore the only information which could reasonably have been requested, as at 10 November 2016, was information relating to VAT periods starting after 1 November 2012. However, as the Information Notice requested records for a period commencing on 1 February 2012, the FTT said that HMRC needed a specific reason to justify requesting information relating to this earlier period.

HMRC was unable to provide an explanation as to why information was required beyond the normal four year period. In the circumstances, the FTT said that it would expect HMRC to allege careless or deliberate conduct on the part of the taxpayer in order to justify seeking information beyond the four year time period. However, no such suggestion was made in this case. In fact, the taxpayer had already been subject to a VAT check for earlier periods (up to April 2012) which HMRC failed to take account of in issuing the Information Notice for a period commencing with VAT period 1 February 2012.

In the FTT's view, requesting information for periods outside the normal four year assessment period and for which a VAT check had already been made without providing a specific reason why information was required for those periods, was a sufficiently fundamental flaw to render the Information Notice invalid in its entirety.

Comment

HMRC's ever increasing use of its information powers has resulted in a number of recent appeals to the FTT and this latest decision is a timely reminder that there are limitations on HMRC's information powers.

HMRC can only go back four years when raising a VAT assessment unless there is an allegation that a loss of tax has been brought about due to careless or deliberate conduct on the part of the taxpayer, in which case it can go back six years or 20 years, respectively. If HMRC requests information to "check the taxpayer's VAT position" for more than the normal four year period, it will need to provide a specific explanation as to why the information is required, or risk rendering the whole information notice invalid.

Taxpayers should carefully review any information notices they receive and where appropriate challenge their validity.

The decision can be viewed here.

Back to contents>

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