Tax update

April 2018

In this month's update we report on HMRC's new Code of Practice 8 guidance; the OECD's consultation on misuse of residence and citizenship schemes to circumvent the common reporting standard; and HMRC's guidance on the new criminal offences relating to offshore activities introduced by Finance Act 2016. We also comment on three recent decisions relating to APNs and penalties.

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HMRC issues revised Code of Practice 8 (COP 8) guidance

On 23 February 2018, HMRC's Fraud Investigation Service published a revised version of its COP 8 guidance. The guidance explains how the Fraud and Avoidance section of the Specialist Investigations directorate of HMRC carry out civil tax investigations where serious fraud is not suspected but investigation is considered necessary. more›

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The below is based on an article first published in Tax Journal on 8 February 2018. more›

Cannon – tax barrister not careless in relying on advice received from his accountant

In *Cannon v HMRC* [2017] UKFTT 859 (TC), the First-tier Tribunal (FTT) has held that a tax barrister was not careless in relying on tax advice received from an accountant he retained to provide professional advice on specified issues. more›

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Goldsmith – late filing penalties cancelled by the Tribunal

In *David Goldsmith v HMRC* [2018] UKFTT 0005 (TC), the FTT has cancelled late filing penalties issued to the taxpayer as the statutory requirements contained in section 8(1), Taxes Management Act 1970 (TMA), had not been satisfied and HMRC did not have the power to require the taxpayer to deliver self-assessment returns. **more›**

About this update

The 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

HMRC issues revised Code of Practice 8 (COP 8) guidance

On 23 February 2018, HMRC's Fraud Investigation Service published a revised version of its COP 8 guidance. The guidance explains how the Fraud and Avoidance section of the Specialist Investigations directorate of HMRC carry out civil tax investigations where serious fraud is not suspected but investigation is considered necessary. It explains how the investigation will proceed and the possible penalty reductions for disclosure and co-operation.

The only policy change relates to HMRC's use of open source material, including blogs and social networking sites where no privacy settings have been applied.

A copy of the guidance can be viewed here.

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OECD consults on misuse of residence schemes to circumvent the common reporting standard (CRS)

On 19 February 2018, the OECD published a consultation document relating to the misuse of residence and citizenship by investment schemes to circumvent the CRS.

Residence and citizenship by investment schemes allow foreign individuals to obtain citizenship or temporary or permanent residence rights in exchange for local investments or against a flat fee. Although such arrangements can be used for a number of legitimate reasons, in the view of the OECD they can also be manipulated to circumvent reporting under the CRS.

The consultation:

- assesses how the schemes are used to circumvent the CRS and identifies the types of scheme that present a high risk of abuse
- sets out the importance of applying CRS due diligence procedures correctly to prevent such abuse, and
- explains the OECD's next steps.

The OECD is seeking evidence on the misuse of such arrangements and methods of preventing abuse.

A copy of the consultation document can be viewed here.

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HMRC issues guidance on new criminal offences relating to offshore income

On 16 March 2018, HMRC published guidance on the three new criminal offences relating to offshore income, assets and activities, introduced by the Finance Act 2016. The guidance provides a summary description of the offences, defences, possible penalties and how to notify HMRC of offshore income or gains.

A copy of the guidance can be viewed here.

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Case reports

Rowe and Vital Nut – Court of Appeal delivers its judgments in APN/PPN judicial review challenges

The below is based on an article first published in Tax Journal on 8 February 2018.

In *R (oao Rowe and Others) v HMRC and R (oao Vital Nut Co Ltd and Others) v HMRC* [2017] EWCA Civ 2105, the Court of Appeal has dismissed the claimant taxpayers' appeals in judicial review proceedings challenging the legality of Accelerated Payment Notices (APNs) and Partner Payment Notices (PPNs).

Background

The High Court dismissed the claimants' judicial review challenges in *R (oao Rowe and Others) v HMRC* [2015] EWHC 2293 (Admin) and *R (oao Vital Nut Co Ltd) v HMRC* [2016] EWHC 1797 (Admin). The claimants challenged the lawfulness of APNs/PPNs (the notices) which HMRC had issued to them pursuant to Part 4, Finance Act 2014.

The claimants appealed to the Court of Appeal which heard both appeals together. The Court delivered its judgment on 12 December 2017, dismissing the appeals. The leading judgments were given by Lady Justice Arden (grounds 1 – 4) and Lord Justice McCombe (grounds 5 and 6).

Grounds of appeal

The claimants argued that the decision to issue the notices was:

1. unreasonable, disproportionate, or otherwise unfair
2. beyond the powers conferred by statute
3. contrary to the principles of natural justice
4. unlawful, in that there was no tax due or payable
5. in breach of Article 1 of the First Protocol (A1P1) (and Article 6), and
6. not in accordance with the "designated officer" requirements contained in the legislation.

Court of Appeal decision

Grounds one and two

The Court summarised the claimants' arguments under grounds 1 and 2 as follows:

i. it was not part of the statutory purpose for APNs/PPNs to be issued to taxpayers who had engaged in tax avoidance before the legislation was passed
ii. the "designated officer" issuing the notices must be satisfied that the arrangements are not effective
iii. HMRC's "policy" for issuing APNs/PPNs does not take into account all relevant factors
iv. the statutory provisions were not retrospective in their effect, and
v. the issuance of the notices was perverse, particularly in light of the fact that delay in progressing the appeals/enquiries was HMRC's fault.

With regard to (i), the Court of Appeal agreed with the High Court, holding that the notices could be issued to taxpayers utilising schemes prior to the legislation coming into effect. The claimants' arguments that the intention of the legislation was to deter future (and not historic) use of tax avoidance arrangements failed. The Court stated that the legislation was also

intended to apply to the "stringing out" of appeals. It did, however, comment that, in construing the legislation, the Court required clear statutory language in order to depart from convention. Lady Justice Arden said:

"... I consider that the breadth of the powers contained in this regime call for caution. In a case such as Mr Rowe's, if the provisions of the FA 2014 are applied without limitation, the result may be that Parliament imposes a disadvantage on citizen A in order to deter citizens B, C, D, E and F from acting in a similar way. That is on the face of it a remarkable result. In principle, it is possible for Parliament to impose such an obligation, but the court will expect the legislation to be expressed in clear language if it is to achieve that effect. I approach the issues of statutory interpretation arising on this appeal on that basis."

The Court concluded that it was the clear intention of Parliament to deter the use of tax avoidance schemes through the use of this legislation and the notices issued to the claimants were within the scope of that statutory purpose.

Although HMRC was ultimately successful in relation to (ii), the Court did not agree with the High Court on this issue. HMRC's case on this point was that the duty of the designated officer was not to determine the effectiveness of the underlying scheme, unless it was 'obvious' that the scheme achieved the intended fiscal consequences. The claimants' case was that the onus should not be on the taxpayer to establish the effectiveness of an arrangement after an APN/PPN had been issued. The Court agreed with the claimants. Lady Justice Arden said:

"The courts are entitled to approach these unusual powers on the basis that (unless the legislation clearly provides the contrary) Parliament would not confer power to serve an APN/PPN unless there were reasonable grounds for concluding that the tax would ultimately be found to be payable. That would result in APNs/PPNs only being capable of being used in a proportionate manner when the interests of the state and of the taxpayers involved are fairly balanced. The contrary proposition would involve allowing the state arbitrarily to deprive individuals of their property, even only in anticipation of an obligation that has not yet become complete in law."

The Court was of the view that the test propounded by Charles J was more generous to HMRC than the statutory language permitted. The statutory language requires the designated officer to be positively satisfied on the information that he then has that the arrangements in question are not effective. This is because section 220(3), Finance Act 2014, requires the designated officer positively to determine, to the best of his information and belief "the denied advantage". Lady Justice Arden said:

"As I see it, Parliament has taken the view that the new powers to exact accelerated payments should only be available if the designated officer forms the view that the tax scheme does not work having diligently weighed up to the appropriate extent all the information available and not before, and the designated officer has no reason to doubt that information ...

I appreciate that this interpretation makes the legislation less easy for HMRC to operate but that is not a reason for departing from the statute's meaning as I understand it to be. It can, moreover, equally be said that it is difficult to see why Parliament would have legislated for the interpolation of a designated officer, a senior officer of HMRC, if it was not intended that HMRC should have to take a view on effectiveness."

Notwithstanding the above, the Court held that, even though an appeal was soon to be determined at the time the PPNs were issued and/or that the delay in the enquiry cases was down to HMRC, it was not unfair on the facts of these cases for HMRC to issue the notices.

On point (iii), the Court found in favour of HMRC. HMRC's policy is to issue APNs/PPNs in virtually all cases where they consider the conditions, referred to in section 219 and paragraph 3, Schedule 32, Finance Act 2014, to be satisfied. The claimants argued that such a policy fettered HMRC's discretion and was unfair. The Court, however, found that the authorities supported HMRC's view and it was open to it to formulate and apply such a general policy. The Court commented that the threshold for defeating the issuance of the notices on such grounds would be extremely high.

With regard to point (iv), the claimants argued that the APN regime retrospectively removed legal entitlements that taxpayers who had participated in arrangements disclosed to HMRC under the DOTAS regime had at the relevant time. HMRC argued that Parliament had clearly intended the legislation to apply to arrangements which had been utilised prior to the enactment of Finance Act 2014. The Court agreed with HMRC and the first instance judges, and confirmed that the APN regime can be applied to arrangements entered into before the legislation came into force.

As to point (v), the claimants relied on the well-known natural justice principles espoused by Lord Mustill in *Ex p Doody* [1994] 1 AC 531. Such principles require HMRC to consider all relevant factors and act fairly in the exercise of its powers. The claimants argued that HMRC had failed to do so in this case, for example, by failing to take into account the fact that the delay in determining the tax appeals was largely the fault of HMRC and not the taxpayers. Likewise, it was argued that HMRC had not considered whether issuing the notices would cause financial hardship to the recipients of the notices. HMRC's position was that it has a hardship policy which enables taxpayers who have received an APN/PPN to contact HMRC with a view to agreeing a 'time to pay' arrangement if they cannot pay without incurring financial hardship.

In the view of the Court, HMRC's application of its hardship policy may not be sufficient as a means of safeguarding taxpayers' rights. Lady Justice Arden said:

"... HMRC may be dealing with individual taxpayers on whom an APN/PPN may have a draconian effect. Some may be wealthy taxpayers but others may have to sell their homes or make decisions about involvement in that business and about that financial expenditure which may turn out to have been unnecessary if the scheme in question is effective ... In deciding whether to issue or confirm an APN/PPN, HMRC may, in performance of their duty to act fairly, have to take into consideration that there is a significant failure rate (20%), and that taxpayers should not be required to comply with APNs/ PPNs where the result would be arbitrary or oppressive, as where a taxpayer is forced to sell his home and is not given enough time to do so in a way that will produce a good price or leave him with an acceptable alternative."

Ground three

HMRC's position was that the duty of fairness is satisfied as a taxpayer who has been issued with an APN/PPN has the right to make representations in relation to any such notice. The claimants argued that HMRC should have explained the basis of their liability before issuing the notices. The Court agreed with the claimants. Consistent with its view in relation to the designated officer ground, the Court said that HMRC is obliged to form a view on the arrangements in

question. The Court concluded, however, that, on the facts of the present cases, the claimants were aware of HMRC's views in relation to the underlying arrangements and the basis of their liability. HMRC referred to the fact that HMRC had published a number of "Spotlights" in which its views on the tax consequences of the arrangements in question were set out. The Court was satisfied that this met the requirement that recipients of APNs/PPNs must be informed of HMRC's view on the tax treatment of the arrangements they have entered into and the basis of any alleged liability.

Ground four
The claimants argued that HMRC was unable to assess them to tax as it had failed to utilise the correct statutory procedure in time. It was argued that enquiry time limits exist for a reason, namely, to provide some finality to taxpayers. The claimants in *Rowe* made standalone carry-back claims and argued that an enquiry into such claims had to be made. They argued that their case was distinguishable on its facts from the taxpayers' cases in *Cotter v HMRC* [2013] 1 WLR 3514 and *R (oao De Silva and Another) v HMRC* [2017] UKSC 74 and they relied on the reasoning of the Court of Appeal in *R (oao Derry) v HMRC* [2017] EWCA Civ 435. HMRC submitted that, even if Mr Rowe's claim was a standalone claim, HMRC could still enquire into it by means of a deemed section 12AC(6), TMA 1970, enquiry into the partnership return.

The Court said that the facts in the claimants' cases could not be distinguished from those in *De Silva* and, relying on the Supreme Court's judgment in *De Silva*, rejected the claimants' argument. When HMRC commenced an enquiry into the return of the partnership for the loss year, this operated as a deemed enquiry into Mr Rowe's tax return, including the statement of his share of the relevant loss for the same period. Accordingly, the Court held that HMRC did not have to open any other enquiry into the standalone claim for relief.

Ground five
In arguing that the issuance of APNs/PPNs infringed the claimants' rights under A1P1, three issues arose for the Court to determine:

1. is the Article engaged at all by interfering with the "peaceful enjoyment of ... possessions"?
2. if so, is the interference "provided for by law", and
3. is the interference "proportionate"?

The Court, agreeing with the High Court below, held that the claimants' rights under A1P1 were not infringed. The Court did, however, disagree with the view expressed by Simler J in *Rowe* in relation to the applicability of *Kopecký v Slovakia* (2005) 41 EHRR 43. In *Kopecký*, the applicant was claiming a right in money and therefore his claim was not a "possession" for A1P1 purposes.

Lord Justice McCombe said:

"Under the APN/PPN procedures, it [the state] simply has a money claim conferred on it by legislation, in anticipation of a possible future tax liability which may or may not be established. It makes no claim whatsoever to the money as tax. The appellants' money remains their money. It is to turn the matter around 180 degrees to say that it is the appellants who only have a claim to keep their money because of the demand made by the state to deprive them of it ... It is difficult to see how the state's statutory claim prevents the cash being a "possession" of the appellants."

The Court also disagreed with Simler J's findings on the applicability of *APVCO 19 Ltd and Others v HM Treasury and Another* [2015] EWCA Civ 648, a case concerning legislation which had been passed to put beyond doubt that tax had been incurred on the entering into of certain transactions involving land. The Court, however, nevertheless concluded that, even if A1P1 was engaged, the interference was provided for by law and was a proportionate one in all the circumstances. Similarly, the interference was determined to be not truly retrospective, given that the taxpayers knew that they may have to pay amounts back to HMRC at some future date, should the arrangements be found to be ineffective.

The Court also concluded that the interference was proportionate, given the legislative objective, namely, to eliminate tax avoidance. Lord Justice McCombe echoed the views expressed by Arden LJ earlier in the judgment, namely, that HMRC must consider an individual's circumstances in order to determine whether issuing an APN/PPN is proportionate. If a recipient of an APN/PPN would suffer undue hardship, it may be argued that issuing the notice is not reasonable or proportionate.

As to the claimant's Article 6 challenge (right to a fair trial), the Court stated that that it did not wish to extend the *Ferrazzini* principle further than was necessary (in *Ferrazzini v Italy* [2001] ECHR 464, the ECHR held that tax matters are not civil matters within Article 6). The Court confirmed that APNs/PPNs are not a claim to tax, as Simler J had held in *Rowe*. The Court, however, considered that the availability of the procedure for making representations against the issuance of notices, together with the availability of judicial review, provided sufficient safeguards to satisfy the requirements of Article 6.

Ground six

Lord Justice McCombe, agreeing with Arden LJ, confirmed that the first instance decisions incorrectly reversed the burden of proof with regard to the designated officer requirement. He said:

"I would add that I cannot see that the statutory requirement of a "designated officer" should mean that that officer should be a mere cipher. He/she must be there to exercise a function and to shoulder responsibility... Otherwise, the statutory requirement of a designated officer would serve no purpose."

Lord Justice McCombe was not satisfied that the designated officer had formed an independent view in the instant cases. The Court, however, relying on section 31(2A), Senior Courts Act 1981, decided that, even if HMRC had applied the correct statutory procedure before issuing the notices, it would likely have arrived at the same conclusion in any event and therefore the notices should be allowed to stand.

Comment

This judgment, whilst confirming that HMRC was entitled to issue the notices, provides helpful clarification in relation to certain statutory requirements referred to in the legislation which must be satisfied before HMRC can issue an APN/PPN. In particular, for the purposes of section 220(3) and paragraph 4(2), Schedule 32, Finance Act 2014, the designated officer must reasonably conclude, on the information available to him, that the underlying arrangements are ineffective and that the tax claimed will ultimately be found to be payable. This is because the legislation requires the designated officer positively to determine, to the best of his information and belief "the denied advantage". As Arden LJ observed, whilst the Court's interpretation of the relevant statutory provisions makes the legislation less easy for HMRC to operate, that is no basis to depart from the statute's meaning.

A large number of APNs/PPNs have been issued by HMRC since these new powers were made available to it. It is important that taxpayers who receive such notices carefully consider whether all necessary statutory conditions have been satisfied. If they have not, there may be grounds to successfully challenge the validity of the APN/PPN. It is interesting to note that but for section 31, Senior Courts Act 1981, the notices may have been quashed as a result of HMRC's misapplication of the law.

Finally, the comments of the Court in relation to financial hardship will also be welcomed by the many taxpayers who have received APNs/PPNs and who are not in a position to pay the amounts demanded of them. To date, HMRC's position has been to simply rely upon their 'time to pay' arrangements in answer to such concerns. Given the comments of the Court, HMRC should now give proper consideration to any financial hardship which recipients of APNs/PPNs will suffer if required to pay the amounts demanded of them, before deciding to confirm a notice.

A copy of the judgment can be viewed here.

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Cannon – tax barrister not careless in relying on advice received from his accountant

In *Cannon v HMRC* [2017] UKFTT 859 (TC), the First-tier Tribunal (FTT) has held that a tax barrister was not careless in relying on tax advice received from an accountant he retained to provide professional advice on specified issues.

Background

HMRC imposed penalties, under Schedule 24, Finance Act 2007, on Mr Patrick Cannon, a tax barrister, in respect of errors contained in his tax return. Specifically, Mr Cannon claimed sideways loss relief against his income in respect of losses realised by a fledgling furnished holiday letting business.

Mr Cannon's accountants claimed the relief despite the fact he had not carried on the rental business for the requisite time period, in the mistaken belief that the required period could be pro-rated to take into account businesses that commenced part-way through a tax year.

Mr Cannon appealed.

FTT decision

The appeal was allowed.

HMRC placed much reliance on the fact that Mr Cannon is a tax barrister who ought, in its view, to fully understand and be able to navigate the relevant legislation.

It was argued on behalf of Mr Cannon that his behaviour was neither deliberate nor careless. He had simply relied on his professional advisors to assist him. He believed that he had been singled out for special treatment by HMRC because of the nature of his practice. As evidence of this, he pointed to a meeting which took place with HMRC in August 2012 at his chambers. Mr Cannon alleged that during this meeting to discuss informal tax advice concerning SDLT legislation, one of the HMRC officials present issued a veiled threat that he should stop offering to his clients advice on tax mitigation strategies involving SDLT.

With regard to this allegation, the FTT commented:

"The independent Bar is not "independent" for no good reason. The ability of citizens to appear before an independent judiciary, independent of the executive and organs of state, whilst being represented by legal representatives, such as barristers who represent clients before Courts and Tribunals without fear or favour (provided a sufficient fee is paid), is an important part of the largely unwritten constitutional mechanism upon which democracy and the rule of law operate in this country."

The FTT also accepted that HMRC's approach to Mr Cannon's tax affairs had been overzealous, commenting:

"The initial decision to categorise one relatively modest fee being put into the wrong accounting year, as a deliberate error, feeds our conclusion that Mr. Charles was being overzealous and that such zealotry no doubt fed the appellant's belief that he was being pursued as a consequence of not abiding by Mr. Valentine's request [to cease giving advice on tax mitigation strategies] ...".

The FTT concluded that Mr Cannon honestly believed that sideways loss relief was available and, furthermore, was not 'careless' in relying on the advice he received from his accountants that pro-rating applied, as the accountants had been engaged to provide professional advice in an area of law in respect of which they held themselves out as having appropriate expertise.

The fact that Mr Cannon is a tax barrister did not mean that he could not rely on advice received from his accountants in an area for which he claimed no expertise.

Whilst the FTT accepted that the negligence of an agent engaged to undertake routine tax filing, or administrative work, can be imputed to the taxpayer, taxpayers will not normally be regarded as negligent when relying on substantive tax advice obtained from an appropriate professional adviser. The FTT said:

"A taxpayer is only liable to a penalty if he has been negligent. There are few who would gainsay the proposition that tax law can be complicated and difficult for taxpayers to understand and, thus, it is only to be expected that, from time to time, taxpayers will resort to professional advice. The purpose of resorting to professional advice is that one normally expects to be able to rely upon it, whether that professional advice is taken from a lawyer, an accountant or a medical practitioner. We consider it difficult to understand how a taxpayer can be negligent if, perceiving the need for professional advice on a matter of difficulty or in a situation where the taxpayer is in doubt as to the proper approach to be taken, he then seeks and relies upon properly considered professional advice."

Comment

This decision is interesting in two principle respects.

First, the FTT has confirmed the position in respect of taxpayers seeking to rely on professional advice when submitting their returns. Taxpayers will not normally be regarded as negligent when relying on substantive tax advice received from an appropriate professional adviser. This is the position even where the taxpayer concerned has general tax expertise.

Second, taxpayers should not be subject to (or be given reason to be believe that they are subject to) unfavourable treatment by HMRC due to their personal circumstances. Mr Cannon

declined HMRC's 'invitation' to cease offering advice on tax mitigation arrangements and the FTT confirmed he was entitled to do so.

A copy of the decision can be viewed here.

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Goldsmith – late filing penalties cancelled by the Tribunal

In *David Goldsmith v HMRC* [2018] UKFTT 0005 (TC), the FTT has cancelled late filing penalties issued to the taxpayer as the statutory requirements contained in section 8(1), Taxes Management Act 1970 (TMA), had not been satisfied and HMRC did not have the power to require the taxpayer to deliver self-assessment returns.

Background

The taxpayer was not registered on HMRC's self-assessment computer system. During tax years 2011/12 and 2012/13, he received income from employment and a payment of taxable Employment and Support Allowance (ESA) from the Department of Work and Pensions. No tax was deducted from the payment from the taxpayer's employment because his personal allowance exceeded the amount of income he received. An error on the part of HMRC meant that no tax was deducted from the ESA payment. Income tax in the sum of £914.40 was payable.

The automatic reconciliation of the PAYE process identified the discrepancy and two forms P800, citing the underpayments were sent to the taxpayer informing him of the underpayments. Thereafter, HMRC issued tax returns in 2014 to enable the debt to be enforced.

In cases where an underpayment is a relatively small sum, it is normally "coded out" by the application of an adjusted code reducing the taxpayer's personal allowance in a later year. For reasons which were not made clear to the FTT, that did not happen in this case and HMRC sought payment from the taxpayer.

A payment plan was agreed with the taxpayer, however, after paying three of 33 installments, the taxpayer made no further payments. Seeking a way to compel the taxpayer to make good the underpayment, HMRC decided to issue notices to the taxpayer requiring him to file self-assessment returns for years relevant to the underpayments.

When those returns were not filed on time, HMRC issued penalties for failure to file the returns by the due dates. The taxpayer appealed the penalties to HMRC claiming that he had not received any notices requiring him to file or the tax returns purported to have been sent to him. His appeal was rejected and he appealed to the FTT.

The appeal was allocated to the paper track which meant that no hearing would be necessary and the FTT could determine the matter on the papers. On obtaining the appeal bundle, and having formed a view on the issues, the judge invited the parties to make written submissions. His provisional comments made it clear that he was minded to uphold the appeal and so HMRC filed written submissions and requested that, if the judge was not minded to agree with HMRC, it be given an opportunity to make oral submissions. Accordingly an oral hearing was held.

FTT decision

The appeal was allowed.

The penalties in issue were imposed under paragraph 1, Schedule 55, Finance Act 2009, which provides:

"(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date."

The "return" in question was that referred to in section 8(1)(a), TMA, which provides:

"8. – Personal return.

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –

(a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required. [...]"

HMRC's first argument was that the FTT did not have jurisdiction to consider the validity of the notices. It argued that the FTT, being a "creature of statute", only had the power to consider the question of whether the taxpayer had a reasonable excuse which would lead to the cancellation of the penalties. It was not open to the FTT to consider whether HMRC's decision to issue a notice to file a return was valid as such a challenge could only be dealt with by way of judicial review proceedings in the Administrate Division of the High Court.

The FTT rejected HMRC's narrow interpretation of the case law in this area and found that it was open to it and necessary for it to consider whether the notice had been validly issued in order to establish whether or not the conditions relevant to the issue of penalties had been satisfied.

The FTT was also satisfied that HMRC had issued the notices and the burden of proof was therefore on the taxpayer to demonstrate that he had not received the returns. As the taxpayer was unable to discharge this burden, he had no reasonable excuse for not filing the returns.

However, the fact the taxpayer did not have a reasonable excuse for not filing the returns did not matter as, in the view of the FTT, the penalties were not valid on the basis that the returns had not been issued in accordance with section 8(1). The taxpayer had not been issued with a notice requiring him to file a return "For the purpose of establishing the amounts in which a person is chargeable", as HMRC already knew the amount of tax that was due from the taxpayer and could have collected the tax by coding it out. The reason HMRC had taken the course it had, was to create a circumstance where there would be a debt which could be enforced.

Comment

The effect of this decision appears to be that HMRC is unable to issue section 8 notices to non-self-assessment taxpayers unless the content of the return is genuinely required for the purpose of establishing the taxpayer's liability to tax. It would not therefore be a surprise if HMRC sought permission to appeal this decision to the Upper Tribunal.

A copy of the decision can be viewed here.

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