Tax update

February 2018

In this month's update we report on HMRC's recently published guidance relating to penalties for enablers of defeated abusive tax arrangements; the publication by the EU of a list of non-cooperative jurisdictions in tax matters; and the outcome of HMRC's consultation on reporting obligations for offshore structures. We also comment on three recent cases relating to payments on early termination of fixed term contracts; information notices; and penalties for non-payment of an APN.

News items

HMRC publishes guidance relating to penalties for enablers of defeated abusive tax arrangements

HMRC has published its guidance on Schedule 16, Finance (No. 2) Act 2017, which gives HMRC the power to impose penalties against enablers of defeated tax avoidance arrangements. more›

Council publishes EU list of non-cooperative jurisdictions

The Economic and Financial Affairs (Ecofin) Council has published the first list of non-cooperative jurisdictions in taxation matters. more›

Outcome of HMRC's consultation on reporting obligations of offshore structures published

HMRC has published the outcome to its consultation concerning the introduction of new requirements that intermediaries involved in creating or promoting complex offshore structures notify HMRC both of the particulars of the relevant arrangements and the clients seeking to use them. more›

Case reports

Spurs 2 : 0 HMRC – payment on early termination of fixed term contract not taxable as earnings

In *HMRC v Tottenham Hotspur Ltd* [2017] UKUT 0453 (TCC), the Upper Tribunal (UT) has confirmed the decision of the First-tier Tribunal (FTT) that payments made by a football club in respect of two players on early termination of their contracts were not earnings. They were termination payments and, therefore, were outside the scope of national insurance contributions (NICs). more›

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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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Jiminez – High Court quashes information notices issued to non-UK resident taxpayer

This report is based on an article first published in Tax Journal. A copy of that article can be found here. **more›**

Chapman – penalties for non-payment of an APN can be avoided where it is reasonable to consider the APN unlawful

In *Chapman v HMRC*, [2017] UKFTT 800, the FTT has confirmed that a reasonable belief that an accelerated payment notice (APN) is unlawful can constitute a reasonable excuse for non-payment of the APN. **more›**

News items

HMRC publishes guidance relating to penalties for enablers of defeated abusive tax arrangements

HMRC has published its guidance on Schedule 16, Finance (No. 2) Act 2017, which gives HMRC the power to impose penalties against enablers of defeated tax avoidance arrangements. The legislation came into effect on 16 November 2017.

The guidance can be viewed here.

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Council publishes EU list of non-cooperative jurisdictions

The Economic and Financial Affairs (Ecofin) Council published the first list of non-cooperative jurisdictions in taxation matters.

Seventeen countries are named as falling short of the agreed governance standards. Forty seven countries have committed to addressing concerns and have undertaken to change the way their systems operate. This is part of a wider EU initiative intended to fight tax evasion and improve tax transparency.

The EU Council's press release can be viewed here.

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Outcome of HMRC's consultation on reporting obligations of offshore structures published

HMRC has published the outcome to its consultation concerning the introduction of new requirements that intermediaries involved in creating or promoting complex offshore structures notify HMRC both of the particulars of the relevant arrangements and the clients seeking to use them.

The document explains that many respondents believe that the requirements would work more effectively if the rules worked internationally rather than being restricted to the UK. The OECD and the EU have been working on similar arrangements and the government has indicated that it intends to work alongside these institutions in the future.

The consultation documents can be viewed here.

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Case reports

Spurs 2 : 0 HMRC – payment on early termination of fixed term contract not taxable as earnings

In *HMRC v Tottenham Hotspur Ltd* [2017] UKUT 0453 (TCC), the Upper Tribunal (UT) has confirmed the decision of the First-tier Tribunal (FTT) that payments made by a football club in respect of two players on early termination of their contracts were not earnings. They were termination payments and, therefore, were outside the scope of national insurance contributions (NICs).

Background

The case concerned the transfer of two football players, Peter Crouch and Wilson Palacios (the Players), from Tottenham Hotspur (Spurs) to Stoke City (Stoke).

The Players were employed by Spurs on fixed term employment contracts. The contracts contained a provision for early termination, either if certain circumstances arose (none of which were present in this case), or by mutual agreement between the Players and their employer.

In 2011, Spurs wished to transfer the Players to another club and had identified Stoke as a possible destination. To help facilitate the move, Spurs made payments to the Players as part of the agreement to terminate their contracts early.

HMRC considered that the payments made to the Players were earnings because the terms of the Players' employment contracts expressly envisaged, and provided for, termination by mutual consent. In HMRC's view, any payments received in consequence of implementing those terms were "from" their employment and were subject to income tax and NICs.

Spurs argued that the payments were compensation for the early termination of the Players' contracts and were not made pursuant to any specific provision. Accordingly, the payments were made in return for the Players giving up their rights to be employed until the expiry of the fixed term set out in their employment contracts and, as such, were not "from" their respective employments.

In December 2014, HMRC issued determinations under Regulation 80 of the Income Tax (PAYE) Regulations 2003 and decisions under section 8, Social Security Contributions (Transfer of Functions etc) Act 1999, for recovery of the tax and NICs allegedly due on the payments made to the Players.

Spurs appealed against the determinations and decisions to the FTT. The FTT allowed the appeal.

HMRC appealed to the UT. The main issue before the UT was whether the fact that the Players' employment contracts included clauses expressly allowing for the early termination of their fixed terms by mutual consent was sufficient to establish that the agreed termination payments were "from" an employment.

UT decision
HMRC's appeal was dismissed.

In the view of the UT, there is a distinction between the situation where the entire contract of employment is terminated in exchange for the termination payment and cases where payment was made pursuant to a pre-existing obligation to make such a payment arising under a contract of employment. In the latter case, such payment was "from an employment.

The UT concluded that the payments made in relation to the Players fell squarely within the first category. The payments compensated for the surrender of rights as part of the abandonment of the Players' contracts, they were not from their employment (for example, a payment in lieu of notice under an express term of their employment contracts), but from their termination.

The UT also noted that, under HMRC's view, any contractual provision permitting early consensual termination would be sufficient to make the termination payment made "from" an employment. This would result in almost all termination payments agreed in respect of a fixed term contract being caught as the contract would always contain an express or implied right to agree an early termination.

Comment
The UT's decision carefully analyses the relevant case law and its confirmation of the relevant test will be welcomed by taxpayers.

However, the benefit will be relatively short-lived as Finance (No. 2) Act 2017, changes the law so that all taxable termination payments are to be subject to employer NICs. This was to come into effect from 6 April 2018 but has been deferred until April 2019.

The decision can be viewed here.

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Jiminez – High Court quashes information notices issued to non-UK resident taxpayer

This report is based on an article first published in Tax Journal. A copy of that article can be found here.

In *R (on the application of Jimenez) v (1) The First Tier Tribunal (Tax Chamber) and (2) HMRC* [2017] EWHC 2585 (Admin), the High Court has quashed an information notice given by HMRC to a non-UK resident taxpayer.

Background
Under Schedule 36, Finance Act 2008 (Schedule 36), HMRC has significant information powers at its disposal to compel taxpayers and third parties to provide information and documents, or open up their business premises for inspection. HMRC is able to issue:

- "first party" (or "taxpayer") notices
- "third party" notices, and
- "unknown party" notices.

Where a third party notice is issued, it must name the taxpayer to whom it relates unless the FTT has approved the giving of the notice and disapplied the requirement. A first party notice can be given without the approval of the FTT as can a third party notice, if the taxpayer has agreed that it can be given (and in some other special cases set out in Part 6, Schedule 36).

When it is able to issue an information notice without the approval of the FTT, HMRC can obtain the approval of the FTT to the giving of a taxpayer and a third party notice. Such approval has the result that the person who is given the information notice cannot appeal against the notice or any requirement in it.

Pursuant to paragraph 3, Schedule 36, HMRC sought the approval of the FTT for the giving of a notice to Mr Jiminez (the Claimant), who lived in Dubai.

The FTT gave an anonymised decision on the points that had been raised by the Claimant on whether the hearing relating to its approval of the taxpayer notice should be in public, his ability to make representations at the hearing, and the territorial limits of Schedule 36. Since the Claimant had no right of appeal from the FTT's decision granting approval for the giving of the notice to the Claimant, his only way of challenge was by way of judicial review proceedings which he commenced.

The issue for the Court to determine concerned the jurisdiction of HMRC to issue a notice under Schedule 36 to the Claimant.

The Claimant brought his challenge on the basis that HMRC's information gathering powers do not have extra territorial effect. He argued that, as a non-resident living abroad, he was not subject to the demand issued to him by HMRC pursuant to Schedule 36.

HMRC argued that the Claimant was a taxpayer, for the purposes of Schedule 36, and it has the power to issue a notice under Schedule 36 to any such taxpayer outside the UK to assist it to establish that person's UK tax position. In other words, HMRC argued that there is no territorial limit to the giving of a notice to a taxpayer under Schedule 36.

High Court judgment

The Court (Charles J) observed that Schedule 36 is silent as to its territorial limits. The principle established in *Clark v Oceanic Contractors Inc* [1983] STC 35 is that, unless the contrary is expressly enacted, UK legislation is applicable only to British subjects or to foreigners who have made themselves subject to British jurisdiction by being present in the jurisdiction. In *Masri v Consolidated Contractors* [2009] UKHL 43, Lord Mance expressed the conclusion of a unanimous House of Lords as follows:

"The principle relied upon is one of construction, underpinned by consideration of international comity and law. It is that "Unless the contrary intention appears ...an enactment applies to all persons on matters within the territory to which it extends, not to any other persons and matters"... The principle may not apply, at any rate with the same force, to English subjects, but that is presently irrelevant. Whether and to what extent it applies in relation to foreigners outside the jurisdiction depends ultimately as Lord Wilberforce said in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* upon who is "within the legislative grasp, or intendment" of the relevant provision."

The Claimant relied also on the case of *Perry v SOCA* [2012] 4 All ER 795, in which it was held that the courts had no power under the Proceeds of Crime Act 2002 to make disclosure orders relating to persons outside the jurisdiction. The judge observed that, when having regard to the *Masri* principle, *Perry* may not apply to British nationals.

The Claimant argued that the fact that he is a British national did not render the information notice valid because such an extra-territorial interpretation and application of Schedule 36 would be inconsistent with the approach to the interpretation of domestic legislation against the relevant background of international law. In particular, the Claimant relied on the distinction between (i) an enforcement provision/jurisdiction, and (ii) a prescriptive jurisdiction. He argued that an information notice is an enforcement provision and so cannot be given to a British national outside the jurisdiction.

HMRC placed considerable reliance on *R (Derrin Bros Properties Ltd) v First-tier Tribunal (Tax Chamber)* [2016] EWCA Civ 15 and its confirmation that the purpose underlying Schedule 36 is to provide a credible and effective system of "checking and investigating", which encourages self-regulation and compliance. The Court did not disagree with that submission, however, it was of the view that the principles "do not of themselves found a conclusion that Parliament intended Schedule 36 or parts of it, to have effect outside the UK."

HMRC also argued that Schedule 36 permits the seeking of information for checking the liability of persons to tax in States in respect of which international tax enforcement arrangements have been made. The Court, however, concluded that this matter pointed to the conclusion that its reach extends only to the UK and that if HMRC wants to seek information about liability to UK tax from persons who are abroad, it should rely on such mutual assistance arrangements with the relevant State. The existence of such mutual assistance arrangements was also held to undermine HMRC's arguments based on the public interest in promoting its investigative regime.

The Court agreed with the Claimant's argument that the relevant jurisdiction or issue should properly be classified as "subject matter jurisdiction" rather than "in personam jurisdiction", because it relates to whether a Court can regulate a person's conduct abroad. The classification of the jurisdiction is relevant to the application of the approach in international law in construing UK legislation.

In the view of the Court, *Perry*, which was relied on by the Claimant, provided persuasive authority in favour of the Claimant's contention that Parliament did not intend to give HMRC (with or without the approval of the FTT) the power to issue an information notice to persons outside the jurisdiction because, although criminal offences only arise if such approval is given, penalties are not so dependent, and in any event a territorial distinction cannot be made between information notices on the basis of such approval being given. Mr Justice Charles concluded:

"In my judgment, the application of (i) the Masri principle, and (ii) the approach that Parliament is presumed to have intended to act in accordance with international law, and so not to offend against the sovereignty of another state, found the conclusion that Schedule 36 does not provide a power to give the taxpayer notice that was given to the Claimant in Dubai and so the Revenue should not have given it, the First-tier Tribunal should not have approved it and it should be quashed."

Comment

This case is significant for a number of reasons. Not only does it confirm that Schedule 36 does not have extra-territorial effect, but the Court was critical of the fundamental process regularly used by HMRC to issue Schedule 36 notices following ex parte applications to the FTT. At the outset of his judgment, Mr Justice Charles observed:

"... it seems to me that the Revenue and the First-tier Tribunal may wish to address whether the Ariel decision, and more generally their approach to the determination of applications under Schedule 36, merit reconsideration having regard to basic principles of fairness and the general approach taken by courts to ex parte hearings and the application of the principle of open justice ...".

Mr Justice Charles further commented that the FTT, as the "monitor charged with ensuring that arbitrary conduct by the executive is avoided" should consider a number of reforms to its own processes including:

- holding the hearing in public
- directing that a full record of what is said and done at any hearing and all documents put before the FTT are provided to the taxpayer, and
- permitting the taxpayer to take part in the hearing.

Although, strictly speaking, the above comments made by Mr Justice Charles did not form part of the ratio of his decision, if changes are not made to the way in which such notices are issued and approved, HMRC and the FTT run the risk of future public law challenges on substantially the same grounds.

The judgment can be viewed here.

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Chapman – penalties for non-payment of an APN can be avoided where it is reasonable to consider the APN unlawful

In *Chapman v HMRC*, [2017] UKFTT 800, the FTT has confirmed that a reasonable belief that an accelerated payment notice (APN) is unlawful can constitute a reasonable excuse for non-payment of the APN.

Background

Mr Chapman (the Appellant) claimed a loss in his self-assessment return which arose from a tax planning arrangement which had been notified to HMRC under the DOTAS regime. HMRC opened an enquiry and issued an APN to the Appellant. The Appellant subsequently challenged the lawfulness of the APN in judicial review proceedings and did not pay the APN by the required date. HMRC imposed a penalty on the Appellant for non-payment of the APN.

A time to pay arrangement was agreed with HMRC.

The Appellant appealed the penalty on various grounds, including: (1) that HMRC had been "difficult" to deal with; (2) that "Time to Pay" arrangements were in place which meant he did not have to pay on the due date; and (3) he had a reasonable excuse for non-payment, namely, that he had been advised that the APN was unlawful (and that his judicial review challenge against the APN would succeed).

FTT decision
The appeal was dismissed.

With regard to ground (1), the FTT said that matters relating to HMRC's internal management were not relevant to the appeal. The FTT also dismissed ground (2) and found that the correct statutory mechanisms had not been used to instigate time to pay in time. Paragraph 10, Schedule 56, Finance Act 2004, provides that if a taxpayer makes a request for time to pay before he is liable to pay the APN and HMRC agrees, then a penalty cannot be issued as a result of non-payment of the full amount by the due date. The FTT found that the Appellant had not made the relevant request by the payment date.

With regard to ground (3), the FTT observed that a taxpayer should not assume lightly that HMRC has acted unlawfully in issuing an APN, but rejected HMRC's argument that an APN must be taken to be lawful until the contrary is established. The FTT confirmed that a belief that an APN was unlawful could constitute a "reasonable excuse", which it defined as follows:

"It seems to me that for something to be an excuse it must be such that absent that thing, payment would have been made; and that an excuse is a reasonable excuse if, taking into account all the circumstances including those of the taxpayer, it was reasonable for him to have acted or failed to act as he did."

HMRC argued that a belief that an APN has been unlawfully issued cannot be a reasonable excuse for non-payment of the APN and that an APN must be taken to be lawful until the contrary is established. The FTT rejected this argument.

HMRC also argued that taxpayers should pay the amount demanded in an APN, even if they believe the APN is unlawful as, should the substantive challenge to its lawfulness be successful, the penalty would be quashed. The FTT also rejected this argument, stating:

"... it seems to me that this argument is in effect that if something is lawful it can never be a reasonable excuse to act on a belief that it is unlawful. To my mind that affords 'reasonable' too little scope. No doubt all decisions of the High Court are reasonable, although some are shown to be wrong: it would not be unreasonable I think to act on a High Court decision nevertheless. There must I think be circumstances in which it is reasonable to consider an APN unlawful and on that basis reasonably decline to pay it."

The FTT considered that there must be circumstances in which it is reasonable for a taxpayer to consider an APN unlawful and on that basis reasonably decline to pay it. However, in this case, the Appellant had failed to produce the advice he relied on to found his belief and there was no evidence of error in the APN. Accordingly, his reasonable excuse defence failed.

Comment
Taxpayers appealing a penalty for non-payment of an APN have had an uphill struggle in trying to convince the FTT that they have a reasonable excuse for non-payment on the basis that they believe the APN is invalid. There has been a number of cases over the past 18 months that have indicated that the FTT is of the view that it does not have jurisdiction to consider the validity of an APN (see: *Beadle v HMRC* [2017] UKFTT 544 (TC); *Goldenstate Ltd v HMRC* [2017] UKFTT

0568 (TC); *Paranby v HMRC* [2017] UKFTT 0213 (TC); *O'Donnell v HMRC* [2016] UKFTT 743 (TC); and *Nijjar v HMRC* [2017] UKFTT 0175 (TC)). In this case, however, the FTT has confirmed that a taxpayer's belief in the illegality of an APN may constitute a reasonable excuse for non-payment, provided that belief is reasonable.

The decision can be viewed here.

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