RPC

Tax update

September 2016

In this month's edition we report on (1) HMRC's much anticipated consultation on proposals to tackle disguised remuneration (2) further amendment to the Finance Bill 2016 in relation to EBT settlement relief and (3) HMRC's consultation on proposed penalties for "enablers" of tax avoidance arrangements. We also comment on three recent cases concerning penalties, scheme sanction charges and industrial buildings allowance.

News items

HMRC publishes consultation on changes intended to tackle disguised remuneration

At Budget 2016, the government announced a package of changes to tackle what it describes as disguised remuneration avoidance schemes. more›

Amendment to EBT settlement relief

HMRC has announced a further amendment to the Finance Bill 2016, to extend the time limits applicable under the relief from charge provisions contained in Part 7A of the Income Tax (Earnings and Pensions) Act 2003, where a taxpayer has reached agreement with HMRC. The relief afforded to taxpayers was to be restricted to settlements made before 1 December 2016. The amendment extends this-cut off to 31 March 2017. more›

HMRC publishes consultation on sanctions for "enablers" of tax avoidance arrangements

On 17 August 2016, HMRC issued a consultation document entitled "Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document". The government is proposing to introduce sanctions for enablers of tax avoidance schemes and arrangements. more›

Case reports

Bayliss – taxpayer succeeds on penalties issue in Pendulum scheme

In *Anthony Bayliss v HMRC* [2016] UKFTT 0500 (TC), the First-tier Tribunal (FTT) has found that a taxpayer was not fraudulent or negligent in the completion of his tax return when relying on the advice of his professional advisors. more›

Any comments or queries

Adam Craggs
Partner
+44 20 3060 6421
adam.craggs@rpc.co.uk

Robert Waterson
Senior Associate
+44 20 3060 6245
robert.waterson@rpc.co.uk

About this update

The Tax update is published on the first Thursday of every month, and is written by members of RPC's Tax Dispute team.

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

To subscribe to any of our publications, please click here.

Sippchoice – SIPP scheme administrator avoids tax charge in "pension liberation" case

In *Sippchoice Ltd v HMRC* [2016] UKFTT 464 (TC), the FTT has found that HMRC was wrong to refuse Sippchoice's application for the discharge of liability to scheme sanction charges in circumstances where it was not aware of a pension liberation scheme being operated in respect of the pension scheme's invested funds. more>

Rupert Grint – Harry Potter star loses £1m battle with HMRC

In *Rupert Grint v HMRC* [2016] UKFTT 0537 (TC), the FTT has held that a taxpayer's new accounts did not meet the requirements of section 217, Income Tax (Trading and Other Income) Act 2005 (ITTOIA), for a change in accounting date, as the accounts did not exist when HMRC was notified of the change. more>

News items

HMRC publishes consultation on changes intended to tackle disguised remuneration

At Budget 2016, the government announced a package of changes to tackle what it describes as disguised remuneration avoidance schemes.

On 10 August 2016, HMRC published a consultation document entitled "Tackling Disguised Remuneration: technical consultation". This consultation includes more detail on the changes the government will introduce in Finance Bill 2017 and includes draft legislation in relation to some of the proposals.

The document is detailed and wide-ranging, and includes proposals to:

- introduce a new "close companies' gateway" to Part 7A of the Income Tax (Earnings and Pensions) Act 2003, to tackle arrangements which are purported not to come through the existing Part 7A gateway because they are not connected to employment
- impose a Part 7A tax charge on loans made after 5 April 1999 that are not repaid by 5 April 2019, and to ensure that any loans transferred or written-off are subject to income tax
- transfer the PAYE and NICs liability arising on a Part 7A charge to the employee in certain circumstances.

The consultation also includes provisions to deny a corporation tax charge for disguised remuneration arrangements and to tackle arrangements similar to those targeted by Part 7A, but involving self-employed individuals.

The proposed new the legislation will be retrospective in effect and is likely to have a serious impact on those who have used EBT structures.

The consultation closes on 5 October 2016.

A copy of the consultation document can be found here.

Back to contents›

Amendment to EBT settlement relief

HMRC has announced a further amendment to the Finance Bill 2016, to extend the time limits applicable under the relief from charge provisions contained in Part 7A of the Income Tax (Earnings and Pensions) Act 2003, where a taxpayer has reached agreement with HMRC. The relief afforded to taxpayers was to be restricted to settlements made before 1 December 2016. The amendment extends this-cut off to 31 March 2017.

The relief provides that investment growth on disguised remuneration can be deducted in computing subsequent income tax charges under Part 7A. Taxpayers are experiencing significant delays in obtaining information from HMRC where settlement is proposed, it is therefore unsurprising that the time limits are being extended.

A copy of the amended provision can be found here.

Back to contents›

HMRC publishes consultation on sanctions for "enablers" of tax avoidance arrangements

On 17 August 2016, HMRC issued a consultation document entitled "Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document". The government is proposing to introduce sanctions for enablers of tax avoidance schemes and arrangements.

The proposals are extremely wide. An enabler is described as: "anyone in the supply chain who benefits from an end user implementing tax avoidance arrangements and without whom the arrangements as designed could not be implemented". This could include lawyers, accountants, IFAs and other professional advisers. Those caught would be subject to a penalty applied by HMRC up to a value of 100% of the benefit derived from the arrangements.

The penalty would be triggered by the "defeat" of the relevant arrangements by judicial determination (or agreement with HMRC). The arrangements which will be covered will be those subject to Follower Notices, counteracted by the GAAR, the subject of targeted anti-abuse rules, or registered under DOTAS.

The consultation closes on 12 October 2016.

A copy of the consultation document can be found here.

Back to contents>

Case reports

Baylis – taxpayer succeeds on penalties issue in Pendulum scheme

In *Anthony Bayliss v HMRC* [2016] UKFTT 0500 (TC), the First-tier Tribunal (FTT) has found that a taxpayer was not fraudulent or negligent in the completion of his tax return when relying on the advice of his professional advisors.

Background

Mr Bayliss (the Appellant), appealed against penalties charged by HMRC pursuant to section 95(1)(a) Taxes Management Act 1970 on the basis that he had fraudulently or negligently delivered incorrect self-assessment returns. The alleged fraudulent or negligent behaviour related to a claim to a capital loss in the sum of £539,000 that the Appellant included in his return for 2006/07, but which he subsequently accepted was not available. The capital loss was used to offset gains arising both in 2006/07 and 2007/08. HMRC sought penalties in respect of the tax understated in each of the two years.

The loss related to the Appellant's participation in a tax planning structure called "Pendulum Long" which involved the use of contracts for differences (CFD), which was subsequently found not to produce the intended fiscal consequences.

As part of his involvement in the arrangements, the Appellant had completed a "sophisticated investor" statement for the purposes of the Financial Services and Market Act 2000. However, the Appellant had no experience of CFD or the stock market. He had been a teacher, who in the early 1990s began purchasing, refurbishing and letting properties to students. In 1996 he left the teaching profession to concentrate on his property business.

The Appellant disposed of his property portfolio over the three tax years 2005/06-2007/08. In the first year capital gains tax (CGT) was paid in the usual way on the realised gains. In the following year, his tax advisers suggested involvement with the planning which would generate a loss which could be used to offset CGT.

The Appellant and his accountant attended a meeting with representatives of Montpelier Tax Consultants (Montpelier), the promoter of the scheme, on 15 January 2007. It was at this meeting that the Appellant was informed that the "sophisticated investor" declaration was merely a formality which he was qualified to complete owing to his experience of the property market. This was incorrect.

HMRC opened an enquiry in January 2009. The Appellant maintained (and the FTT accepted) that he took no part in responding to HMRC's enquiries, leaving the matter in the hands of his accountants.

In December 2010, the Appellant was informed by HMRC that a criminal investigation was being conducted into the activities of the Montpelier companies and the CFD scheme. In its letter, HMRC indicated that it would continue to treat the Appellant's enquiry as a civil enquiry.

The Appellant heard nothing more until 2012, when he learnt that Montpelier had been raided. He sought further advice from his accountants who recommended the purchase of a certificate of tax deposit to cover the disputed tax and interest, in case the arrangements were ultimately demonstrated not to produce the desired loss. This he duly did in December 2012.

In April 2013, a new officer within HMRC reviewed the Appellant's file for a possible Code of Practice 9 (COP 9) investigation. HMRC's COP 9 procedure governs civil investigations where a taxpayer is suspected of fraud. HMRC concluded that there was sufficient evidence to indicate tax fraud. Accordingly, in July 2013, HMRC wrote to the Appellant explaining that he was suspected of committing tax fraud and inviting full disclosure under the COP 9 procedure (under which, in return for full disclosure of any fraud, HMRC undertakes not to prosecute the taxpayer concerned).

The Appellant refused to admit any fraudulent behaviour. He offered to withdraw his claims for loss relief and even offered, on a "without prejudice" basis, to pay a penalty of 5% on the basis of negligent behaviour, but he maintained that he had not committed fraud. HMRC rejected the offers. The Appellant withdrew his claims for loss relief in October 2014.

HMRC issued penalties of 35% of the amount of tax at stake on the basis of fraudulent or negligent behaviour. The Appellant appealed against the penalties.

FTT's decision

HMRC accepted that the burden of proof was on it to show, on the balance of probability, that the Appellant had acted fraudulently or negligently.

The FTT observed that in determining whether the Appellant had been fraudulent or negligent in completing his return it was not relevant what had happened after the date of filing. The FTT also made explicit the point that an allegation of fraud is a serious matter. A critical ingredient for any allegation of fraud is to demonstrate some dishonesty on the part of the accused. Something which the Appellant strenuously denied.

Significantly, HMRC's representative specifically confirmed at the hearing that HMRC was not seeking to argue that the arrangements were a sham.

HMRC argued that the Appellant had indicated on his returns that he had made an "economic loss" when, in fact, he had not. The FTT gave short shrift to this argument stating that the tax system is "highly complex" and that there were "many instances where the calculation of a profit or loss for tax purposes differs markedly from the economic profit or loss". The question was whether the Appellant considered the content of his return to be correct at the time it was completed. The FTT concluded, on the basis of the evidence before it, that he did.

HMRC also referred to the Appellant's declaration that he was a "sophisticated investor" as evidence of fraudulent behaviour. Again, the FTT rejected this argument. It accepted that the Appellant was advised to complete the declaration by his advisors and he relied on that advice.

With regard to the broader category of negligence, HMRC relied on the decision in *Litman & Newall v HMRC* [2014] UTFTT 089 (TC), in support of its arguments. *Litman* also concerned a Montpelier scheme involving a loan relationship. The taxpayer in that case was found to have been negligent because he did not look into the "basic commercial reality" of the arrangements.

The FTT declined to apply *Litman* to the present case. Critically, there was no evidence that the loan at issue in *Litman* had even been made or repaid and the taxpayer's failure in that case to establish that the scheme was not a sham was found to demonstrate negligence. In *Litman*, HMRC had argued sham, whereas in the present case it had not. This distinction was important.

The Appellant had seen documents to demonstrate that the transactions at issue were real and, although he had concerns about the competency of the junior staff working for Montpelier, he had received reassurances. In the FTT's view, he was entitled to rely on such assurances.

The Appellant's appeal was therefore allowed.

Comment

This decision confirms that a taxpayer acting in good faith is entitled to rely on the advice of an adviser he trusts as to how the tax position may differ from the accounting position. The FTT did not see how taking into account the response of advisors to queries from HMRC in circumstances where the taxpayer has no knowledge of those communications should adversely affect the level of a reduction applied to a particular penalty.

This decision is also a timely reminder that HMRC should not treat any suspected wrong doing on the part of an adviser as that of the taxpayer. This is particularly important when deciding whether to invoke the COP 9 procedure. It is not necessarily sufficient that HMRC may suspect a taxpayer's adviser of fraud. In order to subject a taxpayer to a COP 9 investigation it must suspect the taxpayer himself of fraud.

There is a perception amongst some taxpayers that HMRC has, in recent times, subjected them to a COP 9 investigation simply because they have participated in tax planning which HMRC disapproves of and in respect of which HMRC suspects fraud on the part of one or more professional advisers associated with the planning. The use of the COP 9 procedure by HMRC in such circumstances may constitute an abuse of its powers challengeable by way of an application for judicial review.

A copy of the decision can be found here.

Back to contents>

Sippchoice – SIPP scheme administrator avoids tax charge in "pension liberation" case

In *Sippchoice Ltd v HMRC* [2016] UKFTT 464 (TC), the FTT has found that HMRC was wrong to refuse Sippchoice's application for the discharge of liability to scheme sanction charges in circumstances where it was not aware of a pension liberation scheme being operated in respect of the pension scheme's invested funds.

Background

Sippchoice Ltd (the Appellant) operated a self-invested personal pension scheme (SIPP), known as the Sippchoice Bespoke SIPP (the Pension Scheme), in its capacity as scheme administrator. HMRC claimed that the Pension Scheme was used as a pension liberation vehicle by allowing members to invest their funds in Imperium Enterprises Ltd (Imperium), and then indirectly accessing these funds in the form of loans before the members reached the age of 55.

HMRC argued that such loans were unauthorised member payments for the purposes of section 160(2), Finance Act 2004 (FA 2004).

Where an unauthorised member payment is made a charge to income tax known as an unauthorised payments charge may be made by HMRC under section 208, FA 2004 and such a charge was imposed by HMRC on the majority of the members of the Pension Scheme.

These assessments had given rise to appeals which had not at the time of the instant appeal been determined.

HMRC had also imposed scheme sanction charges on the Appellant in the sums of £205,307.80, and £168,545 in respect of tax years 2010/2011, and 2011/12, respectively.

The Appellant applied, pursuant to section 268(5), FA 2004, for discharge of its liability to the scheme sanction charges on the grounds set out in section 268(7), namely, that it reasonably believed any unauthorised payments were not scheme chargeable payments and it would not be just and reasonable for liability to be imposed on it. The Appellant's application was refused by HMRC.

The Appellant appealed, pursuant to section 269, FA 2004, against the decision of HMRC to refuse its application for the discharge of the scheme sanction charges.

FTT's decision

The Appellant submitted that it had no knowledge of the fact that loans were being made to individuals in connection with the investment of funds in shares in Imperium until 4 August 2011, when an investor in Imperium sent an email to the Appellant expressing concerns.

HMRC accepted that the Appellant did not know a pension liberation scheme was being operated, but argued that the Appellant did not take adequate steps to ensure that the Pension Scheme was not being abused. HMRC alleged that the Appellant had failed to act on the warning signs and did not, for example, ask any of the members whether they had received or been offered a loan in connection with their pension funds.

The FTT accepted the Appellant's view that section 268 should be interpreted to include situations where the scheme administrator reasonably believed there to be no unauthorised payment and therefore reasonably believed there was no scheme chargeable payment. The FTT accepted that the Appellant had raised concerns which it had regarding pension liberation, but these concerns had been laid to rest by misinformation and false assurances given to it by Imperium.

Accordingly, the FTT allowed the Appellant's appeal.

Comment

In reaching its decision, the FTT considered the decision of the Court of Appeal in *Moblix Ltd (in administration) and others v HMRC* [2010] STC 1436, which was an MTIC case. The FTT considered that the question arising in the instant case (did the Appellant reasonably believe that no unauthorised payments were being made) raised similar evidential issues to those considered by the courts in MTIC cases. The FTT concluded that having recognised the possibility of pension liberation and made proportionate enquiries, it was reasonable for the Appellant to be satisfied with the responses it received which appeared to be genuine. This decision will be welcomed by pension scheme administrators.

A copy of the decision can be found here.

Back to contents>

Rupert Grint – Harry Potter star loses £1m battle with HMRC

In *Rupert Grint v HMRC* [2016] UKFTT 0537 (TC), the FTT has held that a taxpayer's new accounts did not meet the requirements of section 217, Income Tax (Trading and Other Income) Act 2005 (ITTOIA), for a change in accounting date, as the accounts did not exist when HMRC were notified of the change.

Background

The well-known Harry Potter film star, Rupert Grint (the Appellant), wished to bring forward the receipt of income to the tax year 2009/10, in order to avoid the 50% additional rate of income tax that applied from 2010/11. The Appellant therefore purported to change his accounting date. Section 217 ITTOIA, required the Appellant to, among other things, produce accounts for a period of account ending on the new accounting date and not exceeding 18 months, and to give HMRC notice of that change by the date on which the tax return was filed.

If the change in his accounting date had been effective, the Appellant would have saved around £1m in income tax.

Following an enquiry, HMRC amended the Appellant's tax returns for the tax years 2009/10 and 2010/11. The Appellant appealed against these amendments.

FTT's decision

The FTT held that to change an accounting date, the accounts effecting the change and satisfying the statutory requirements, must exist when the tax return was filed.

In the view of the FTT, it is implicit in the legislation that it only permits notification of actual changes in accounting date and not prospective ones and as the change is effected by drawing up accounts to the new accounting date, there can be no change in the accounting date when the accounts to the new accounting date have not been drawn up at the time HMRC is notified.

The FTT concluded that the relevant accounts in the Appellant's case were for a period exceeding 18 months and could not, therefore, operate to change his accounting date. Accordingly, the Appellant's appeal was dismissed.

Comment

The decision, while fact-dependent, contains some interesting commentary on the meaning of "accounts". The FTT said that multiple accounts could, as in this case, exist, however, where this did occur, the relevant accounts were those that the taxpayer relied upon for general commercial purposes. Taxpayers will no doubt wish to bear that in mind when changing accounting date.

A copy of the decision can be found here.

Back to contents>

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 79 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern City legal services business."

At RPC we put our clients and our people at the heart of what we do:

- **Best Legal Adviser status every year since 2009**
- **Best Legal Employer status every year since 2009**
- **Shortlisted for Law Firm of the Year for two consecutive years**
- **Top 30 Most Innovative Law Firms in Europe**

We have also been shortlisted and won a number of industry awards, including:

- **Winner – Law Firm of the Year – The British Legal Awards 2015**
- **Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015**
- **Winner – Law Firm of the Year – The Lawyer Awards 2014**
- **Winner – Law Firm of the Year – Halsbury Legal Awards 2014**
- **Winner – Commercial Team of the Year – The British Legal Awards 2014**
- **Winner – Competition Team of the Year – Legal Business Awards 2014**
- **Winner – Best Corporate Social Responsibility Initiative – British Insurance Awards 2014**

Areas of expertise

- Banking
- Commercial
- Commercial Litigation
- Competition
- Construction
- Corporate
- Employment
- Insurance
- Intellectual Property
- Media
- Outsourcing
- Pensions
- Private Equity
- Real Estate
- Regulatory
- Reinsurance
- Tax
- Technology

16454

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000