

PRACTICE UPDATE

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1. Assessments and appeals

It is normally straightforward to tell when HM Revenue and Customs (HMRC) have raised an assessment in respect of a taxpayer. However, what constitutes an 'assessment'? This is an important question because assessments are generally subject to a right of appeal. But is there a right of appeal against an HMRC tax calculation notice?

Right of appeal?

In *Clark v CRC* [2011] UKFTT 302 (TC), the taxpayer received a tax calculation notice (Form P800) from HMRC, indicating that tax had been under-collected for 2009-10, amounting to £806.60. The taxpayer appealed to the tribunal. HMRC said that the taxpayer had no right of appeal against a tax calculation notice, and asked the tribunal to strike out his appeal.

For a case to be struck out, it must be 'plain and obvious' that it will not succeed. However, the tribunal considered that the taxpayer may well have a right of appeal against the tax calculation notice, and dismissed HMRC's application for the appeal to be struck out. The tribunal decided that the appeal raised 'important and fundamental questions' which needed more consideration, by way of a separate appeal hearing and/or a judicial review claim to the High Court.

The taxpayer had four sources of income within the scope of PAYE during 2009-10. He had contacted HMRC four or five times early in that tax year. HMRC issued the

tax calculation notice in November 2010, showing the tax underpayment of £806.60. Upon receipt, the taxpayer called HMRC and was told that they had allowed him two personal tax allowances by mistake. The tribunal commented that the taxpayer had "tried very hard" to ensure that his income was correctly taxed before receipt.

Arguable case

HMRC stated that the calculation notice is an "informal assessment" and that there was no statutory right of appeal against it. However, the tribunal noted that (under *TMA 1970, s 31(1)(d)*) taxpayers have a right to appeal against "an assessment which is not a self-assessment", and that it was "clearly arguable" that the "informal calculation" is an assessment other than a self-assessment.

The tribunal concluded that it was not "plain and obvious" that Mr Clark had no right of appeal against the tax calculation notice. It was certainly arguable that a tax calculation notice was a notice of assessment, in which case there was a right of appeal. The tribunal refused HMRC's application to strike out the case, and directed that if the appeal could not be settled by agreement between the parties, it should be reclassified as a 'standard' case and listed for hearing before another tribunal.

The outcome of Mr Clark's case is not known at the time of writing. However, the tribunal's decision could have much wider implications for the many employees and pensioners who receive from HMRC a

P800 tax calculation each year. In its guidance for taxpayers on the P800 form (www.hmrc.gov.uk/p800/index.htm), HMRC states: "If you don't agree with something included in your P800 Tax Calculation, contact HMRC...If HMRC agrees that your P800 Tax Calculation is incorrect they will amend it and send you a new one." However, this procedure presumably deals only with errors or omissions on the form itself.

With regard to errors by employers and pension providers which result in a tax underpayment, HMRC advises: "If you think your employer or pension provider has made a mistake - for example because they didn't take reasonable care to use the right tax code - they may be due to pay back the tax owed instead."

However, what about HMRC errors, which result in a tax underpayment?

Concession A19

As mentioned, in Mr Clark's case HMRC had given the benefit of two personal allowances. Extra-Statutory Concession A19 'Giving up tax where there are Revenue delays in using information (www.hmrc.gov.uk/specialist/esc.pdf) provides that HMRC will "normally" give up tax arrears resulting from their failure to make "proper and timely" use of information. In Mr Clark's case, the tribunal Judge, Anne Redston, stated:

"In the instant case, HMRC were told by Mr Clark on four or five occasions, before the end of the 2009-10 fiscal year, about his retirement and his four different sources of income. Despite this, they gave him two personal allowances. I thus find that they "failed to make proper use" of the facts with which they had been provided, and thus that he would fall within the first of the two alternative ways for meeting the second "exceptional" part of the ESC."

However, it was also pointed out that there is no right of appeal against HMRC's refusal to apply an Extra Statutory Concession.

Conclusion

ESC A19 has limitations in its application, because it is subject to conditions.

The facility to appeal against P800 notices would constitute a helpful and reassuring safeguard for taxpayers such as Mr Clark.

2. HMRC Information notices

Taxpayers can be required to provide HM Revenue and Customs (HMRC) with certain information and/or documents, if HMRC issues a written notice to that effect (*FA 2008, Sch 36, para 1*; previously *TMA 1970 s 20(1)*). The question arises: what information and documents are considered to be within the taxpayer's remit to provide?

Reasonably required

Under HMRC's recently introduced information powers (in *FA 2008, Sch 36*), taxpayers must provide such information or documentation as is 'reasonably required' to check the taxpayer's tax position. The previous legislation (in *TMA 1970, s 20*) required the taxpayer to provide such documents and particulars as are in the person's 'possession or power'.

In *Parissis and Others v CRC* [2011] UKFTT 218 (TC), three individuals (the respondents) provided documents and particulars to HMRC in response to information notices. HMRC contended that the documents supplied only partly complied with the information notices, and applied for penalties for the failure. The respondents contended that the documents demanded by the *TMA 1970, s 20* notices were not within their 'possession or power' and were not produced for that reason.

The individuals were connected with offshore trusts of which they were settlors and/or beneficiaries. The 'missing documents' (i.e. which HMRC requested but had not been supplied) included trust documents and accounts in respect of a British Virgin Islands (BVI) company, the shares in which were beneficially owned by the trusts. The tribunal considered HMRC must raise a case that the

documents were in the respondent's possession or power, and then it was for the respondents to show that they were not.

The respondents argued that they had no power over the missing documents. Once again, HMRC must establish a case that the documents exist, and the respondents must then prove that they do not. The tribunal's finding was that the BVI company and trust accounts existed. The tribunal also found that the other correspondence and documentation when the trust was set up existed, at least in the hands of the trustee.

HMRC accepted that the respondents did not possess the missing documents, but argued that the respondents had the power to influence the trustees to provide the documents. The respondents argued that they did not have a presently legal right to any of the material sought by HMRC, which was therefore not within their power. HMRC considered that the material was effectively within their power, because the settlors and beneficiaries could be assumed to have real power over the trustees.

The tribunal considered the meaning of 'power' and concluded that the term splits into two concepts - 'legal' power and 'practical' power. In terms of legal power, the tribunal concluded that the ordinary meaning of power could not extend to include legal action that is likely to fail. Some of the documents were not considered to be within the respondents' legal power on that basis. However, with regard to practical power, the tribunal held that:

"..documents are within a person's power if they can obtain them, by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them."

The tribunal also stated that even if not obliged by court order to provide the documents, it was likely that a trustee would choose, in the spirit of trusteeship, to provide copies of them to the settlors

and beneficiaries. HMRC had raised a case that the documents were within the respondents' power, and the tribunal therefore considered that it was for the respondents to show that they had asked the trustees for the documents and been refused. They had not done so, and were in breach of the information notices and therefore liable to a penalty.

It is worth noting that, in the tribunal's view, the documents in the above case would not have been in the respondents' possession or power if the trust deed(s) contained a clause excluding the trustees' duty to give information and the respondents had asked the trustees to provide the missing documents but had been refused. Trust deeds for two of the trusts did contain such exclusions, but unfortunately for the respondents it would appear that they should have asked the trustees for the documents anyway.

Different approach

What can HMRC do if a taxpayer refuses to provide requested documents which it could not lawfully be compelled to produce?

The tribunal in the *Parissis* case also considered this point, and noted that HMRC have wide powers to make a discovery assessment where they honestly consider that there has been a tax underpayment. It would then be for the taxpayer to show that the assessment is wrong. The tribunal cited the case of *T Haythornwaite & Sons Ltd* CA 1927 11 TC 657, in which the taxpayer company's refusal to provide documents had the effect of leaving itself without the evidence to challenge an assessment, which was therefore upheld in the Court of Appeal.

Conclusion

The decision in the *Parissis* case is worrying. In broad terms, it indicates that a document is in a taxpayer's power if it is in the possession of someone else, even if the taxpayer cannot compel that other person to provide the document.

Taxpayers who receive information notices from HMRC for documents which

are in the possession of another person would therefore be faced with the prospect of having to ask that other person for the documents, or face a penalty.

In addition, if information is in the taxpayer's legal power but not his possession, it would seem that he or she must take legal action if necessary to obtain that information, unless such legal action is likely to fail. This will probably involve the taxpayer incurring significant legal costs in bringing proceedings against the third party.

It is not known at the time of writing whether the *Parissis* case has been appealed. If there is no appeal, HMRC may consider it possible to ask for virtually any information and documents, which will place a heavy burden on the taxpayer to attempt to obtain it from others. It is therefore to be hoped that the above case is not the last word on the subject.

3. Errors and discovery

Many taxpayers and agents take the precaution of including as much additional information as possible when filing tax returns, with a view to reducing the possibility of HM Revenue and Customs (HMRC) making a discovery assessment outside the normal time limit for them to make an enquiry into the return. However, a recent Upper-tier tribunal decision would seem to indicate that this approach is not necessarily effective in itself.

In *Moore v CRC* [2011] UKUT 239 (TCC), HMRC enquired into the taxpayer's 2003-04 tax return and found that he had incorrectly been deducting capital losses on his investments from bank interest paid to him. The taxpayer had done this on the basis of informal advice given at a social occasion by an accountant. However, he sent with each of his tax returns a sheet of paper setting out exactly how he had calculated the figures. The taxpayer did not follow the HMRC guidance provided with the returns, or use the working sheet attached to the returns.

No protection

HMRC's 'discovery' had been made when they received interest details from the bank, which showed higher amounts of interest than those shown on the taxpayer's returns.

The first-tier tribunal had dismissed the taxpayer's initial appeal, but found that the sheets of paper sent with his tax returns had contained sufficient explanation of what he had done that HMRC could not rely on the discovery rule in *TMA 1970, s 29(5)*. This broadly provides that HMRC can make a discovery if an officer "... could not have been reasonably expected, on the basis of the information made available to him before that time" to have been aware of an under-assessment etc. However, the first-tier tribunal had held that the taxpayer was guilty of 'negligent' conduct within *s 29(4)*, and dismissed the taxpayer's appeal against the discovery assessments.

The Upper-tier tax tribunal judge commented that the taxpayer's self-assessments were not based upon what he wrote in the additional sheets, but on what he entered in the boxes.

Despite finding the taxpayer's arguments "attractive", the Upper-tier tribunal held that the first-tier tribunal's conclusion about what the 'duty of care' entailed was right. The additional information supplied on the sheets of paper would have given Mr Moore protection against one of the conditions for discovery (i.e. *TMA 1970, s 29(5)*), but not the other condition in *s 29(4)*. A discovery assessment was valid if either condition was satisfied. The taxpayer's appeal was dismissed.

Discovery conditions

The alternative discovery conditions in *s 29(4), (5)* are presently as follows:

"(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

The legislation for the relevant tax year in the Moore case referred to fraudulent or negligent conduct. However, HMRC generally seems to equate "careless" behaviour to "negligent" conduct.

Conclusion

The decision in the Moore case is a cause for concern, for at least two reasons:

1. The Upper-tier tribunal judge considered that a tax return is based on what is entered in the boxes on the return, not on what is contained in sheets submitted with the return, no matter how much additional information is included on those sheets. On that basis, it would seem to make no difference if a taxpayer includes additional information in the white space on the return, rather than in additional sheets (assuming that 'boxes' means those in which the figures are entered on the return).

2. It was noted that the taxpayer did not follow the HMRC guidance provided on completing the tax return.

It was also inferred that the taxpayer would not have made the error if he had done so. Does this mean that a taxpayer who makes an error on the tax return will be careless (formerly negligent) if HMRC's guidance was not used when completing it?

Of course, HMRC now produces toolkits to help taxpayers when completing tax returns etc. These toolkits, like HMRC's tax return guidance, do not carry the force of law. Nevertheless, it would probably do the taxpayer no harm to use them where

applicable, and to be able to demonstrate having done so, if necessary.

Finally, in another recent case in which discovery assessments were challenged (*Charlton & Ors v Revenue & Customs* [2011] UKFTT 467 (TC)), the taxpayers fared rather more successfully. A transcript of the *Charlton* case can be downloaded from the British and Irish Legal Information website: www.bailii.org/uk/cases/UKFTT/TC/2011/TC01317.html.

4. Legitimate expectation

Can a taxpayer (A) require HM Revenue and Customs (HMRC) to apply favourable, but incorrect, tax treatment to him or her, on the basis that the same tax treatment had been allowed to another taxpayer (B)? In other words, does taxpayer A have a legitimate expectation of the same favourable but incorrect tax treatment?

What is legitimate expectation?

'Legitimate expectation' was described in *Patel v CRC* [2011] as "a doctrine of administrative law, deriving from the principle that public authorities must act fairly".

In that case, the taxpayer subscribed for units in an enterprise zone (EZ) unit trust in 2006-07, giving rise to an entitlement to 100% industrial buildings allowances. In his tax return, the taxpayer set this loss against his profits as a dentist for income tax purposes. He also set this loss against his dentist profits in computing his liability to class 4 NICs. HMRC enquired into the taxpayer's return, and subsequently issued a closure notice to reduce the losses claimed (which were originally overstated), and to remove relief for the losses for Class 4 NIC purposes.

The taxpayer appealed, on the grounds that HMRC had in the past allowed EZ capital allowances against trading profits for class 4 purposes. The taxpayer's agent agreed that there was no statutory basis for this treatment, but argued that there was an established practice of

HMRC to allow such relief, and pointed to a case involving another client in which EZ allowances were allowed against class 4 profits. However, HMRC contended that the case did not evidence any policy on HMRC's part; rather it was a mistake.

Does it apply?

The tribunal held that its jurisdiction was limited to NIC (and tax) statutes, and dismissed the taxpayer's appeal. The tribunal judge commented: "Although a formally published statement or a consistent administrative practice might bind HMRC, it does so because it gives rise to a legitimate expectation enforceable by judicial review, rather than under tax and NIC statutes."

The tribunal pointed out that if the taxpayer did have a legitimate expectation, an application for judicial review should presently be made to the High Court. However, the judge added that there is developing case law on the jurisdiction of the tribunal regarding legitimate expectation of taxpayers. The tribunal therefore went on to consider whether HMRC's conduct gave rise to a legitimate expectation for the taxpayer, and concluded that it did not.

The tribunal referred to previous case law (*R (oao Weston) v Inland Revenue*, *R (oao Esterson) v HMRC* and *R (oao Wilkinson) v Inland Revenue*), in which Moses J said:

"There is no arguable fairness in [HMRC] pursuing that duty merely because, for some reason, they have failed to pursue their obligations in relation to the other taxpayers. Nor could it possibly be contended that there was unfairness to the other taxpayers since they had the good fortune ... to have escaped the tax. But the mere fact that two taxpayers in arguably the same situation have not in fact been charged tax does not raise a case of unfairness without more."

The tribunal held that just because other taxpayers were apparently allowed to set EZ allowances against profits in calculating their class 4 NICs, it did not create unfairness for Mr Patel giving rise

to any enforceable rights against HMRC. The taxpayer's appeal was dismissed.

Conclusion

The beneficial NIC treatment sought by the taxpayer in the above case was not allowed by law. On that basis, it seems that taxpayers would be unable to use a legitimate expectation argument in favour of HMRC applying tax treatment which is incorrect.

However, legitimate expectation may be potentially helpful to taxpayers in other circumstances, perhaps where HMRC has formally published a statement on a particular matter, or where HMRC has not applied a recognised and consistent administrative practice in respect of a taxpayer.

As the concept of legitimate expectation and its boundaries continues to develop, taxpayers and practitioners should be aware of its availability as a possible remedy where HMRC has dealt with a particular tax matter inconsistently. However, the potential cost of an application for judicial review will need to be taken into account.

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