Tax update

May 2017

In this update we report on HMRC's recently amended guidance on the General Anti-Abuse Rule, HMRC's draft guidance on the new disguised remuneration provisions in the Income Tax (Earnings and Pensions) Act 2003, and on the recent modifications to the Finance Bill 2017. We also comment on three recent cases involving the requirements for a valid Closure Notice and the correct forum for appealing them, a dispute against a penalty and HMRC's associated unreasonable behaviour, and the question of what is to be considered "reasonable conduct" for a pension scheme administrator in order to avoid liability for a tax charge.

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HMRC's draft guidance on new disguised remuneration provisions

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Archer: High Court confirms Closure Notices are defective but dismisses judicial review as taxpayer should have appealed to the Tribunal

In *R (on the application of Archer) v HMRC*, the High Court agreed with the claimant that Closure Notices issued by HMRC must state the tax due, but dismissed his application for judicial review on the ground that he should have appealed to the First-tier Tribunal (FTT). more›

Any comments or queries

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About this update

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Pandey: Tribunal cancels penalty imposed against a doctor and criticises HMRC's unreasonable behaviour

In *Dr Ragini Pandey v HMRC*, the FTT cancelled a penalty which had been issued by HMRC under paragraph 1, Schedule 24, Finance Act 2007 and in so doing criticised HMRC's "unreasonable" behaviour. **more›**

Sippchoice: SIPP scheme administrator avoids "pension liberation" tax charge

In *HMRC v Sippchoice Ltd*, the Upper Tribunal (UT) has upheld the decision of the FTT that Sippchoice should not be subject to scheme sanction charges but said that the FTT's reference to missing trader intra community (MTIC) case law in assessing the evidential burden was incorrect. **more›**

News items

HMRC's revised guidance on the General Anti-Abuse Rule

On 31 March 2017, HMRC published amendments to its guidance on the General Anti-Abuse Rule (GAAR). The revisions mainly reflect changes introduced by Finance Acts 2015 and 2016, including:

- the application of the GAAR to diverted profits tax and the apprenticeship levy
- new powers for HMRC officers to make provisional counteractions
- provisions allowing similar cases to be "pooled" before referral to the GAAR Advisory Panel. HMRC may then nominate one case from the pool to be considered, or make a "generic referral". The GAAR Advisory Panel's decision will then be applied to the similar cases. Where similar cases are identified after an opinion has been given, there is a new procedure to "bind" such cases to that decision
- new GAAR penalty provisions for transactions entered into on or after 15 September 2016
- the removal of the tax advantage conferred from special purpose share schemes in the Finance Act 2015.

A copy of HMRC's guidance can be found here.

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HMRC's draft guidance on new disguised remuneration provisions

On 20 March 2017, HMRC published draft guidance for inclusion in its Employment Income Manual, which explains the proposed amendments to the disguised remuneration legislation in Part 7A, Income Tax (Earnings and Pensions) Act 2003, contained in the Finance Bill 2017.

The draft guidance includes information on applying the new rules to prevent double taxation; the new relevant step for transferring, releasing or writing off a loan; and the amendment clarifying that a payment of a tax liability in relation to a relevant step is not itself a relevant step.

HMRC's draft guidance can be found here.

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Finance Bill 2017 modified

The Government has significantly amended the Finance Bill 2017. The much reduced Bill removes some of the most controversial provisions of the Bill, including clauses relating to Making Tax Digital, the new deemed domicile rules for non-domiciled individuals, penalties for enablers of defeated tax avoidance schemes and the Future Loan Charge provisions.

These deletions were made because of the impending General Election. However, the "reprieve" may be short-lived as the Government has indicated that if re-elected it will reintroduce the dropped provisions at the earliest opportunity.

Details on the clauses and schedules removed from the Bill can be found here.

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Case reports

Archer: High Court confirms Closure Notices are defective but dismisses judicial review as taxpayer should have appealed to the Tribunal

In *R (on the application of Archer) v HMRC*[1], the High Court agreed with the claimant that Closure Notices issued by HMRC must state the tax due, but dismissed his application for judicial review on the ground that he should have appealed to the First-tier Tribunal (FTT).

Background

Mr Archer (the claimant) participated in two tax avoidance schemes which were designed to create losses. The first involved relevant discounted securities (RDS) and the second involved the surrender of second-hand life assurance policies (SHIPS). He claimed losses in his tax returns for the years 2001/2002 and 2002/2003. HMRC opened enquiries into these returns, and in 2009 the Court of Appeal found that both schemes were ineffective in *Astall & Edwards v HMRC*[2] and *Drummond v HMRC*[3].

On 30 October 2015, HMRC issued Accelerated Payment Notices and Follower Notices in respect of the RDS scheme and on 15 January 2016 it issued an Accelerated Payment Notice and Follower Notice in respect of the SHIPS scheme.

On 2 February 2016, HMRC issued two Closure Notices, purportedly in accordance with section 28A, Taxes Management Act 1970 (TMA), which stated that no relief was due for the losses claimed.

The Closure Notices did not specify the amounts of tax due as a result of the unavailability of relief, but did state that "I am amending your return to reflect all of the above". HMRC's amendments to the claimant's tax returns and self-assessment were visible online from 3 February 2016.

The claimant did not appeal the Closure Notices under section 31, TMA, on the basis that they were invalid as they had not complied with section 28A(2)(b), TMA, as they had not amended his returns.

The claimant issued judicial review proceedings.

High Court decision

Mr Justice Jay, in dismissing the judicial review application, held that:

i) A Closure Notice must amend the taxpayer's return itself by stating the amount of tax due (section 28A). The words "I am amending your return" in the Closure Notices did not serve to amend the return, even when combined with the officer amending the computerised returns and self-assessments. *Bristol & West plc v HMRC*[4] applied.
ii) Section 59B(5), TMA, would fix HMRC's claim to a debt only where there had been an amendment to a return under section 28A. As there had been no amendment, no debt could arise unless the defect could be remedied by section 114(1), TMA. In this case it could not. There was no assessment, or even "purported assessment", on which section 114(1) could operate.
iii) Although the Closure Notices were not "assessments", they were some "other proceeding", for the purposes of section 114(1). HMRC set out its conclusions in the Closure Notices and the claimant should have appealed these conclusions to the FTT under section 31(1)(b). The application for judicial review was therefore an abuse of process and would be dismissed.

1. [2017] EWHC 296 (Admin).
2. [2009] EWCA Civ 1010.
3. [2009] EWCA Civ 608.
4. [2016] STC 1491.

Comment

This is yet another example of a taxpayer choosing the incorrect forum in which to challenge HMRC. On this occasion, the High Court was of the view that the taxpayer should have issued notices of appeal under section 31(1)(b), TMA and pursued his appeals before the FTT. As he chose not to do so, his application for judicial review could not succeed as it was an abuse of process.

It is important that a taxpayer chooses the correct forum when challenging HMRC and expert legal advice should be sought on this issue at the earliest possible opportunity.

A copy of the judgment can be found here.

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Pandey: Tribunal cancels penalty imposed against a doctor and criticises HMRC's unreasonable behaviour

In *Dr Ragini Pandey v HMRC*[5], the FTT cancelled a penalty which had been issued by HMRC under paragraph 1, Schedule 24, Finance Act 2007 and in so doing criticised HMRC's "unreasonable" behaviour.

Background

The case concerned a paediatric heart surgeon, Dr Pandey (the appellant), who appealed against the imposition of a penalty under paragraph 1, Schedule 24, Finance Act 2007, which HMRC had issued for two alleged careless inaccuracies in her 2009/10 tax return.

The appellant had worked at successive hospitals in the UK up to June 2011. From June 2011 to February 2013, she worked in Australia before returning to work at the UH Bristol NHS Trust. Her only source of income whilst working in the UK was her NHS salary, which was subject to PAYE.

In August 2012, when the appellant was working in Australia, she received a telephone call from HMRC informing her that she owed additional tax and that it would be seeking an attachment of earnings order. Although working in Australia, the appellant did what she could to assist HMRC and her accountant duly filed her 2009/10 and other returns in 2013. HMRC subsequently opened an enquiry into the appellant's 2009/10 return, under section 9A, TMA, because it was considered she had omitted to include employment income.

In January 2015, HMRC sent the appellant notice of an attachment of earnings order they proposed to apply for. HMRC also sent a letter warning of the possibility of a penalty under Schedule 24, Finance Act 2007, for inaccuracies in her 2009/10 tax return.

Although the matter was resolved, HMRC issued a penalty assessment to the appellant on 21 April 2015, for inaccuracies in her tax return. The appellant appealed this assessment.

FTT's decision

The appeal was preceded by an application by the appellant for permission to appeal out of time. Adopting the three stage approach set out in *Denton v TH White Ltd*[6], the FTT granted permission to appeal out of time and proceeded to hear the substantive appeal.

5. [2017] UKFTT 0216 (TC).
6. [2014] EWCA Civ 906.

The FTT began by considering whether the appellant had been careless, for the purposes of Schedule 24, Finance Act 2007. Although by omitting to include the appellant's only income (and the tax deducted from it under PAYE) in 2009/10, the appellant's accountants were careless, that of itself, did not make the appellant's actions careless. However, the FTT concluded that the appellant had also been careless by not checking her return.

Notwithstanding the above, the FTT concluded that there had been no loss of tax. Throughout 2009/10, the appellant's employers had used incorrect PAYE codes. Accordingly, there had been a failure to deduct the right amount of tax from the appellant's salary and she would have been entitled to a credit under regulation 185(5), Income Tax (PAYE) Regulations 2003.

The appeal was therefore allowed and the penalty cancelled on the basis that there had been no understatement of tax.

Comment

The FTT's decision begins with the opening sentence: "Well here we go again". The judge (Judge Richard Thomas) was quoting from the opening sentence of the decision of Judge Nicholas Wikeley in *NI v HMRC*[7], a decision relating to tax credits, which was one in a long list of such cases which came before the Upper Tribunal's Administrative Appeals Chamber in which there had been a catalogue of errors committed by HMRC. In delivering his decision in the present case, Judge Thomas criticised HMRC's behaviour as unreasonable and said the case should never have reached the tribunal. He considered it "astonishing" that a determination charging over £50k could be made in a case where a person is clearly a PAYE only employee earning in the region of £60k, with PAYE fully deducted in that year as shown on HMRC's own records.

In light of HMRC's unreasonable behaviour, the FTT ordered HMRC to pay the appellant's costs. This is to include the cost of the appellant's travel to and from India to attend the hearing.

This is, as the Judge noted, not the first case to come before the FTT where HMRC's approach to Schedule 24, Finance Act 2007, has been severely criticised. It is encouraging that the FTT chose to penalise HMRC's unreasonable conduct with the award of costs against it. It is to be hoped that an adverse costs order, together with such judicial criticism, will result in HMRC modifying its future conduct accordingly.

A copy of the decision can be found here.

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7. [2015] UKUT 160 (AAC).

Sippchoice: SIPP scheme administrator avoids "pension liberation" tax charge

In *HMRC v Sippchoice Ltd*[8], the Upper Tribunal (UT) has upheld the decision of the FTT that Sippchoice should not be subject to scheme sanction charges but said that the FTT's reference to missing trader intra community (MTIC) case law in assessing the evidential burden was incorrect.

Background

Sippchoice Ltd (the Administrator) operated a self-invested personal pension scheme, known as the Sippchoice Bespoke SIPP (the Pension Scheme). 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 age at which members are permitted to obtain such benefits, namely, 55.

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

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

The Administrator applied, pursuant to section 268(5), Finance Act 2004, for discharge of its liability to the scheme sanction charges on the grounds set out in section 268(7)(a) and (b), Finance Act 2004, namely, that it reasonably believed any unauthorised payment was not "a scheme chargeable payment" and it would not be "just and reasonable" for liability to be imposed on it.

The Administrator's appeal was allowed by the FTT.

In reaching its decision, the FTT considered the decision of the Court of Appeal in *Moblix Ltd (in administration) and others v HMRC*[9], which was a case concerning MTIC fraud and determined that the evidential issues and approach should be similar. The FTT concluded that having recognised the possibility of pension liberation and made proportionate enquiries, it was reasonable for the Administrator to be satisfied with the responses it had received.

UT's decision

HMRC appealed to the UT on the basis that (i) the FTT had erred in law in determining that the charge fell under section 268(7)(a) and (ii) in relation to the later part of the period in which the Pension Scheme had operated, the FTT's finding was inconsistent with the documentary evidence.

With regard to (i), HMRC argued that the Administrator had to form a belief that the unauthorised payment was not a scheme chargeable payment and any such belief had to be reasonably held.

It was accepted that the Administrator was in fact unaware that an unauthorised payment had been made. With regard to the argument that the belief must be reasonably held, HMRC argued that the FTT had misinterpreted the meaning of "reasonable belief" by applying that test in accordance with the case law relevant to MTIC fraud and that the UT was accordingly able to revisit the FTT's findings on that point as MTIC case law is founded in EU law principles of fraudulent evasion and is specific to that area.

8. [2017] UKUT 87 (TCC).
9. [2010] STC 1436.

The UT agreed with HMRC that the *Moblix* approach, which had been adopted by the FTT, was not appropriate. However, it was not prepared to look behind that finding on the basis that factual judgments of that type are not susceptible to appeal unless they are founded on an error of law (*Proctor & Gamble v HMRC*[10]). The UT did not consider that the FTT had made any errors of law when undertaking the evaluative process of assessing the evidence and coming to its conclusion that the Administrator's belief had been reasonable.

In relation to (ii), HMRC's argument was that, at a meeting which took place between the Administrator and Imperium, the Administrator asked whether loans were being made by an unconnected third party and that as this indicated their awareness of this possibility the FTT had erred in law in finding that, for periods subsequent to that meeting, the evidence did not disclose circumstances which would have indicated to the Administrator that a more sophisticated scheme was being operated. The UT rejected this argument. It was of the view that the FTT's finding was one that it was entitled to make on the evidence before it.

HMRC's appeal was dismissed.

Comment
Though fact sensitive, this decision will be welcomed by pension administrators and provides helpful guidance on the boundaries of what the tribunals will consider to be reasonable conduct on the part of pension administrators when discharging their duties.

A copy of the decision can be found here.

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10. [2009] STC 1990.

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