Tax update

September 2018

In this month's update we report on (1) HMRC's updated position regarding payment of the April 2019 "loan charge"; (2) HMRC's updated guidance on the targeted anti-avoidance rule for close company distributions on a winding up; and (3) the CIOT's comments on off-payroll working in the private sector. We also comment on three recent decisions relating to (1) late filing penalties; (2) an application by HMRC to amend its Statement of Case; and (3) tax geared penalties for failure to comply with information notices.

News items

HMRC publishes Spotlight 44 on the 2019 disguised remuneration loan charge

On 30 July 2018, HMRC published Spotlight 44 on the 2019 disguised remuneration loan charge. The Spotlight reminds taxpayers that if they wish to use the disguised remuneration settlement opportunity, they must provide all relevant information to HMRC before 30 September 2018. more›

HMRC updates its Company Taxation Manual in relation to the TAAR for close company distributions on a winding up

On 25 July 2018, HMRC updated its Company Taxation Manual in relation to the application of the "main purpose" test (Condition D) in the targeted anti-avoidance rule (TAAR) that taxes as income, rather than capital gain, distributions made to an individual in the course of a winding up of a close company if that individual continues, in one of three ways, to have involvement in the company's trade (or a similar trade) after the winding up. more›

Off-payroll working in the private sector – CIOT comments

In its response to the Treasury and HMRC consultation proposing changes to the off-payroll working rules (IR35) for engagements in the private sector, the Chartered Institute of Taxation (CIOT) has suggested that there is a better option than simply extending the public-sector deduction at source rules to the private sector. more›

Any comments or queries

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

Robert Waterson
Legal Director
+44 20 3060 6245
robert.waterson@rpc.co.uk

Michelle Sloane
Senior Associate
+44 20 3060 6255
michelle.sloane@rpc.co.uk

About this update

Our 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.

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

Case reports

Shaw – Tribunal cancels penalties ... again!

In *Shaw v HMRC* [2018] UKFTT 0381 (TC), the First-tier Tribunal (FTT) has cancelled late filing penalties because HMRC had not satisfied the statutory requirements contained in section 8(1), Taxes Management Act 1970 (TMA) as a notice to file had not been validly served on the taxpayer. **more›**

Allpay – Tribunal refuses HMRC permission to amend its Statement of Case and awards costs to the taxpayer

In *Allpay Ltd v HMRC* [2018] UKFTT 0273 (TC), the First-tier Tribunal (FTT) has dismissed HMRC's application to amend its Statement of Case to plead a new legal issue and awarded the taxpayer its costs. **more›**

Tager – Court of Appeal reduces penalties for failure to comply with information notices

In *Tager & Ors v HMRC* [2018] EWCA Civ 1727, in allowing the taxpayers' appeals, the Court of Appeal has provided some general observations on the scope and purpose of HMRC's power to impose tax-related penalties under paragraph 50, Schedule 36, Finance Act 2008, for failure to comply with information notices issued under paragraph 1, Schedule 36, Finance Act 2008. **more›**

News items

HMRC publishes Spotlight 44 on the 2019 disguised remuneration loan charge

On 30 July 2018, HMRC published Spotlight 44 on the 2019 disguised remuneration loan charge. The Spotlight reminds taxpayers that if they wish to use the disguised remuneration settlement opportunity, they must provide all relevant information to HMRC before 30 September 2018. HMRC has recently announced an extended five-year payment period which taxpayers who earn less than £50k can take advantage off if they wish to settle with HMRC.

A copy of Spotlight 44 can be viewed here.

Back to contents>

HMRC updates its Company Taxation Manual in relation to the TAAR for close company distributions on a winding up

On 25 July 2018, HMRC updated its Company Taxation Manual in relation to the application of the "main purpose" test (Condition D) in the targeted anti-avoidance rule (TAAR) that taxes as income, rather than capital gain, distributions made to an individual in the course of a winding up of a close company if that individual continues, in one of three ways, to have involvement in the company's trade (or a similar trade) after the winding up.

The updated Manual confirms that:

- a decision not to make an income distribution prior to the company's winding up does not, of itself, mean that Condition D is met
- if the recipient of the distribution is confident there will be enough supporting evidence for an officer to arrive at a sound conclusion that Condition D was not met, that individual should self-assess on that basis and HMRC can only displace that where the individual's decision is not reasonable. The revised guidance also confirms that although the main purpose test is applied by reference to intentions at the time of the decision to wind up the company, this will be evidenced by what happens after the winding up occurs
- it is less likely that Condition D will be met where the individual remains involved with the carrying on of the trade (or similar) as an employee (rather than as an owner, shareholder or partner) and has no involvement with, or influence over, the direction or decision-making of the entity carrying on the activities.

HMRC has also amended its examples that illustrate one of the three types of ongoing involvement in the trade required for the TAAR to apply, emphasising that the involvement has to be "with the carrying on of" the trade (similar language has been added to CTM36340).

A copy of HMRC's Company Taxation Manual can be viewed here.

Back to contents>

Off-payroll working in the private sector – CIOT comments

In its response to the Treasury and HMRC consultation proposing changes to the off-payroll working rules (IR35) for engagements in the private sector, the Chartered Institute of Taxation (CIOT) has suggested that there is a better option than simply extending the public-sector deduction at source rules to the private sector. It suggests the consideration of an approach that builds on existing record-keeping requirements and a requirement to secure supply chains but which also requires the business to e-file a report of payments made to personal service companies to HMRC on a regular basis.

This is an area that many taxpayers will be concerned with as, if HMRC's preferred option within the current consultation proposals is implemented, it will likely mean (a) a significant additional compliance burden being placed on private sector employers; and (b) individual taxpayers having to re-evaluate their tax position and potentially reorganize their affairs to minimize the risk of being caught by IR35.

A copy of the CIOT's comments can be viewed here.

Back to contents>

Case reports

Shaw – Tribunal cancels penalties ... again!

In *Shaw v HMRC* [2018] UKFTT 0381 (TC), the First-tier Tribunal (FTT) has cancelled late filing penalties because HMRC had not satisfied the statutory requirements contained in section 8(1), Taxes Management Act 1970 (TMA), as a notice to file had not been validly served on the taxpayer.

Background

On 21 July 2016, Craig Shaw (the taxpayer) opted-in to HMRC's self-assessment digital service. On 6 April 2016, HMRC claimed to have issued to the taxpayer, to his online tax account secure mail box, a "notice to file".

The taxpayer failed to file his electronic return for the tax year 2015/16 on time. It was filed with HMRC on 6 November 2017, whereas the filing date for the return was 31 January 2017 (section 8, TMA).

Failure to file a return on time engages the penalty regime contained in Schedule 55, Finance Act 2009 (references below are to paragraphs in Schedule 55).

As the taxpayer's return was not received by the filing date, HMRC issued a notice of penalty assessment for a late filing penalty of £100 (paragraph 1). As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment for the daily penalty (paragraph 4). As the return had not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment for the 6 month penalty (paragraph 5).

The taxpayer appealed.

FTT decision

The appeal was allowed.

The question to be determined by the FTT was whether a valid notice to file a return, under section 8 TMA, had been issued to the taxpayer on 6 April 2016.

As the burden of establishing that a taxpayer is liable to a penalty is on HMRC, it provided the following evidence in support of its claim that it had issued a valid notice:

- an extract from HMRC's computer records entitled "Return Summary" which purported to indicate that a notice to file for the tax year 2015/16 had been issued on 6 April 2016
- a "largely illegible" extract from HMRC's digital records purporting to indicate that a notice to file and an email alert had been sent to the taxpayer at his secure mailbox in his online account, and
- a copy of a notice to file comprising a pro forma letter, dated 6 April 2016, with no addressee or signature (or indeed signature block).

The FTT, in considering HMRC's evidence, concluded that HMRC had failed to establish that it had served a notice to file on the taxpayer. Section 8(1) requires a notice to file to be given to a taxpayer "by an officer of the Board". In the view of the FTT, this required a signature by a named officer, regardless of whether the notice was given by post or digitally. The FTT said, at

paragraph 5(11):

"The phrase "given to him by an officer of the Board" means what it says. I would expect any such notice to be signed by a named officer and evidence provided which shows that to be the case. The officer giving the notice needs to be identified in the notice because the return must be made and delivered to that officer. In other words, there must be evidence that the named officer has signed the notice or it must be otherwise made clear that he is "giving" it."

Extracts from HMRC's computer records purporting to indicate that a notice to file had been issued were inadequate as they failed to name any particular officer. A pro forma notice to file provided by HMRC was similarly inadequate as it contained no signature block or named officer. The FTT noted, at paragraph 8:

"I am being asked to speculate by HMRC that a notice to file was given to this appellant by an Officer of the Board. I am not prepared to so speculate. I cannot draw an inference that this was the case from the evidence that has been presented to me."

The FTT concluded that as no valid notice had been given to the taxpayer, filing penalties could not be validly assessed. This decision follows the decisions of the FTT in *Patel & Anor v HMRC* [2018] UKFTT 185 and *DJ Wood v HMRC* [2018] UKFTT 74, which held that only by issuing a notice under section 8, could the corresponding statutory framework be engaged.

As no valid notice had been given, any return made absent a valid notice was voluntary and late filing penalties could not be validly assessed.

Comment
This decision is yet another reminder to HMRC that it must adhere to the statutory requirements contained in section 8, TMA.

The decision also emphasises the importance of adducing appropriate evidence to the FTT, particularly in the context of penalty proceedings.

Evidential issues can be critical in determining the outcome of a case before the FTT and it is important that taxpayers and their advisers not only prepare their own cases well but also identify any weaknesses in HMRC's case. It is not sufficient for HMRC to simply make assertions; it must adduce appropriate evidence to make good any such assertions.

A copy of the decision can be viewed here.

Back to contents>

Allpay – Tribunal refuses HMRC permission to amend its Statement of Case and awards costs to the taxpayer

In *Allpay Ltd v HMRC* [2018] UKFTT 0273 (TC), the First-tier Tribunal (FTT) has dismissed HMRC's application to amend its Statement of Case to plead a new legal issue and awarded the taxpayer its costs.

Background
Allpay Ltd (the taxpayer), provided bill payment services and treated this as exempt from VAT. On 21 January 2016, HMRC issued a decision that the taxpayer's bill payment services were

subject to VAT and the taxpayer appealed the decision.

Article 135(1)(d) of the Principle VAT Directive 2006/112/EC, provides for a VAT exemption if the following two conditions are met:

- the services are "transactions ... concerning ... payments", and
- the services are not "debt collection" services.

In its Statement of Case, which it provided on 6 December 2016, HMRC alleged only that the services were of debt collection.

On 17 November 2017, HMRC wrote to the taxpayer and asked whether it would withdraw its appeal on the basis of the 2016 decision by the Court of Justice of the European Union in *Bookit* [2017] EUECJ C-607/14 and the application of that decision by the FTT in *Paypoint v HMRC* [2017] UKFTT 424. In *Paypoint*, the FTT found that services which consisted of providing a system of payment collection was not exempt from VAT.

In light of these two cases, HMRC argued that the services were not "transactions ... concerning ... payments", under Article 135(1)(d) (the Payment Services issue).

The taxpayer refused to withdraw its appeal and pointed out that the Payment Services issue had not been pleaded in HMRC's Statement of Case. Although HMRC did not accept that it was not pleaded, or that it required to be pleaded, it applied to the FTT for permission to amend its Statement of Case to include a pleading that the taxpayer's services were not "transactions ... concerning ... payments". HMRC claimed that the application to amend was only made out of an abundance of caution.

The taxpayer opposed the application.

FTT's decision
HMRC's application was dismissed.

The FTT considered Rule 25 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and confirmed that HMRC's Statement of Case should set out its position in respect of its case in sufficient detail to enable a taxpayer to properly prepare its case for hearing.

The FTT first asked what was the issue in the case based on the existing Notice of Appeal and Statement of Case. The issue was whether the taxpayer's bill payments services were exempt as they were not debt collection services.

The FTT found that even though the onus of proof in respect of the Payment Services issue was on the taxpayer, it did not have to discharge this burden unless HMRC included in its Statement of Case an allegation that the services were not "transactions ... concerning ... payments".

The taxpayer had averred in its Notice of Appeal that its services were payment services within Article 135(1)(d) and HMRC's failure to challenge that in its Statement of Case must be taken as acceptance of it.

The FTT then considered whether HMRC should be allowed to introduce into the appeal proceedings the Payment Services issue by amending its Statement of Case. The FTT considered

that it would only be fair to permit an amendment which satisfies Rule 25 and in its view HMRC's amendment did not satisfy Rule 25, as it was too vague. HMRC had failed to set out, either legally or factually, why it considered the taxpayer's services not to be payment services. In the view of the FTT, to allow such an amendment would lead to trial by ambush.

Significantly, the FTT also awarded costs against HMRC on the basis that it was unreasonable for HMRC to apply to amend its Statement of Case without properly explaining what its amended case was to be.

Comment
HMRC is required to plead its case in sufficient detail in its Statement of Case to enable the taxpayer to fully understand the basis of HMRC's position.

Increasingly, there is a tendency on the part of HMRC to seek to change its legal arguments after it has served its Statement of Case. In appropriate cases, taxpayers should challenge any attempt by HMRC to "ambush" them by introducing new arguments at a late stage in the appeal proceedings.

A copy of the decision can be viewed here.

Back to contents>

Tager – Court of Appeal reduces penalties for failure to comply with information notices

In *Tager & Ors v HMRC* [2018] EWCA Civ 1727, in allowing the taxpayers' appeals, the Court of Appeal has provided some general observations on the scope and purpose of HMRC's power to impose tax-related penalties under paragraph 50, Schedule 36, Finance Act 2008, for failure to comply with information notices issued under paragraph 1, Schedule 36, Finance Act 2008.

Background
Mr Romie Tager QC got into difficulty with HMRC both in respect of his personal tax affairs and also in relation to the estate of his father, for which Mr Tager acted as the *de facto* administrator and his personal representative for IHT purposes.

Almost three years after the proscribed date, Mr Tager provided an IHT account relating to his father's estate which indicated IHT payable of £168,579.60.

With regard to his own tax returns, Mr Tager had been late in filing his returns but he made substantial payments on account which were more than sufficient to cover his liabilities to income tax and interest when his liability was eventually calculated.

HMRC opened enquiries into Mr Tager's late returns as well as making enquiries and requests in relation to the IHT account which he had filed.

Having received no reply to its enquiries, HMRC issued various information notices under Schedule 36, Finance Act 2008, which were not complied with. HMRC therefore issued penalties under paragraphs 39 and 40, Schedule 36, Finance Act 2008, but the information notices were still not complied with. Finally, HMRC applied to the Upper Tribunal (UT) requesting the imposition of a penalty under paragraph 50, Schedule 36, Finance Act 2008.

Paragraph 50 provides:

"50 Tax-related penalty

(1) This paragraph applies where-

(a) A person becomes liable to a penalty under paragraph 39,

(b) The failure ... continues after a penalty is imposed under that paragraph,

(c) An officer of Revenue and Customs has reason to believe that, as a result of the failure ... the amount of tax that the person has paid, or is likely to pay, is significantly less than it would otherwise have been,

(d) Before the end of the period of 12 months beginning with the relevant date ... an officer of Revenue and Customs makes an application to the Upper Tribunal for an additional penalty to be imposed on the person, and

(e) The Upper Tribunal decides that it is appropriate for an additional penalty to be imposed.

(2) The person is liable to a penalty of an amount decided by the Upper Tribunal.

(3) In deciding the amount of the penalty, the Upper Tribunal must have regard to the amount of tax which has not been, or is not likely to be, paid by the person.

(4) Where a person becomes liable to a penalty under this paragraph, HMRC must notify the person.

(5) Any penalty under this paragraph is in addition to the penalty or penalties under paragraphs 39 or 40.

...

(7) In sub-paragraph (1)(d) "the relevant date" means –

(a) In a case involving an information notice against which a person may appeal, the latest of –

(i) The date on which the person became liable to the penalty under paragraph 39,

(ii) The end of the period in which notice of an appeal against the information notice could have been given, and

(iii) If notice of such an appeal is given, the date on which the appeal is determined or withdrawn, and

(b) In any other case, the date on which the person became liable to the penalty under paragraph 39."

In the UT, Judge Bishopp clearly found Mr Tager's repeated inaction difficult to comprehend. When faced with numerous enquiries and mounting penalties, Mr Tager had simply paid the relevant fines and continued to not comply with the information notices.

In calculating the level of the penalty to be imposed, the UT considered that paragraph 50

is intended to be punitive and in the instant case should reflect the very significant trouble Mr Tager had put HMRC to.

The UT concluded that there was a comparison to be made between paragraph 50 penalties and those imposed for "deliberate concealment" since, in its view "the mischief targeted by them is materially the same". From this, the UT considered the terms of Schedule 55, Finance Act 2009, in which penalties of 200% may be imposed. Although it considered a penalty of 200% would be too high, it felt a penalty of 100% was appropriate.

The UT applied tax-related penalties in the aggregate sum of £1,246,020 in March 2015. This was later reduced to £1,075,210 after some computational errors came to light.

Mr Tager appealed.

Court of Appeal judgment
The appeal was allowed.

The Court commented on the fact that this was the first time paragraph 50 had been used and set out how it considered the legislation was intended to operate.

First, it observed that it was penal in nature and, accordingly, should be reserved for the most serious of cases.

Second, there must be a link between the non-compliance and the amount of tax which the taxpayer is likely to have to pay.

Third, the UT should have regard to any reasons for the failure when deciding the quantum of the penalty.

Fourth, it is for the UT itself to decide on the amount of tax unpaid, or likely to be unpaid, based on the evidence available to it. The burden being on HMRC.

The Court agreed with the UT that the level of the penalty is not a proxy for the tax unpaid. The Court considered the UT's focus on the penalty provisions contained in Schedule 55, Finance Act 2009. The 100% penalty settled on was akin to a penalty for "deliberate and concealed" behaviour. The Court emphasised that such a penalty necessarily involved conduct which was "dishonest" and conduct which would be akin to fraud. Although no such argument had been advanced by HMRC, the Court thought Judge Bishopp had equated the scale of Mr Tager's non-compliance with an intentional lack of transparency, such that he found that: "Mr Tager's failure, in respect of all the notices, was comparable in gravity to deliberate concealment". In the view of the Court, this went too far. It commented:

"Many disobliging epithets can be used to characterise Mr Tager's deplorable conduct in this case, and a selection of them may be found in the three Decisions as well as in this judgment; but they should not be permitted to blur the important distinction between conduct which is dishonest (or akin to dishonesty) on the one hand, and conduct which is grossly, or even recklessly, negligent, on the other hand. Mr Tager was assuredly guilty of conduct of the latter type, but not the former".

The Court went on to consider the appropriate penalty to be imposed based on an assessment of Mr Tager's conduct, the sums of tax which went unpaid and the duration over which the underpayment persisted. The Court emphasised that it was not always necessary to show a clear link between the amount of tax in issue and the penalty. The Court should instead take into account the broad considerations of conduct, scale and circumstances in arriving at an appropriate figure. The Court decided to reduce the penalty to £220,000.

Comment
This judgment leaves significant discretion in the hands of the UT when determining the level of a paragraph 50 penalty.

Although such applications are not likely to be common, as the imposition of lesser penalties under paragraphs 39 and 40, Schedule 36, Finance Act 2008, will normally be sufficient to persuade the recipient of an information notice to comply with the notice, the judgment does include a helpful list of the types of issues the UT should take into account when deciding the quantum of a paragraph 50 penalty. Importantly, the judgment emphasises, once again, the important distinction between conduct which is negligent or careless and conduct which is dishonest.

A copy of the judgment can be viewed here.

Back to contents>

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 83 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 – Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17**
- **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**

Areas of expertise

- Competition
- Construction & Engineering
- Corporate/M&A/ECM/ PE/Funds
- Corporate Insurance
- Dispute Resolution
- Employment
- Finance
- Insurance & Reinsurance
- IP
- Media
- Pensions
- Professional Negligence
- Projects & Outsourcing
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Technology

18453

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