Tax update

October 2018

In this month's update we report on (1) HMRC's Spotlight 45 on umbrella company avoidance schemes; (2) an update to HMRC's Venture Capital Schemes Manual; and (3) call for evidence on HMRC powers. We also comment on three recent decisions relating to (1) the validity of determinations under section 100, TMA; (2) HMRC's power to remove Gross Payment Status from sub-contractors; and (3) notices to file tax returns.

News items

HMRC publishes Spotlight 45 on umbrella company avoidance schemes

On 23 August 2018, HMRC published Spotlight 45 in which they provide guidance on what taxpayers should do if an agency or umbrella company offers to reduce their tax liability. more›

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Call for evidence on HMRC powers

The House of Lords Economic Affairs Finance Bill Sub-committee has invited written contributions for its inquiry on the draft Finance Bill 2018. The Sub-committee is considering developments in the balance of powers and safeguards between HMRC and taxpayers. more›

Case reports

Expion – No valid determination of penalties

In *Expion Silverstone Ltd v HMRC*, the First-tier Tribunal (FTT) has held that no valid determination was made by an officer of the board under section 100, Taxes Management Act 1970 (TMA), in respect of penalties issued following the failure to file Employment Intermediaries returns. more›

J P Whitter – HMRC not obliged to consider impact of cancellation of Gross Payment Status on business

In *J P Whitter (Water Well Engineers) Ltd v HMRC*, the Supreme Court has confirmed the view of the Court of Appeal that HMRC has the power to remove "Gross Payment Status" from sub-contractors under the Construction Industry Scheme, without an obligation to take into account the impact on the tax-paying business. more›

Any comments or queries

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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.

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Groves – A notice to file must be given by an identified HMRC officer

In *Groves v HMRC*, the First-tier Tribunal (FTT) has allowed an appeal against penalties issued by HMRC pursuant to Schedule 55, Finance Act 2009, for the late filing of a tax return as the notice to file was not signed by an "Officer of the Board" and in any event, the notice was invalid as it was not given by HMRC for the purpose set out in section 8, Taxes Management Act 1970 (TMA) and therefore any penalties issued for late filing of the return were invalid. more›

News items

HMRC publishes Spotlight 45 on umbrella company avoidance schemes

On 23 August 2018, HMRC published Spotlight 45 in which they provide guidance on what taxpayers should do if an agency or umbrella company offers to reduce their tax liability.

HMRC suggests that taxpayers should check whether:

- the company is claiming that taxpayers will keep 80% or more of their salary
- only a small amount of their salary is paid through payroll and subject to PAYE (indicating that tax is only being paid on part of the income) or whether the payment from the umbrella company is routed through various companies
- they are paid using a loan, credit or investment payment and the company claims that this is not subject to income tax or National Insurance contributions.

A copy of Spotlight 45 can be viewed here.

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HMRC updates its guidance on VCTs

HMRC has updated the guidance in its Venture Capital Schemes Manual on venture capital trusts (VCTs) to reflect changes made by Finance Act 2018. The changes include:

- guidance on advance assurance. HMRC will not routinely provide an opinion on "knowledge-intensive company" status. It will consider such status only if the proposed investment would otherwise breach the rules for a qualifying holding.
- additional guidance on the "operating costs" conditions. Guidance is provided on the extension to start-up companies.

A copy of HMRC's Venture Capital Schemes Manual can be viewed here.

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Call for evidence on HMRC powers

The House of Lords Economic Affairs Finance Bill Sub-committee has invited written contributions for its inquiry on the draft Finance Bill 2018. The Sub-committee is considering developments in the balance of powers and safeguards between HMRC and taxpayers. In particular, the Sub-committee is interested in:

- what principles should underlie the design of HMRC powers and where should the balance be struck between taxpayer and HMRC?
- what principles should govern the development of HMRC powers in a globalised digital information age?
- to what extent, or in what areas, is the existing balance of powers between HMRC and the taxpayer inappropriate or unfair?
- how should HMRC powers be differentiated to reflect the different problems being tackled eg careless error, sophisticated tax avoidance, and deliberate tax evasion?
- how are HMRC's powers operating in practice? Are they being used in line with their original policy intent?

- is there sufficient oversight of HMRC powers and safeguards against their abuse or misuse? Does the oversight and governance of the powers need to be improved? If so, how?
- what is the right balance of powers and safeguards in the security deposit regime and the assessment of offshore matters, for which amendments are proposed in clauses 33–35 of the draft Finance Bill?

A copy of the parliamentary update can be viewed here.

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Case reports

Expion – No valid determination of penalties

In *Expion Silverstone Ltd v HMRC*[1], the First-tier Tribunal (FTT) has held that no valid determination was made by an officer of the board under section 100, Taxes Management Act 1970 (TMA), in respect of penalties issued following the failure to file Employment Intermediaries returns.

Background

An employment intermediary, within the meaning of section 716B, Income Tax (Earnings and Pensions) Act 2003, must, for each tax quarter, provide to HMRC specified information relating to payments made to agency workers for whom it has not operated PAYE. The information to be provided is specified in regulation G of the Income Tax (PAYE) Regulations 2003 (the Regulations) and must be included in a return in a form prescribed by HMRC. The return must be made no later than the end of the tax month following the end of the tax quarter.

An employment intermediary who fails to file a return for a tax quarter on time is liable to a penalty under section 98(1)(b), TMA. The relevant provisions of section 98 provide for an initial penalty not exceeding £3,000 and if the failure continues further penalties not exceeding £600 per day.

In order to impose a penalty under section 98, HMRC must determine the penalty pursuant to section 100, TMA, which provides, so far as relevant, as follows:

"100 Determination of penalties by officer of Board

(1) ... an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate."

Expion Silverstone Ltd (the taxpayer) failed to file its return on time for the tax quarters ending 5 July 2016, 5 October 2016 and 5 January 2017.

On 19 April 2017, HMRC issued three penalty assessments to the taxpayer under section 98(1)(b), TMA, in the sums of £250, £500 and £1,000 (the assessments), for failure to file Employment Intermediaries returns (the returns) on time under regulation 84F of the Regulations.

The taxpayer appealed the assessments.

FTT decision

The appeal was allowed.

The FTT noted that the burden of establishing whether the taxpayer was prima facie liable to the penalties was on HMRC. It was for HMRC to prove each factual matter said to justify the imposition of the penalties on the taxpayer.

The assessments were evidenced by an extract from HMRC's computer records, consisting of a one page landscape document showing, amongst other things, that penalties were due.

1. [2018] UKFTT 0460 (TC).

Given the limited evidence which HMRC had adduced, the FTT issued directions directing HMRC to provide written submissions evidencing the name of the HMRC officer who had made the penalty determination. HMRC responded in writing as follows:

"These penalties were automatically issued by HMRC's computer systems therefore we cannot provide a named person in respect of individual cases.

The computer recorded the penalties and issued penalty notices on 19/04/2017 in accordance with the HMRC's policy in respect of late filing of Employment Intermediary returns".

In the view of the FTT, although HMRC has a discretion under section 100, TMA, as to whether an officer of the Board should make a determination imposing a penalty, once a decision to impose a penalty under that section has been made, the determination itself must be made by an actual authorised officer of the Board and not a computer (*Donaldson v HMRC*[2]).

Accordingly, given that the burden was on HMRC and it had provided limited evidence in support of its position, the FTT had little difficulty in concluding that the raising and issuing of the assessments was not in accordance with section 100 and was therefore unlawful. The Judge commented:

"It seems to me that if HMRC are suggesting that their policy is that no officer of the Board makes a determination in relation to penalties for late filing of Employment Intermediaries returns and the penalties are not only recorded and notified by a computer but also determined by a computer (ie there is no human intervention in the determination process) then their policy is inconsistent with the law."

Comment

Although only a first-instance decision and therefore not binding, HMRC will be concerned that the FTT has concluded that penalties automatically issued by a computer were invalid as this may well have wider implications for the department in relation to other penalties which are issued in a similar way.

The reasoning of the FTT in this case is consistent with other recent FTT decisions, such as *Shaw v HMRC*[3].

A copy of the decision can be viewed here.

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J P Whitter – HMRC not obliged to consider impact of cancellation of Gross Payment Status on business

In *J P Whitter (Water Well Engineers) Ltd v HMRC*[4], the Supreme Court has confirmed the view of the Court of Appeal that HMRC has the power to remove 'Gross Payment Status' from sub-contractors under the Construction Industry Scheme (CIS), without an obligation to take into account the impact on the tax-paying business.

Background

JP Whitter (Water Well Engineers) Ltd (the taxpayer) was registered for Gross Payment Status under the CIS. CIS requires certain contractors to deduct and pay over to HMRC a proportion of all payments made to the sub-contractor in respect of labour under a sub-contract.

2. [2013] UKFTT 317.
3. [2018] UKFTT 0381 (TC).
4. [2018] UKSC 31.

The amount deducted and paid over is, in due course, allowed as a credit against the sub-contractor's liability to HMRC. However, sub-contractors with statutory certificates of gross payment registration are exempt from those requirements. That tends to make any sub-contractor holding a certificate a more attractive party for a contractor to deal with. It also improves the subcontractor's cash flow by enabling the sub-contractor to receive the contract price without deduction.

The status is subject to stringent rules including the need for a record of good tax compliance. Failure to adhere to the rules can cause a business to be stripped of the status.

In June 2009, the taxpayer failed a review of its status for the first time. This happened again the following year and in both instances HMRC cancelled, and then reinstated, its gross payment status, following an appeal. Then, in a period of less than ten months, the taxpayer made late payments on seven occasions, the longest delay being 118 days. It had no 'reasonable excuse' for the delay. In May 2011, following a review, HMRC cancelled the taxpayer's registration, pursuant to section 66(1), Finance Act 2004.

A significant proportion of the taxpayer's business is derived from a small number of key customers and those customers would withdraw their custom if the taxpayer was to remain without Gross Payment Status. HMRC took no account of these facts when it revoked the taxpayer's registration.

The taxpayer appealed HMRC's decision to cancel its gross payment registration.

Before the First-tier Tribunal (FTT), the taxpayer argued that the exercise of HMRC's discretion regarding cancellation was fettered and, in the absence of contrary intention, the impact of cancellation on it was a relevant consideration which should have been taken into account by HMRC. It further submitted that the cancellation interfered with its possessions under Article 1, Protocol 1 of the ECHR (A1P1). Possessions in this context refers to the taxpayer's entitlement to the gross contract price or the rights associated with registration under the CIS.

The FTT agreed with the taxpayer and allowed its appeal. The FTT accepted the taxpayer's evidence that the cancellation, once it took effect, would have had a seriously detrimental impact on its business. In the FTT's view, HMRC had been wrong not to take account of the likely impact on the taxpayer's business.

HMRC successfully appealed to the Upper Tribunal (UT) and the taxpayer's appeal to the Court of Appeal was dismissed.

The taxpayer appealed to the Supreme Court.

Supreme Court judgment
The appeal was dismissed.

The Supreme Court agreed with the findings of the UT and the Court of Appeal. It found that section 66(1) did not require or authorise HMRC, when exercising its right to cancel a company's registration under the CIS, to take into account the impact of the cancellation on the taxpayer's business. It stated that any statutory discretion must be exercised consistently with the objects

and scope of the relevant statutory scheme. The Court could not find any indication in the CIS that Parliament intended to give HMRC the authority to take into account matters extraneous to the CIS that did not relate directly, or otherwise, to the requirements for registration of gross payment, or to the objective of securing compliance with those requirements. Lord Carnwath said, at [22]:

"... I cannot read the power as extending to matters "which do not relate, directly or indirectly, to the requirements for registration for gross payment, and to the objective of securing compliance with those requirements" (para 60) [of the Court of Appeal's decision]. He [Henderson LJ] rightly emphasised the highly prescriptive nature of the scheme. This starts with the narrowly defined conditions for registration in the first place, among which the record of compliance with the tax and other statutory requirements is a mandatory element, allowing no element of discretion. The same conditions are brought into the cancellation procedure by section 66. The mere fact that the cancellation power is not itself mandatory is unsurprising. Some element of flexibility may be desirable in any enforcement regime to allow for cases where the failure is limited and temporary (even if not within the prescribed classes) and poses no practical threat to the objectives of the scheme. It is wholly inconsistent with that tightly drawn scheme for there to be implied a general dispensing power such as implied by the company's submissions."

In relation to the argument that HMRC had disproportionately interfered with the taxpayer's possessions under A1P1, the Court found that this interference with its registration rights was proportionate and within the margin of appreciation permitted with regard to tax enforcement by the state. Lord Carnwath said, at [23]:

"Turning to A1/P1 I see force in Mr Eadie's submission that, even accepting that rights conferred by registration amount to "possessions", they cannot extend beyond the limits set by the legislation by which they are created. However, I find it unnecessary to rest my decision on that point, since I have no doubt that the Court of Appeal were right to hold that any interference was proportionate. Once it is accepted that the statute does not in itself require the consideration of the impact on the individual taxpayer, there is nothing in A1/P1 which would justify the court in reading in such a requirement. Registration is a privilege conferred by the legislation, which has significant economic advantages, but it is subject to stringent conditions and the risk of cancellation. The impact on the company is no different in kind from that which is inherent in the legislation. I agree entirely with Henderson LJ that the exercise of the power within the scope of the statutory framework comes well within the wide margin of appreciation allowed to the state for the enforcement of tax."

Comment

The lack of Gross Payment Status can affect businesses; not only in respect of cash flow, but also in that Gross Payment Status is often a requirement in the tendering process. This judgment is therefore important for those businesses who operate under the CIS and highlights the importance of complying with the strict rules of registration in relation to Gross Payment Status under the CIS regime. The Court has confirmed that HMRC is not obliged to consider extraneous factors when exercising its discretion to cancel such status, including any detrimental impact cancellation may have on a taxpayer's business.

A copy of the judgment can be viewed here.

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Groves – A notice to file must be given by an identified HMRC officer

In *Groves v HMRC*[5], the First-tier Tribunal (FTT) has allowed an appeal against penalties issued by HMRC pursuant to Schedule 55, Finance Act 2009, for the late filing of a tax return as the notice to file was not signed by an "Officer of the Board" and in any event, the notice was invalid as it was not given by HMRC for the purpose set out in section 8, Taxes Management Act 1970 (TMA) and therefore any penalties issued for late filing of the return were invalid.

Background

Mr Peter Groves (the taxpayer) was employed during the 2014/15 tax year. HMRC considered that he had underpaid income tax in the sum of £166.80 and in October 2015 sent him a P800 tax calculation showing an underpayment of tax of £166.80.

In January and April 2016, voluntary payment letters were sent by HMRC to the taxpayer asking him to pay the amount or come to an arrangement to pay and, if he did not, collection would be made via the self-assessment system.

The taxpayer did not respond to either of the voluntary payment letters and in July 2016 his record was automatically put into the self-assessment system so that the underpaid tax could be collected.

On 21 July 2016, HMRC issue a purported notice to file to the taxpayer. The filing date for a valid notice to file, served on 21 July 2016, would have been 28 October 2016.

As the return was not received by 28 October 2016 and had still not been received 6 months later, HMRC issued penalties to the taxpayer under paragraph 3, Schedule 55, Finance Act 2009, for the late filing of his tax return for the tax year 2014/15.

The taxpayer appealed.

FTT's decision

The appeal was allowed.

The FTT considered whether the requirements contained in section 8, TMA, which must be satisfied in order for a notice to file to be valid, had been satisfied.

Section 8(1)(a) provides as follows:

"(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an Officer of the Board –

(a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice."

The FTT concluded that section 8(1) was not satisfied as HMRC's purported notice to file had not been given to the taxpayer by an "Officer of the Board" and the notice was therefore invalid. In reaching this conclusion, the FTT was influenced by the fact that there was no signature block on the pro forma letter which had been sent to the taxpayer. It was therefore not clear whether the letter had been signed by a particular officer or whether it would have been signed by HMRC (or indeed whether it had been signed at all).

5. [2018] UKFTT 0311 (TC).

Similarly, there was nothing in the computer printouts relied upon by HMRC to indicate whether an officer, and if so which officer, issued the notice to file to the taxpayer.

Notwithstanding the above conclusion, which was sufficient to dispose of the appeal, the FTT said that if it had found that a valid notice to file had been given by an Officer of the Board, it would still have allowed the appeal on the basis that the notice had not been given for the purpose set out in section 8, namely, for "the purpose of establishing the amounts in which a person is chargeable to income".

In the present case, as in *Lennon v HMRC*[6], HMRC knew the amount for which the taxpayer was chargeable to income tax and did not therefore need to serve the purported notice to file on the taxpayer in order to "establish" that amount. At the time the purported notice was issued, HMRC had already established the quantum of tax due from the taxpayer in the sum of £166.80. Accordingly, the purported notice to file was invalid in any event.

As the notice was invalid, there was no obligation on the taxpayer to file his return for 2014/15. Accordingly, the penalty regime contained in Schedule 55, Finance Act 2009, was never engaged and the taxpayer could not be liable for the penalties.

Comment
This decision is likely to have wide-ranging and unwelcome consequences for HMRC since its pro forma notice to file does not contain a signature block and HMRC's records may be unable to confirm whether a particular HMRC officer issued the notice. Given the wider implications of this decision for HMRC, it may decide to seek permission to appeal the decision.

A copy of the decision can be viewed here.

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6. [2018] UKFTT 0220).

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.

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- **Winner – Law Firm of the Year – The Lawyer Awards 2014**
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