Tax update

November 2017

In this month's update we report on HMRC's revised guidance relating to venture capital schemes, the coming into force of section 166, Finance Act 2016 (offences relating to offshore income) and HMRC's new guidance on self-reporting for failure to prevent the facilitation of tax avoidance. We also comment on three recent tax cases on principle private residence relief, section 114, Taxes Management Act 1970 and a penalty case in which the judge described HMRC's argument as "clap trap".

News items

Updated guidance on venture capital schemes

HMRC has updated its venture capital schemes manual to take into account changes made to the Enterprise Investment Scheme (EIS) and Venture Capital Trusts (VCT) rules by the Finance (No.2) Act 2015. more›

New criminal offences for offshore failures now in force

Section 166, Finance Act 2016, which introduces the following strict liability offences, came into force on 7 October 2017. more›

Tax evasion self reporting

New guidance has been published by HMRC to assist companies and partnerships when "self-reporting" in circumstances where they discover they have failed to prevent the facilitation of tax evasion and believe they may have committed an offence under Part 3, Criminal Finances Act 2017. more›

Case reports

Bailey – quality trumps quantity as Tribunal grants taxpayer principle private residence relief

In *Stephen Bailey v HMRC*, the First-tier Tribunal (FTT) granted the taxpayer principle private residence (PPR) relief, under section 222, Taxation of Chargeable Gains Act 1992 (TCGA), despite the taxpayer having only occupied the property in question for two periods of less than six months. more›

Any comments or queries

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About this update

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

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

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Chadwick – discovery assessment on wrong person cannot be remedied by section 114 TMA

In *Chadwick (as trustee in bankruptcy of Mrs Gloria Oduneye-Braniffe) v The National Crime Agency*, the FTT has held than an assessment issued to a trustee in bankruptcy was a gross error that could not be cured by section 114, TMA. more>

McGreevy – Tribunal describes HMRC's argument as "clap trap" in late filing case

In *R McGreevy v HMRC*, the FTT allowed the taxpayer's appeal against penalties imposed for the late filing of her non-resident CGT (NRCGT) return on the basis that she had a reasonable excuse. more>

News items

Updated guidance on venture capital schemes

HMRC has updated its venture capital schemes manual to take into account changes made to the Enterprise Investment Scheme (EIS) and Venture Capital Trusts (VCT) rules by the Finance (No.2) Act 2015.

The manual provides a new list of UK state aids approved by the European Commission which are relevant investments for the purposes the EIS and VCT investment limits.

The manual also explains that money raised through a VCT or EIS investment generally cannot be used to cover day to day expenditure.

A copy of the manual can be found here.

Back to contents›

New criminal offences for offshore failures now in force

Section 166 Finance Act 2016, which introduces the following strict liability offences, came into force on 7 October 2017:

- failure to notify HMRC of chargeability to income tax or capital gains tax
- failure to make a return under section 8 TMA
- filing an inaccurate return in respect of offshore income, assets or activities where the tax underpaid or understated is more than £25k.

A copy of Statutory Instrument 2017 No. 970 (C. 91) can be found here.

Back to contents›

Tax evasion self reporting

New guidance has been published by HMRC to assist companies and partnerships when "self-reporting" in circumstances where they discover they have failed to prevent the facilitation of tax evasion and believe they may have committed an offence under Part 3, Criminal Finances Act 2017.

The guidance provides details on how to notify HMRC should such a discovery be made. Self reporting does not guarantee that an organisation will not be prosecuted but it could form part of that organisation's defence and is likely to be relevant in relation to the level of any penalties imposed by HMRC.

A copy of the guidance can be found here.

Back to contents›

Case reports

Bailey – quality trumps quantity as Tribunal grants taxpayer principle private residence relief

In *Stephen Bailey v HMRC*[1], the First-tier Tribunal (FTT) granted the taxpayer principle private residence (PPR) relief, under section 222, Taxation of Chargeable Gains Act 1992 (TCGA), despite the taxpayer having only occupied the property in question for two periods of less than six months.

Background

In February 2008, Stephen Bailey (the taxpayer), acquired a property in Richmond (the Richmond property) through his property company Landseers Ltd (the company), for £420,000. The property was purchased by the company with the assistance of a three month bridging loan.

At this time, the taxpayer was living with his children at a property in Maidstone, which he owned jointly with his partner (the Maidstone property).

The taxpayer sought a personal mortgage with the intention that it be used to finance the purchase of the Richmond property from the company. While seeking a mortgage, the taxpayer transferred some of his furniture from the Maidstone property to the Richmond property. Only a small amount of basic furniture was transferred as the intention was to let the Maidstone property fully furnished. The taxpayer and his children lived at the Richmond property for two and a half months while he sought a mortgage.

Due to the financial crisis of 2008, the taxpayer was unable to obtain a normal mortgage and he was only able to secure a "buy-to-let" mortgage. If he had not obtained such a mortgage, the company would have defaulted on its bridging loan and the Richmond property would have been repossessed. The taxpayer purchased the Richmond property from the company on 2 May 2008 for £429,000 and let it to a close friend in accordance with the terms of the buy-to-let mortgage. The taxpayer then lived with his partner in a property she owned in Tachbrooke.

When the tenant died, the taxpayer moved back into the Richmond property, again intending to make it a home for his family. However, within a few weeks, the taxpayer realised that because of various health issues he was unable to cope with living in the house and he decided to sell it. Richmond was sold on 31 August 2010 for £550,000, realising a gain of £121,000.

The taxpayer claimed that no capital gains tax (CGT) was due on the basis that he was entitled to PPR relief under section 222, TCGA, which excludes to charge property that is an individual's main residence.

HMRC argued that there was no evidence that the taxpayer had occupied the Richmond property as his main private residence during his ownership of the property and issued a discovery assessment under section 29, Taxes Management Act 1970 (TMA), to CGT for the year 2010/11, in respect of the taxpayer's disposal of the Richmond property. The taxpayer appealed to the FTT.

1. [2017] UKFTT 658 (TC).

FTT decision

The taxpayer's appeal was allowed.

Applying sections 222(1)(a) and 223 (in the form in force at the time) TCGA, the FTT considered that as the taxpayer had owned the Richmond property for less than three years if he had occupied the property as his "only or main residence" at any time during the period of ownership, the relief would be engaged.

In the view of the FTT it is the quality, rather than the quantity, of occupation which matters and there is no minimum period of residence for the relief to apply. The period of residence need only have an assumption of "permanence, continuity, or some expectation of continuity" (*Goodwin v Curtis*[2]).

The FTT found that the taxpayer had occupied the Richmond property for two short periods (two or three months in each case). On both occasions he had intended the property to be the family home. The taxpayer was forced to move out of the property due to circumstances beyond his control. The FTT took into account the fact that the taxpayer let the property to a close friend and attempted to move in again once the property was vacated following the death of the tenant.

Notwithstanding the short periods involved, the FTT was satisfied that at least part of the taxpayer's occupancy had the required degree of "permanence, continuity or expectation of continuity", for it to have been his "residence" for the purposes of section 222, TCGA.

Comment

This case is a useful restatement of the necessary criteria which must be satisfied in order for PPR relief to be applicable under section 222, TCGA. Although the taxpayer had occupied the property for two short periods of time, the FTT confirmed that it is the quality and not the quantity of occupation which matters when considering the relief.

A copy of the decision can be found here.

Back to contents>

Chadwick – discovery assessment on wrong person cannot be remedied by section 114 TMA

In *Chadwick (as trustee in bankruptcy of Mrs Gloria Oduneye-Braniffe) v The National Crime Agency*[3], the FTT has held than an assessment issued to a trustee in bankruptcy was a gross error that could not be cured by section 114, TMA.

Background

In 2013, following an investigation by the National Crime Agency (NCA) into the trafficking of Class A drugs, Mrs Oduneye-Braniffe (the taxpayer) was arrested on suspicion of money laundering and subsequently declared bankrupt. In October 2014, she was advised that no further action would be taken against her in relation to money laundering.

On 22 April 2015, using revenue powers provided under the Proceeds of Crime Act 2002, the NCA issued to Mr Chadwick (the appellant), the taxpayer's trustee in bankruptcy, discovery assessments for tax years 2004/05 to 2008/09, inclusive (the Assessments).

2. [1998] STC 475.
3. [2017] UKFTT 656 (TC).

It was common ground that the Assessments had been addressed to and served on the wrong person, as it is the bankrupt who is assessable (*Hibbert v Fysh (HM Inspector of Taxes)*[4]), although any right of appeal is vested in the trustee in bankruptcy.

The NCA sought to rely on section 114(1), TMA, to argue that the error was of no consequence.

Section 114(1) provides:

"(1) An assessment or determination … which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

The NCA argued that both the taxpayer and the NCA understood the intent was to assess the taxpayer to tax and she was not misled or confused.

FTT decision

The appeal was allowed and the Assessments were cancelled.

The FTT rejected the NCA's argument. In the FTT's view, the NCA clearly intended to assess the appellant. In its letter to the appellant of 22 April 2015, the NCA referred to "you" as meaning the appellant, not the taxpayer.

The FTT concluded that the Assessments contained a gross error (as the appellant was not assessable on the income assessed), and that such an error was capable of misleading the taxpayer and the appellant. Whether either was actually mislead was immaterial although the FTT considered it was possible that the taxpayer could have formed the view that she was not liable to pay the tax and NICs assessed and that the appellant would take care of it. The FTT concluded that the Assessments were not "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts" and accordingly the error could not be cured by section 114(1), TMA.

Comment

Regular readers of our monthly Update will recall that in February 2017, we discussed the FTT's decision in *Chartridge Developments Limited*[5] (a copy of our Update can be found here). In that case, HMRC was unsuccessful in its attempt to rely upon section 114, TMA, to cure a defect in penalty notices.

This case provides further helpful guidance and analysis on the scope of section 114 and confirms the need for accuracy on the part of HMRC, and other organisations such as the NCA when using revenue powers. Section 114 cannot be relied upon to remedy gross errors which are likely to mislead the taxpayer.

A copy of the decision can be found here.

Back to contents>

4. 40 TC 305.
5. [2016] UKFTT 766.

McGreevy – Tribunal describes HMRC's argument as "clap trap" in late filing case

In *R McGreevy v HMRC*[6], the FTT allowed the taxpayer's appeal against penalties imposed for the late filing of her non-resident CGT (NRCGT) return on the basis that she had a reasonable excuse.

Background

Ms McGreevy (the taxpayer) was UK non-resident, living in Australia. The case concerned the late filing by the taxpayer of her NRCGT return and the subsequent imposition of penalties by HMRC for the late filing.

The disposal detailed in the return related to a sale of property located in the UK. The taxpayer did not file her NRCGT return until August 2016, whereas it should have been filed with HMRC within 30 days after the completion of the transaction on 7 July 2015.

The return itself indicated that there was no tax to pay as the taxpayer qualified for PPR relief on the sale. Nevertheless, HMRC issued penalty notices in September 2016, in the sum of £1,600, comprising £700 in late filing penalties and £900 in daily penalties for the period between August 2015 and August 2016 (the notices).

The taxpayer appealed the notices on the basis that she had a reasonable excuse for her failure to file her NRCGT return on time. She did not know that she was required to complete a separate NRCGT return because she believed the disposal could be set out in her annual non-resident self-assessment return, which included a space for capital gains. She explained to HMRC that her mistake was an honest mistake and, once discovered, was remedied at the earliest opportunity.

HMRC's position was that there existed sufficient published material to indicate that a NRCGT return must be made within 30 days of completion. Taxpayers, so HMRC argued, had an obligation to be aware of the relevant rules and the taxpayer in this case ought to have acquainted herself with the correct legal position.

FTT decision

The appeal was allowed and the penalties were cancelled.

In penalty cases, the burden of proof is on HMRC and it has to establish that the penalty has been properly imposed. The FTT found that the daily penalties were not lawful as HMRC had been unable to demonstrate that they had been imposed by an HMRC officer. In addition, HMRC had failed to notify the taxpayer of the starting date for the penalties (paragraph 4, Schedule 55, Finance Act 2009).

With regard to the late filing penalties, the FTT found that they were validly issued and so went on to consider whether the taxpayer had a reasonable excuse for the delay. The FTT noted that the NRCGT return was in its first year of existence at the time the gain arose and that the paper self-assessment return that the taxpayer had received for the 2015/16 tax year made no reference to a NRCGT return, nor had the taxpayer received any separate notification. Despite the newness of the rules, the FTT observed that HMRC had made no attempt to target the relevant and small number of taxpayers to whom the new rules might apply.

The FTT was particularly scathing in response to HMRC's submission that information about the requirement to file a NRCGT return was in the public domain, describing it as "claptrap". The

6. [2017] UKFTT 0690 (TC).

published information, on which HMRC relied, amounted to statements contained within the Chancellor's Autumn Statement for 2013 and a separate document buried on HMRC's website which the FTT described as "obscure". The FTT said:

"I am sure that every December in the past few years the appellant, like many other inhabitants of Rozelle, NSW, Australia, has been agog with excitement waiting for the British Chancellor of the Exchequer's Autumn Statement. How much more relevant must it be to their tax affairs than anything the Australian Treasurer has to announce. That this "contention" by HMRC, that the new legislation had been announced in the Autumn Statement (with the implication that it was reasonable for the appellant to know this and unreasonable not to have known it) was seriously advanced by HMRC as a ground for denying the appellant had a reasonable excuse for not knowing about the NRCGT return deadlines, is a prime example of the concept of "nerdview": a phrase coined by Professor Geoff Pullum of Edinburgh University. Only a small coterie of people obsessed by tax (of which I am no doubt one) would admit that the Chancellor's Autumn Statement on tax matters is something that should register in anyone's consciousness ...".

HMRC was not assisted by the fact that in its Statement of Case it referred to the wrong Autumn Statement. The FTT commented:

"The SoC does not exhibit reasonable care when it gave the Tribunal incorrect information. But HMRC expects a non-resident living in a suburb of Sydney to be more knowledgeable about UK tax consultations than their own staff."

Perhaps not surprisingly, the FTT had little difficulty in finding that the taxpayer did have a reasonable excuse, concluding that the arguments advanced by HMRC about the taxpayer's knowledge of the law were "little short of preposterous".

Comment

This is yet another case in which HMRC appears to have demonstrated a complete lack of proportionality with one of its "customers".

There were clearly special circumstances in this case, not only because the rules were new, largely unreported, and applied to a comparatively small number of people, but also because the taxpayer fully expected (and received) a full tax exemption for the gain under the PRR. She also believed that she could notify the gain to HMRC through her normal self-assessment return because it included space for gains to be declared.

A moment's thought on the part of HMRC ought to have indicated that this was a case where the taxpayer had a reasonable excuse and penalties should not have been imposed.

A copy of the decision can be found here.

Back to contents>

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