RPC

Tax update

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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 general VAT update on the final Thursday of every month, and a weekly blog, RPC Tax Take.

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News

Cross Purposes: HMRC investigation teams to merge

HMRC is to merge two of its key investigation teams: specialist investigations (SI) and criminal investigations (CI). HMRC has indicated that this will enable it to "better share expertise and knowledge" and be "more effective in tackling the most serious tax crime".

SI deals with direct and indirect taxes in respect of certain tax avoidance matters as well as cases of suspected fraud where the civil procedure rules are used. CI deals with cases prosecuted under the criminal procedure.

HMRC insists that the move is not designed to save money, but it remains to be seen if redundancies will follow.

This move does suggest a more focused approach from HMRC in relation to tax fraud.

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New LDF published

A Fifth Joint Declaration relating to the Liechtenstein Disclosure Facility (LDF) has been signed by the UK and Liechtenstein governments. The Chancellor announced in the March budget that the LDF would close in December 2015 (rather than April 2016, as had previously been the case).

The Fifth Joint Declaration can be read here.

HMRC has published updated guidance which can be read here

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Taking offence offshore

On 16 July 2015, the Government issued four consultation documents on the topic of offshore tax, non-compliance and evasion.

The first consultation document discusses an increase in the minimum penalty for offshore non-compliance and evasion. This includes a new asset-based penalty regime which potentially could be so high as to amount to a confiscation of a person's overseas assets.

The second consultation document discusses penalties for those who help people to commit offshore tax non-compliance and evasion, including 'naming and shaming' of those individuals.

The third consultation document sets out a new corporate criminal offence.

Finally, the fourth document provides draft legislation for a new strict liability offence, in relation to which any person who fails to notify HMRC, or submits an incorrect tax return of any offshore income or gains anywhere in the world, could be summarily convicted of a criminal offence.

The new strict liability offence would mark a major change to the operation of criminal law in the context of the UK tax system. Under the proposals, a person could be convicted of a criminal offence, notwithstanding that the failure to disclose was not deliberate.

There are currently a number of disclosure campaigns in place, including the LDF, but this will end on 31 December 2015, to be replaced by a tougher regime for a further year. Thereafter HMRC will close off opportunities to disclose on favourable terms.

The consultation documents demonstrate HMRC's greater focus on tax evasion.

Anyone with concerns regarding their personal situation, including non-domiciles, should seek expert legal advice.

The first consultation document can be read here.

The second consultation document can be read here.

The third consultation document can be read here.

The fourth consultation document can be read here.

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Cases

Late appeals: Tribunal confirms the correct approach to procedural errors in *Citipost Mail v HMRC*

The approach to procedural errors, such as the late filing of appeals and non-compliance with directions, has been the subject of a number of decisions over the past 18 months. The various judicial interpretations, in particular, in *Denton v White*[1] and *Data Select v HMRC*[2], have resulted in a period of uncertainty for taxpayers. However, in the recent case of *Citipost Mail v HMRC*[3] the First-tier Tribunal (FTT) has provided some welcome guidance on the correct approach.

Background

Citipost Mail Limited (Citipost) specialises in the delivery of paper based products and packets. From September 2009 to March 2012, it delivered packages sourced in Jersey to the UK on the basis that the deliveries fell within the Low Value Bulk Imports (LVBI) approval (available at the relevant time).

In 2011, HMRC became concerned with the way Citipost was operating the LVBI and on 2 November 2011 issued a "post clearance demand notice" (PCDN) for unpaid import VAT (the First PCDN). Later, in January 2013, HMRC issued a penalty in relation to the First PCDN. This was followed by two further PCDNs, each dated 23 January 2013.

Citipost requested a formal review of the two later PCDNs and the penalty, which were upheld. In its decision, HMRC confirmed that the First PCDN had not been included in the review because it was out of time. Citipost appealed this decision.

The matter recently came before the FTT for preliminary hearing to determine whether Citipost should be allowed to make a late appeal against the First PCDN. The recent decision deals only with that matter.

FTT's decision

The FTT considered the following three issues:

- whether the First PCDN had been issued by HMRC and/or received by Citipost
- had Citipost decided not to appeal the First PCDN and
- should Citipost be permitted to make a late appeal in relation to the First PCDN.

Whether the First PCDN had been issued and received

Taking into account all the circumstances, in particular, reference to the First PCDN in correspondence and the completion of the form (address, date for payment etc) the FTT had no difficulty in finding that the First PCDN had been properly issued.

With regard to whether the First PCDN was received, the FTT considered the evidence and found that it had. Factors the FTT took into account included correspondence between the parties in which Citipost had not identified that the First PCDN had not been received, but requesting copies of the schedule with the calculations. In addition, a witness who had initially stated that the First PCDN had been received changed his evidence before the hearing.

Had Citipost decided not to appeal the First PCDN

Citipost submitted that it remained in negotiations with HMRC and therefore did not request

1. [2015] EWCA Civ 906.
2. [2012] UKUT 187.
3. [2015] UKFTT 0252 (TC).

a review of the First PCDN, or commence an appeal. However, the FTT concluded that such a submission was contrary to the evidence which indicated there was not a continuing dialogue but rather that Citipost had intended to comply with HMRC's requirements.

Should Citipost be granted permission to make a late appeal in relation to the First PCDN
The main issue for determination by the FTT concerned whether to allow Citipost to make a late appeal.

In reaching a conclusion on this point, the FTT considered whether it should follow the "three stage" approach in *Denton* where "all the circumstances" are not considered until the third stage; or follow *Data Select*, which requires only that all the circumstances be considered and balanced.

In *Leeds City Council v HMRC*[4], the Upper Tribunal (UT) held that the correct approach was that adopted in *Data Select*. However, in *McCarthy & Stone (Developments) Limited v HMRC*[5], the UT was of the view that the *Denton* approach should be followed. Decisions of the UT are of course binding on the FTT, but as the two decisions were of equal standing, the FTT was able to choose which decision to follow.

The FTT chose to follow *Leeds*. In reaching its conclusion it considered why Judge Bishopp in *Leeds* decided that the decision in *McCarthy & Stone* was wrong. The FTT agreed with Judge Bishopp that when the Court of Appeal in *Denton* set out a three-stage test, it was giving guidance about the operation of the Civil Procedure Rules, which emphasises the saving of costs. The FTT rules do not have such an emphasis and the Court of Appeal was not giving guidance on these rules.

Accordingly, in deciding whether or not to allow the late appeal, the FTT followed the approach in *Data Select*, and considered all of the circumstances of the case. The seriousness and significance of breaches were considered and weighed along with all other relevant factors. In Citipost's case, the significant length of the delay, the lack of good reason for not appealing within the time limit and the need to ensure fairness as between taxpayers were crucial. These outweighed the only factor in favour of granting permission, that of risking the payment of money which may not be due.

The FTT found in favour of HMRC and refused permission for the late appeal.

Comment
The FTT's decision in this case follows the approach taken in *Kumon Educational UK Co Ltd v HMRC*[6]. Further reinforcement to the decision in *Leeds* was of course also given in *BP University College of Professional Studies Ltd v HMRC*[7]. It can be expected then that, unless and until *Leeds* is overturned, both the FTT and the UT will follow it in preference to *McCarthy & Stone*.

The decision can be read here.

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Upper Tribunal considers whether alternative arguments from HMRC require permission to appeal

An interesting procedural issue was recently considered by the UT in *Steven Price, John Myers and James Lucas v HMRC*[8]. The UT had to consider the distinction between affirmation of a

4. [2014] UKUT 350.
5. [2014] UKUT 196.
6. [2014] UKFTT 772 (TC).
7. [2014] UKFTT 917 (TC).
8. [2015] UKUT 0164 (TCC).

decision of the FTT on different grounds to those relied upon by the FTT, and whether the respondent to an appeal requires permission to appeal in order to enable it to contend for a different outcome in relation to one specific aspect of the FTT's decision.

Background

The original appeals to the FTT concerned a tax avoidance scheme which was intended to exploit capital gains tax (CGT) base cost rules for employment-related "securities options" and "convertible securities" to generate CGT losses that could be used to relieve income tax.

The scheme attracted a large number of participants of whom Steven Price, John Myers and James Lucas (the Appellants) were examples.

In order for the scheme to create the intended fiscal consequences, it was necessary for the Appellants to establish that, for CGT purposes, their acquisition costs of acquiring shares pursuant to an option was the value for which was contended. This meant that they had to avoid being caught by deeming provisions contained within the Taxation of Capital Gains Act 1992 (TCGA), in particular, section 17, which has the effect of substituting market value where an asset is acquired otherwise than by a bargain made at arm's length.

FTT's decision

The FTT[9], concluded that the scheme was not effective and rejected the Appellants' argument that they made substantial allowable losses.

Before the FTT, the parties had proceeded on the basis that the participants' acquisition of the relevant shares was a non-arm's length bargain such that section 17 would prima facia apply. The Appellants' case was that the scheme had succeeded in coming within sections 144ZA or 149AA TCGA, and thus avoided section 17. However, somewhat surprisingly, the FTT, decided that the market value rule did not apply for a different reason, namely, because the relevant transaction was not "otherwise than by way of a bargain made at arm's length" and hence was not subject to section 17 at all.

This meant that it was necessary for the FTT to decide what the acquisition cost of the shares was, since it was not market value under section 17, which required a consideration of section 38 TCGA, under which the acquisition cost of an asset is the amount of the consideration given "wholly and exclusively" for the acquisition of the asset.

The FTT concluded that the Appellants did not give the amount paid "wholly and exclusively" for the shares. The most that could be said to have been given for the shares, for example in the case of Mr Myers, was £600. The FTT therefore reduced Mr Myers' acquisition cost to £600 and his allowable loss to £48.

On appeal to the UT, the Appellants sought to uphold the FTT's decision that section 17 did not apply (referred to as Decision 1) and challenged the FTT's decision on the "wholly and exclusively" issue, applying section 38 TCGA (referred to as Decision 2).

The procedural issue before the UT

The Appellants obtained the permission of the FTT to appeal against Decision 2 to the UT and they contended that that was the only issue properly before the UT. The Appellants argued that if HMRC wished to challenge Decision 1 before the UT, it needed to seek permission to appeal that aspect of the FTT's decision, but as it had not done so, the UT could not, and should

9. [2013] UKFTT 297 (TC).

not, grant HMRC permission to challenge Decision 1. HMRC contended that it did not need permission to challenge Decision 1.

UT's decision
The UT rejected the Appellants' argument in relation to Decision 1, and concluded that HMRC did not need permission to appeal that decision. The Appellants were also unsuccessful in relation to Decision 2, and the appeal was therefore dismissed.

What was the decision of the FTT?
The UT said that an important consideration in identifying the decision of a court or tribunal was to identify what issue or issues had been referred to it for decision. It was appropriate, therefore, to examine what was referred to the FTT under the Taxes Management Act 1970 (TMA).

Mr Myers appealed to the FTT by notice dated 11 September 2012, which specified the decision which he was appealing "as the closure notice dated 23 August 2012" and "the amount of tax" as "£2,400,258.80".

The UT noted that:

- the appeal was brought under section 31(1)(b) TMA under which the appeal was brought against any conclusion stated or amendment made in HMRC's closure notice
- the FTT was acting under section 49(3) TMA, under which its jurisdiction was to decide the matter in question
- the FTT's powers were contained in section 50(7A) TMA, which required it to decide (i) whether Mr Myers' claim to offset capital losses should have been allowed and (ii) if so, the extent of the allowance that was appropriate.

The UT commented that (paragraph 46):

"These are therefore the issues which were referred to the FTT by Mr Myers' appeal, the issues which the FTT had jurisdiction to decide under s49D(3) TMA and the issues they were required to decide by s50(7) TMA."

None of the other matters considered by the FTT therefore were matters that were or could have themselves been the subject of an appeal under section 31(1)(b) TMA, or arose for decision under section 50(7A) TMA, they were rather matters that formed part of the reason why it decided what it did.

Before the FTT, HMRC's position had been that the market value was "some £600 odd" and the UT noted that HMRC did not challenge the findings of the FTT in this regard. The UT concluded therefore that HMRC's respondents' notice fell squarely within the principle that a respondent who sought to uphold the decision below by a different route was not thereby appealing that decision, and did not need permission to do so.

Comment
The UT's decision contains a useful summary of the provisions which apply to appeals from the FTT to the UT and is a helpful reminder of the principles which apply in determining whether a party is simply seeking to affirm a decision on different grounds to those relied upon by the FTT (which argument may be contained in the Respondent's Response to the Appellant's Notice of

Appeal) or is challenging the decision itself, which requires an appeal, and permission to bring that appeal.

The decision can be read here.

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Taxpayer not careless in share options case

In *Alistair Norman v HMRC*[10], the FTT has concluded that a taxpayer who wrongly recorded gains made after exercising a share option granted by his employer as capital, rather than income, was not "careless" for the purposes of paragraph 1(1), Schedule 24, Finance Act 2007. As the taxpayer had not appealed the penalty, HMRC undertook to cancel the penalty.

Background

In 2008, Alistair Norman (the Appellant) was employed by a company called QlikTech (Qlik). He was experienced in marketing software and under his contract of employment received a basic salary, a bonus and a car allowance. By separate letter, Qlik confirmed to the Appellant that he was entitled to stock options. If the Appellant served for five years, he would be entitled to exercise options over 15,000 shares in Qlik's parent company. If he left before that time, he would receive a proportion of the 15,000 referable to time in service.

The Appellant was informed that the stock options were "part of [his] package" but did not "form any part of any contractual terms and conditions of employment".

The Appellant resigned in 2011 and exercised his stock options over 6,536 shares and immediately sold them for a profit. The only information he received regarding his exercise of the stock options was a transaction record prepared by Citigroup Global Markets Inc which acted as agent in the share transaction. He received no additional P45 from Qlik, or any other notice of a payment from which tax was deducted. Qlik did however file a P14 form with HMRC which aggregated the share option with his basic salary.

When the Appellant's accountants completed his self-assessment tax return, they included the share transaction in the "gains qualifying for entrepreneurs' relief" and "gains of the year before losses" boxes. HMRC noticed the disparity in the forms over a year later and wrote to indicate that they were undertaking a "compliance check" into his affairs.

In correspondence, the Appellant argued that the shares were not income from his employment because the right to acquire them was not a term in his employment contract. HMRC rejected this argument and issued a discovery assessment, pursuant to section 29, TMA, and a penalty assessment for carelessly submitting an inaccurate tax return, pursuant to paragraph 13, Schedule 24, Finance Act 2007.

The Appellant appealed the assessment and, following an internal review, the matter was transmitted to the FTT for determination.

FTT's decision

In the view of the FTT, the Appellant's analysis and understanding of the correct tax treatment of the shares he had received from Qlik was incorrect. The FTT concluded that the stock options which had been granted to the Appellant were granted by reason of his employment

10. [2015] UKFTT 0303 (TC).

and that gain had been realised on the exercise of the stock options and ought therefore to have been subject to tax as employment income.

With regard to the discovery assessment, the Appellant argued that HMRC was out of time to raise the assessment and that HMRC had not “discovered” a loss of tax within the meaning of section 29 TMA. The FTT rejected these arguments. In this case, the HMRC officer had the P14 and the tax return and noted that there was a substantial difference between them, on that basis the FTT accepted that the officer carrying out the compliance check made a discovery within the meaning of section 29(1) TMA and upheld the assessment.

The FTT considered whether the tax loss had been brought about carelessly, so as to justify the penalty assessment which HMRC had issued to the Appellant. The oft repeated test is found in *Colin Moore v Revenue and Customs Commissioners*[11], where it is expressed as follows:

“The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.”

In completing his return, the Appellant looked only at his P45, which showed his salary only and the Citigroup record of the sale. HMRC was of the view that the omission of the gain from the employment pages of the Appellant’s return was careless. The FTT did not agree. It found that it was reasonable for the Appellant and his accountants to complete the return in the way it had been completed - the FTT observed that Box 1 on the return contained the instruction “enter the total from your P45 or P60” – which was what the Appellant had done.

Comment

The decision is lengthy, and, as is often the case with lengthy tribunal decisions, a great deal turns on the facts, however, this case does act as a further indicator of the pragmatic approach the FTT is prepared to take when considering whether a taxpayer or his adviser has been “careless”.

The FTT accepted that it was reasonable for the Appellant’s accountants to come to the view that the gain did not come from, or by reason of, an employment, because it was not included in the Appellant’s contract of employment. This is a somewhat surprising finding given that the FTT concluded that the accountant’s view was wrong as a matter of law. The FTT appears to have been influenced more by the fact that the only information available was the Citigroup transaction and that all the relevant sums were recorded on the return, albeit not all in the correct place.

The introduction of the self-assessment system led to a considerable shift in responsibility from the Revenue to the taxpayer which can have the effect of placing an unrealistic expectation of knowledge and understanding on the shoulders of individuals which has often led HMRC to view the word “careless” as synonymous with “mistaken”. In this case, the FTT was prepared to accept that the Appellant was not careless in his mistake but as the FTT observed, the point is often “finely balanced” and therefore taxpayers (and representatives) who are in any doubt should seek specialist advice.

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11. [2011] UKUT 239 (TCC).

About RPC

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