

A round-up of recent issues

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1. General

1.1 Tax appeal video hearing pilot launched

A pilot has been launched to test a video courtroom with members of the public. This will enable taxpayers to have their tax appeal heard through a video hearing.

All attendees, including the judge, will participate in the hearing via video technology. Making use of technology to hold video hearings for technical parts of cases that mainly involve legal professionals and judges is hoped to save court time and help cases to progress faster.

The first hearings under the pilot will take place in the spring. The choice to use this new type of hearing would always be made by the judge in the case.

www.gov.uk/government/news/video-hearing-pilot-launched

1.2 GAAR advisory panel recruiting up to six new members

The independent GAAR advisory panel was set up in 2013, and in 2017 started to consider referrals and publish its opinion. Five of the existing members are standing down in 2018 and up to six new members are being recruited.

'Each Panel member will be expected to have knowledge and expertise in relation to one or more of the taxes covered by the GAAR, and to be committed to making the GAAR legislation work efficiently and effectively. The aim is to have a Panel that is broad based, balanced and cohesive. The number of Panel members is flexible in order to meet these objectives'.

www.exec-appointments.com/job/1489771/general-anti-abuse-rule-gaar-advisory-panel-member-/?LinkSource=PremiumListing

1.3 ICAEW responds to HMRC on Making Tax Digital (MTD)

The ICAEW has submitted its response to HMRC's consultation on the MTD draft legislation in respect of VAT.

The ICAEW's view is that MTD should not be compulsory for VAT, or any tax, until the programme is working well.

<https://ion.icaew.com/taxfaculty/b/weblog/posts/our-members-views-on-making-tax-digital-for-vat>

1.4 Welsh vacant land tax to be taken forward

The Welsh Cabinet Secretary for Finance has said that the Welsh Government will put forward its vacant land tax idea to test the Wales Act 2014 powers.

A vacant land tax was one of the four new tax ideas shortlisted alongside the draft Budget in October. The proposal will have to be approved by the UK Government.

<http://llyw.cymru/newsroom/finance1/2018/180213-vacant-land-tax-idea-to-be-used-to-test-wales-act-powers/?lang=en>

2. Private client

2.1 HMRC 2016/17 tax calculations and class 2 NICs

Following the submission of 2016/17 tax returns that include Class 2 NICs, HMRC has, in many cases, issued SA302 tax calculations with an adjustment to the Class 2 liability that may be incorrect.

The amounts involved are minor; however, there may be a knock-on effect on state pension entitlement and issues could arise with a mortgage application because the liabilities reported on the tax return do not exactly match HMRC's calculation. Consideration should therefore be given as to whether or not it is worthwhile rectifying the position.

The adjustments fall into three categories:

- removing the NIC liability where HMRC has not been notified that the individual is self-employed or a partner;
- the individual started or ceased self-employment or partnership during 2016/17 and the tax return and HMRC report conflicting start/end dates; and
- the individual was an employee and was self-employed or a partner in 2016/17, and the combined Class 1 and 2 liability exceeded the annual maximum, but the Class 2 liability reported on the tax return was not adjusted accordingly. HMRC's calculation therefore includes the correct restricted Class 2 liability.

2.2 Successes in appeals against late filing penalties

There has been a series of cases appealing self-assessment late filing penalties that the FTT has found in favour of the taxpayer.

Various points of interest arose as follows, and in each case the penalties were cancelled:

- Case 1: While the case was not decided on this point alone, the FTT noted that there is no statutory requirement to register for self-assessment and file a tax return just because the taxpayer is a director. HMRC in this case confused the criteria by which it exercises its discretion to issue a notice to file with the statutory obligation to notify liability. There was, in any event, a reasonable excuse for late filing.
Symes v HMRC [2018] UKFTT 0042 (TC)
<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10287/TC06320.pdf>
- Case 2: No notice was given specifying the date from which daily penalties applied. The £100 fixed penalty was not appropriate to a late partnership return.
Patel v HMRC [2018] UKFTT 0035 (TC)
<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10277/TC06315.pdf>
- Case 3: The FTT stated its view that where the taxpayer is not given a notice to file a tax return by HMRC, there can be no penalties issued under FA 2009 Sch.55, even if the taxpayer does file a return. The latter may happen fairly commonly where a taxpayer has not given notice of chargeability but proceeds to file a return. In this case the FTT found that HMRC did not show that a proper notice containing the information required was sent to the taxpayer.
Wood v HMRC [2018] UKFTT 0074 (TC)
<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10304/TC06339.pdf>
- Case 4: Late filing penalties were issued in respect of a partnership return. The FTT referred to specific HMRC decisions in this case as 'a decision of utmost illogicality' and 'an irrational decision'. The FTT found that although the partnership was registered for self-assessment in respect of the relevant tax year, it did not in fact exist until the following tax year. Before then one of the 'partners' was trading on his own account and reported all profit in his own tax return.
Ahammed v HMRC [2018] UKFTT 0040 (TC)
<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10285/TC06318.pdf>
- Case 5: The taxpayer had appointed an agent to file his tax returns and had been assured by the agent that these had been filed electronically. He was in regular contact with both his agent and HMRC in relation to filing his tax returns. It later transpired that his agent had not filed the returns. At that time, the taxpayer took steps to file them by paper (no tax was due) and appointed a new agent. The FTT noted that while the circumstances in which reliance on a third party can amount to a reasonable

excuse will be very limited, in this case the taxpayer had exercised reasonable care and as such did have a reasonable excuse.

Macinnes v HMRC [2018] UKFTT 0044 (TC)

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10289/TC06322.pdf>

2.3 Penalties for late submission of non-resident CGT return

While there have been two recent cases found in favour of the taxpayer, this case follows the latest appeals in finding that ignorance of the laws is not a reasonable excuse for the late filing of a non-resident CGT (NRCGT) return. The FTT did however cancel all but £100 of the £1,400 of outstanding penalties.

The taxpayer disposed of two properties, but filed the required NRCGT returns after the filing deadline. In both cases no CGT was due. In respect of each property, initial £100 late filing penalties were issued, along with a £300 penalty for failure to file within 6 months of the filing date and a further £300 penalty for failure to file within 12 months of the filing date.

The FTT found that ignorance of the law is not a reasonable excuse and, as such, the £100 late filing penalty on the first disposal stood. The taxpayer had not been allowed time to learn from his mistake, though, and so there were special circumstances in relation to the second property. The £100 late filing penalty was cancelled accordingly. This was in line with the decision in *Welland v HMRC* [2017] UKFTT 870 (TC).

The FTT also found that HMRC had overlooked penalty provisions that state that 'Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed 100% of the liability to tax'. This was relevant as the two £300 penalties were within different paragraphs. As the liability to tax was nil, HMRC had not applied these penalties in line with the legislation and all of the £300 penalties were cancelled.

Jackson v HMRC [2018] UKFTT 0064 (TC)

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10305/TC06329.pdf>

2.4 Business investment relief guidance

HMRC has updated its recently published business investment relief (BIR) guidance. The update confirms that where an 'extraction of value event' occurs after 6 April 2017, if the investment was made before 6 April 2017, this will continue to be treated under the old rules.

From 6 April 2017, the extraction of value rule has been tightened up such that it will only be breached if the relevant person receives value in circumstances that are directly or indirectly attributable to his investment and he fails to take the appropriate mitigation steps. Prior to 6 April 2017, the rule could be breached in wider circumstances.

HMRC has now updated its guidance to clarify how the rules will work where the investment was made prior to the change in legislation, which is in line with the new legislation.

www.gov.uk/guidance/business-investment-relief

2.5 Another attempt to challenge HMRC on partnership carry back of losses fails

In two sets of proceedings, attempts by tax payers to seek declarations in their favour in Chancery have been struck out by the Court. The correct forum for the cases was held to be the tax tribunals and where necessary there could be judicial review

The consolidated claims were effectively on behalf of several hundred claimants. There was also a second claim that involved extra features as also concerning Gift Aid relief. In brief, the cases concerned various film partnerships where claims were made for loss carry back, broadly on the same terms as in the *De Silva* case. The *De Silva* case has now been heard by the SC, see [2017] UKSC 74, [2017] 1 WLR 4384, but at the time of the hearing the judgement had not been handed down. The claimants had therefore sought

an adjournment of the strike out applications of HMRC. Warren J found however that where closure notices had been served the claimants should either have appealed or sought judicial review, and where they had not, they should await the decision. There was no basis for them to seek declaratory relief.

Knibbs & Ors v HMRC [2018] EWHC 136 (Ch)

www.bailii.org/ew/cases/EWHC/Ch/2018/136.html

2.6 FTT allows appeal against follower notice penalty

The FTT has cancelled a penalty issued to a taxpayer for failure to take corrective action following the receipt of a follower notice. This was on the basis that the taxpayer's failure was reasonable in all the circumstances.

The taxpayer entered into a tax avoidance scheme 'Working Wheels' that has been held not to work. This increased his repayment for the tax year by over £250,000, although HMRC refused to make the repayment.

The taxpayer was sent a follower notice, requiring corrective action to be taken, including amending the relevant self-assessment tax return, along with an accelerated payment notice. His agent called HMRC to confirm that he wanted to settle his affairs as per the letters received but he had never received the repayment, and HMRC confirmed no action was to be taken at that stage. HMRC then issued a £78,000 penalty for failure to take corrective action.

The FTT found that while the taxpayer failed to comply with the necessary corrective action required, this was 'reasonable in all the circumstances' based on the specific facts of the case. He had instructed his accountant to deal with it and relied on his advice and the letter received from HMRC was ambiguous. HMRC also wrongly issued him with an APN and advised verbally that no further action was required, and no further tax was in fact payable.

The FTT stated that '*it is incumbent upon HMRC to make sure that the paperwork and demands it issues to taxpayers are accurate and valid if they wish to rely on failures to comply*'. The penalty was cancelled.

Onillon v HMRC [2018] UKFTT 0033 (TC)

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10275/TC06313.pdf>

2.7 Was there a discovery and was a tax insufficiency brought about deliberately?

The UT found in favour of the taxpayer that there was no discovery, no inaccuracy and no deliberate behaviour.

The taxpayer participated in a scheme that generated large employment-related losses that he set against income. The loss was claimed in the partnership pages on his return, as the correct entry could not be made on the employment pages, with a disclosure explaining the position. While HMRC opened an enquiry into the return within the prescribed time limit, this was subsequently found to be opened under the wrong section of legislation and was therefore invalid. HMRC then issued a discovery assessment.

The FTT had found that while there was a discovery, the inaccuracy had not been brought about deliberately and so the discovery assessment was not valid.

On appeal to the UT, it found that there was no discovery; the relevant discovery had been made five years earlier when the enquiry was opened. HMRC's appeal was therefore dismissed.

It went on to note that where an entry in a document is explicitly based on a bona fide albeit controversial interpretation of tax law, and the position is identified on the return although this subsequently proves to be wrong, this does not amount to an inaccuracy. It may later become inaccurate. In addition, as the use of the partnership pages was forced on the taxpayer, again this did not mean that the return was inaccurate.

The UT went on to find that in any event the taxpayer did not act deliberately.

Tooth V HMRC [2018] UKUT 0038 (TCC)

https://assets.publishing.service.gov.uk/media/5a7b2687e5274a34770e9c40/HMRC_v_Raymond_Tooth.pdf

3. Trust, estates and IHT

3.1 OTS publishes its IHT scoping review document

The OTS has published a scoping document for its IHT General Simplification Review.

This document follows the Chancellor's and Financial Secretary's request to the OTS 'to carry out a review of a range of aspects of IHT and how it functions today, including its economic incidence, to identify simplification opportunities'.

Although the aspects to be covered appear to be largely technical and administrative, the document does include looking at these wider, more controversial, issues:

- complexities arising from the reliefs and their interaction with the wider tax framework;
- the scale and impact of any distortions to taxpayers' decisions, investments, asset prices or the timing of transactions because of the IHT rules, relevant aspects of the taxation of trusts, or interactions with other taxes such as capital gains tax; and
- the perception of the complexity of the IHT rules amongst taxpayers, practitioners and industry bodies.

The OTS will call for evidence in early 2018, with a view to producing a report in the autumn this year.

www.gov.uk/government/uploads/system/uploads/attachment_data/file/681434/OTS-IHT_Review_Scoping_document.pdf

3.2 Trust Registration Service - further updates

The CIOT has published details of clarification it has received from HMRC on queries that have been raised on the Trust Registration Service (TRS).

The queries cover:

- settlor when trust created from deed of variation;
- settlor when trust created by will;
- corrections to the register;
- trusts paying stamp duty and SDRT;
- workarounds for missing or unobtainable data; and
- confidentiality within firms.

The CIOT notes that HMRC has confirmed that, given that the filing deadline is so close, there will be no further updates to its FAQs provided on 22 November on the TRS.

HMRC is also planning to announce details of the penalties regime at the end of February 2018.

www.tax.org.uk/policy-technical/technical-news/trust-registration-service-%E2%80%93-further-updates

4. PAYE and employment

4.1 HMRC Published Spotlight 42 on Contractor Loan Schemes

HMRC has referred a specific contractor loan tax avoidance scheme to the Advertising Standards Authority (ASA) and has spotlighted the decision of the ASA in its favour.

The ASA has ruled against misleading advertising of contractor loan schemes by scheme promoter, Williams Gordon. This scheme is already the subject of the earlier Spotlight 33.

The ASA ruled that the promoter's website 'misled by omission' - by failing to mention the many government tools and policies aimed at the avoidance they were promoting and that the contractor loan scheme offered is a form of tax avoidance which HMRC believes did not work.

This is the second time that HMRC has recently Spotlighted an ASA ruling. It also adds to the overwhelming preponderance of recent Spotlights on remuneration schemes generally.

www.gov.uk/guidance/contractor-loan-schemes-misleading-advertising-spotlight-42

4.2 IR35 - FTT ruling in favour of HMRC

This case centred on an arrangement whereby the appellant provided services for the BBC through a Personal Service Company (PSC). The FTT ruled in favour of HMRC, in determining that had the appellant engaged with the BBC directly, the appellant would have had an employment-type arrangement with the BBC and therefore that IR35 was engaged so that PAYE and Class 1 NICs should have been applied on the earnings by the PSC.

- The judge acknowledged that employment status is a 'value judgement' and that presented with the same facts of a case, 'it is in the nature of a value judgement that different people may come to different conclusions'.
- The judge made it clear that the court did not criticise the appellant for engaging with the BBC through a PSC on a self-employed basis (and filing her tax returns as if IR35 did not apply), as she took professional advice in relation to the contractual arrangements and was even encouraged by the BBC to contract through a PSC. It would appear from this case that if HMRC and an individual disagree on an employment arrangement due to a difference in their 'value judgement' of the circumstances (rather than as a result of any overt tax/NIC avoidance attempt), then this individual should not be penalised in the event that an arrangement operating on a self-employed basis is ultimately ruled to employment in nature.

Christa Ackroyd Media Ltd v HMRC [2018] UKFTT 69 (TC)

<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10300/TC06334.pdf>

5. Business tax

5.1 Country-by-Country Reporting - further guidance

The OECD has released further guidance on the implementation of Country-by-Country Reporting.

Particular areas of interest discussed in the guidance are:

- i. whether or not extraordinary income and gains from investment activities are required to be included in total consolidated group revenues when applying the EUR 750 million threshold;
- ii. how to apply the EUR 750 million threshold in cases where the previous fiscal period is less than 12 months, and
- iii. whether or not a CbC report must be prepared by the ultimate parent entity of an MNE group for the first fiscal period in which the group has independent existence, following disposal by another group.

www.oecd.org/ctp/beps/CbC-Compilation-of-approaches-adopted-by-jurisdictions.pdf

www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf

6. VAT

6.1 FTT provides judgement on the separate identity of branches and their recharges.

The FTT has found that branches of The National Federation of Occupational Pensioners (NFOP) are to be regarded as separate taxable persons but that the entire membership fees collected (regardless of any amount forwarded to the branches) is included in the total consideration.

NFOP is a company limited by guarantee that provides help and support to pensioners of particular occupation pension schemes in exchange for a membership fee. At the time of joining, a member can either nominate a branch or be assigned to a 'general branch'. If a member belongs to a branch then a portion of the fee is forwarded on to that branch.

The appeal consisted of two parts; first that NFOP and the branches should be regarded as separate taxable persons and the second arguing the branch rebate should be excluded from the consideration received by NFOP, thus reducing its liability. HMRC maintained that the branches were not separate taxable persons and that the full value of membership should be regarded as the consideration for the supply.

The FTT concluded that the branches were incorporated associations acting as separate taxable persons. This decision opened up the possibility that the 'branch rebate' was a separate supply between two separate taxable supplies and so could therefore potentially be excluded from the total consideration received by NFOP.

The FTT noted the following:

- the value of the fee subscription and what was passed on to the branch was set by NFOP in a general meeting. This implied no agency arrangement;
- members that did not join a specific branch were charged the same fee with no amount being remitted to any other branch.

The FTT decided therefore that the whole amount of the subscription would make up the total consideration for the supply between NFOP and its members, not the amount less the rebate. It had not been demonstrated that the branch rebate was collected on behalf of the branches and belonged to them.

The National Federation of Occupational Pensioners v HMRC [2018] UKFTT 0026 (TC)

www.templetax.com/ImageLibrary/cs109_TC06305.pdf

7. And finally

Computer says No

It didn't matter very much: it was only a £100 fine and the parties didn't even show in court. It did, though, bring a wintry smile to our faces in the otherwise bleak landscape of FTT hearings on fines. A taxpayer was let off a fine as having a reasonable excuse for failing to make a return on time. So far, so uninteresting; it was, though, the alternative ground that the court found for the taxpayer that took the seasonal chill away.

Put simply, it was a defeat for the unfeeling system. To be immediately clear, we are not talking about Her Majesty's Revenue and Customs or any of its officers. Indeed, that's the point of this little tale: none of them was involved, and that was the problem. In the judgement, you feel the judge, Richard Thomas, warming to his theme when discussing the penalty letter: '*The letter shows it to have been issued by HMRC, CT Services, Corporation Tax Services, HMRC, United Kingdom, BX9 1AX, but no name of any officer is given (unless it is a Mr or Ms C. T. Services, which seems unlikely)*'. Ho ho! Sure enough, that is the fatal flaw. It is a mere computer that has spewed out the determination. Here, at least, that was not good enough. In this instance, as the judge said, '*a determination under s.100 [TMA 1970, the relevant penalty section] must be made by an officer of HMRC, that is a human being*'.

HMRC officers might have preferred to see that last phrase punctuated to make it clearer that they are all human beings, but we take the point. Don't get too excited; there are plenty of situations where the computer can be used. Just for once though, it was a triumph of humanity over the machine.

www.bailii.org/uk/cases/UKFTT/TC/2017/TC06225.html

Glossary				
Organisations		Courts	Taxes etc	
CIOT - Chartered Institute of Taxation	ICAEW - The Institute of Chartered Accountants in England and Wales	CA - Court of Appeal	ATED - Annual Tax on Enveloped Dwellings	NIC - National Insurance Contribution
EU - European Union	ICAS - The Institute of Chartered Accountants of Scotland	CJEU - Court of Justice of the European Union	CGT - Capital Gains Tax	PAYE - Pay As You Earn
EC - European Commission	OECD - Organisation for Economic Co-operation and Development	FTT - First-tier Tribunal	CT - Corporation Tax	R&D - Research & Development
HMRC - HM Revenue & Customs	OTS - Office of Tax Simplification	HC - High Court	IHT - Inheritance Tax	SDLT - Stamp Duty Land Tax
HMT - HM Treasury		SC - Supreme Court	IT - Income Tax	VAT - Value Added Tax
		UT - Upper Tribunal		

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