Briefing

Private client review for March

Speed read

This month, we comment on two victories for HMRC before the tribunal which serve as a reminder of HMRC's increasing scepticism over claims for SDLT relief. The government confirms it will continue with its regimes for persons of significant control and the register of overseas entities, despite a recent CJEU ruling. A record number of tax returns were submitted on time this year. Another couple of wins for HMRC in relation to discovery assessments confirm that the concept of staleness (following *Tooth*) may in fact be dead, and also remind us that taxpayers cannot hide behind the 'smokescreen' of professional advisers. Finally, a recent FTT decision (relating to an IHT scheme) illustrates that FTT decisions are not binding in other cases.

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SDLT: further wins for HMRC

We have commented previously on HMRC's recent successes in the SDLT realm. A further two decisions – one relating to the application of mixed use SDLT rates and another on the availability of the relief from higher SDLT rates where the new property is a replacement for the taxpayer's main residence – have continued this trend.

In *Sexton v HMRC* [2023] UKFTT 73 (TC), the taxpayers acquired a leasehold interest in a flat, with a right under the lease to use a communal garden. Initially, the taxpayers paid SDLT at residential property rates; however, they later claimed a refund on the basis that the property was not in fact wholly residential and so SDLT should have been charged instead at the (lower) rates for mixed use properties.

The taxpayers argued that the communal garden was non-residential as it was used 'in common' with the owners of the other properties in the block of flats. In their view, the right to use the garden would need to subsist solely for the benefit of the taxpayers' flat for it to be residential in nature.

However, the First-tier Tribunal (FTT) agreed with HMRC's analysis, i.e. that the flat was the main subject matter of the transaction and the right to use the garden was appurtenant to the main subject matter. As such, it did not change the nature of the property from residential to non-residential.

In *Cohen v HMRC* [2023] UKFTT 90 (TC), the taxpayer purchased a property, renovated it and moved in – but moved out again within ten days. After three months of ownership, he sold the property to his parents and bought a flat.

The taxpayer submitted an SDLT return which did not include any charge to higher rate tax, on the basis that the purchase of the flat was the replacement of his previous main residence.

However, the FTT concluded (echoing arguments more normally aired in CGT) that the first property was not the taxpayer's only or main residence, noting that:

- occupation of a property by the taxpayer does not necessarily create a residence for SDLT purposes;
- the very brief period in which the taxpayer lived in the first property was indicative that his occupation was temporary; and
- the taxpayer decided to sell the first property and to purchase the flat during the first property's renovation works, i.e. before he moved into the first property.

Accordingly, the taxpayer's appeal against the application of the higher rate of SDLT was dismissed.

On the facts, these decisions are unsurprising; however, they serve as a reminder that HMRC is becoming increasingly sceptical of claims for relief under the SDLT rules and is happy to challenge taxpayers in this area. HMRC's consultation on SDLT (which closed around one year ago, but no outcomes have yet been announced) states HMRC's view that 'the rules for mixed-property transactions are being used by some purchasers to unfairly reduce the SDLT payable, despite the purchase not containing any meaningful non-residential aspects.' Taxpayers should therefore expect continued scrutiny in this area.

Transparency initiatives and HMRC's use of data

In a significant judgment published on 22 November 2022 (joined cases of *Luxembourg Business Registers* (Case C-37/20) and *Sovim* (Case C-601/20)), the CJEU struck down provisions of EU law that gave the general public unfettered access to information on the beneficial owners of legal entities. A number of European jurisdictions immediately restricted access to their beneficial ownership registers, and there was much speculation on the extent to which the ruling might affect transparency initiatives in the UK. However, on 30 January 2023, the government published a memorandum which confirmed that, in its view, both the persons with significant control (PSC) and the register of overseas entities (ROE) regimes are compliant with the European Convention on Human Rights. We can therefore expect these regimes to remain in place in their existing forms, at least for the time being. In this context, taxpayers ought to bear in mind that data collected from the PSC and ROE registers is being used by HMRC to investigate their affairs. In connection with the recent deadline for filing under the ROE regime, HMRC has issued 'nudge' letters to overseas entities and published policy papers urging taxpayers to come forward and declare any unpaid tax before investigations are instigated.

Self-assessment deadline: good behaviour by taxpayers

HMRC has reported that a record number of taxpayers have submitted their self-assessment tax returns on time. 11.7 million returns were received by 31 January 2023, with an estimated 600,000 taxpayers missing the 2021/22 self-assessment deadline (and potentially incurring late filing penalties and interest on any unpaid tax). Furthermore, total HMRC receipts for the period from April 2022 to January 2023 stand at £660bn: an increase of more than £65bn from the same period a year earlier. However, these record-breaking figures are not necessarily as impressive as they sound: the

stark increase is widely being attributed to fiscal drag, i.e. tax thresholds and allowances failing to keep up with inflation. It would therefore be unwise for taxpayers to expect any immediate action from the government on tax rates.

Discovery assessments prove fruitful for HMRC

Harrison v HMRC [2023] UKUT 38 (TCC) concerns an appeal lodged by Mr Harrison against the FTT's failure to grant him permission to appeal against an HMRC discovery assessment. The assessment was made in respect of Mr Harrison's receipt of sale proceeds of a property in the 2007/08 tax year, received via a partnership between Mr Harrison and his wife following an arrangement with their son and daughter-in-law.

Mr Harrison appealed against the assessment on three grounds (as modified by the Upper Tribunal (UT)), being that the FTT had incorrectly concluded that HMRC had sufficiently proved that they had made a discovery for the purposes of TMA 1970 s 29(1); and that the relevant discovery had not become stale. The third ground related to Mr Harrison's liability to tax on the amount received by the partnership. The UT dismissed Mr Harrison's appeal on all points.

On the validity of the discovery assessment, the UT found that Mr Harrison did not deny that HMRC had made a discovery. Rather, his argument was that the discovery had become 'stale' as the assessment was only issued in 2015 (relating to events in 2007/08).

Mr Harrison proposed an inventive argument pursuant to *HMRC v Tooth* [2021] UKSC 17 (the main authority on 'staleness', discussed previously), this being that the UT should apply the ruling on staleness set out in the Court of Appeal (CA) decision in *Tooth* (i.e. that a discovery requires an element of 'newness' that may be lacking if it is not issued 'within a reasonable period after' the discovery is made), rather than relying on the *obiter dicta* of the Supreme Court's (SC's) later decision in the same case (i.e. that the concept of staleness did not exist), which were not strictly binding.

The UT, however, concluded that it was bound by the SC's decision, which provided general guidance on the important issue of staleness, and which the SC clearly intended should be followed by all courts and tribunals. On this basis, the staleness aspect of Mr Harrison's appeal was dismissed.

It is perhaps not surprising that the UT decided to follow the 'higher' authority of the SC, rather than that of the CA, notwithstanding that the SC's relevant commentary was *obiter*. However, whether this will always be the tribunals' approach remains to be seen. And the UT's comments that 'staleness' is not like Monty Python's parrot 'not dead, only sleeping. It is [in fact] deceased' may not prove to be the final word on this.

HMRC has also been successful in *Rizvi v HMRC* [2023] UKFTT 124 (TC). The case relates to a dispute concerning discovery assessments issued to Dr Rizvi in respect of self-assessment tax returns filed for the 2014/15 to 2016/17 tax years, in each of which Dr Rizvi claimed enterprise investment scheme (EIS) relief. EIS relief was not in fact available to Dr Rizvi, since he had not received the EIS3 compliance certificate which is required before a claim for EIS relief can be made. The FTT had to determine whether Dr Rizvi, or someone acting on his behalf, had been careless, since this is the requirement for HMRC to have been entitled to issue the assessments.

The FTT concluded that Dr Rizvi had not himself been careless in filing his returns, as he was being advised on his tax affairs by an accountancy firm (and had been advised by the same firm for more than 20 years). The FTT was satisfied that the firm was acting on Mr Rizvi's behalf: it provided him with advice (and had introduced him to the EIS scheme), completed his tax returns and was named as his agent on these returns.

The FTT decided that the firm acted carelessly in preparing Dr Rizvi's returns, as it should have been aware of the need for an EIS3 to claim EIS relief. HMRC was therefore entitled to raise the discovery assessments against Dr Rizvi and were within the six-year time limit (which is the relevant limit given that the loss of tax was caused carelessly).

This is an interesting follow-on from *Cruise v HMRC* [2023] UKFTT 41 (TC) and *Golden Grove Trust v HMRC* [2023] UKFTT 27 (TC), discussed in last month's column. The takeaway message is clear: taxpayers cannot hide behind the 'smokescreen' of professional advisers. The actions of such advisers are ultimately interpreted as the actions of the taxpayer by the tribunals, so pick your advisers carefully.

Proof that FTT decisions are not binding in other cases, although confusion may ensue

In *The executors of the estate of Linington v HMRC* [2023] UKFTT 89 (TC), the FTT found that a reversionary interest in a settlement was not excluded property and that, when this interest was assigned to a different trust, this was a transfer of value for IHT purposes.

The case concerned the assignment of a reversionary interest in a 150-year-old Isle of Man trust (the MTrust), to the (now late) Mr Linington, who was also granted an option to become an income beneficiary. He then transferred the reversionary interest to the trustees of a second trust (the KTrust), before exercising the option of becoming an income beneficiary of the MTrust. This was pursuant to an IHT scheme, widely used before the law was changed in 2012, rendering the scheme ineffective.

Since the relevant transfers took place in 2010, before the introduction of FA 2012 ss 74A–74C (discrediting the scheme), the question as to whether there were transfers of value for IHT purposes first depended on whether the acquisition of the reversionary interest was made for money or money's worth (and therefore was not excluded property). The FTT found that Mr Linington acquired the reversionary interest at the same time as he had paid a fee for this arrangement and, on this basis, the reversionary interest was not excluded property.

The transfer to the KTrust was found to be a transfer of value as the separation of the reversionary interest in the MTrust from the option to become an income beneficiary of that trust led to a reduction in the value of Mr Linington's estate. This met the definition of a transfer of value under IHTA 1984 s 3 and therefore the transfers gave rise to an IHT charge.

What makes this decision interesting and (perhaps) surprising, is that it is contrary to the previous FTT decision in *Salinger and another v HMRC* [2016] UKFTT 677 (TC), where the facts were almost identical (as the same scheme was used). In *Salinger*, the FTT held that the scheme worked, but here it was found to fail. The *Linington* judge was careful not to expressly disagree with *Salinger*, but instead said: 'I have reached a different conclusion by reference to the evidence and legal arguments as they were presented to me'. This is potentially confusing: advisers may be left in some doubt as to the effectiveness of the scheme. Although there are likely to be few unresolved cases in respect of this specific issue, given the 2012 legislation, the case is a reminder that taxpayers cannot necessarily rely on the FTT always to follow the decisions made in previous FTT cases. ■

Note: this article was written before the Spring Budget. For the private client aspects of the Budget, see last week's edition.

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- Tax procedure's dead parrot: staleness and stare decisis (C Kirkham-Wilson, 21.2.23)
- How binding are FTT decisions? (O Marre, 9.3.23)