Briefing

Private client review for November

Speed read

This month, we comment on a couple of further victories for HMRC in the SDLT-realm: in *Averdieck*, the FTT quashed the taxpayers' claim that a right of way over land meant their property was 'mixed use'; and in *Wilby*, HMRC successfully argued that a discovery assessment regarding an SDLT return can be valid notwithstanding that one of the discovering officers cannot be named. A further two cases regarding information notices are victories (for now) for the taxpayers: in *Newpier*, the FTT held that HMRC cannot continue an enquiry where the taxpayer has no more information to provide; and in *Davies*, HMRC was unable to request information beyond that which was reasonable. Finally, we look at two recent 'nudge letter' campaigns by HMRC which demonstrate HMRC's active use of data collected, including by other government departments.

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SDLT: rights of way over residential property insufficient to create 'mixed use'

In our March column, we looked at the Court of Appeal's decision in *Hyman and others v HMRC* [2022] EWCA Civ 185. The findings in that case were central to the discussion in *Averdieck v HMRC* [2022] UKFTT 374 (TC) and the taxpayers in both cases were represented by the same counsel.

Mr and Mrs Averdieck purchased a large home set in roughly 14 acres of extensive grounds, for which they paid c.£3m. The case turned on the impact of a lane running along one of the boundaries of the property, which provided access to a neighbouring farm and five residential homes.

The taxpayers were subject to various obligations to protect the public's right of way over and along the lane, and (having paid the full rate) made a claim for an SDLT repayment on the basis that the land was 'mixed use'. The taxpayers' initial stance was that the lane was not required for the 'reasonable enjoyment' of the house, but by the time the case was heard this argument had been rejected in *Hyman*. The FTT agreed with the court's finding in that case that the existence of burdensome obligations in respect of land does not prevent that land constituting the 'grounds' of a residence.

As such, the taxpayers changed tack and instead argued that the land comprising the lane was used for a separate commercial purpose, namely the access to the neighbouring farm. The FTT rejected this argument, with the judge noting that: 'Whilst I accept that the farmer's business is a commercial operation, it is conducted on his farm. It is no more conducted in the lane than it is on the main road.'

As the latest in a string of victories for HMRC on the topic of mixed-use property, this decision serves as a reminder that the tribunals will give the term 'grounds' its ordinary and wide meaning. As noted previously in this column, the government's consultation on SDLT (which closed in February 2022) contained various suggestions for reform of the mixed property rules (which would narrow their application), so we wait for news on this front.

Discovery assessments: 'whodunnit'?

Wilby v HMRC [2022] UKFTT 348 (TC) marked another win for HMRC in the area of discovery assessments. The question before the FTT (in a case where the amount of the assessment was not debated) was: can an assessment be validly made where HMRC cannot identify which of its officers made the discovery in question? The FTT's answer: yes.

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The case concerned an SDLT return filed by Mr Wilby in June 2008 and a discovery assessment issued in April 2011 under FA 2003. The SDLT discovery assessment rules are in a similar form to the TMA 1970 provisions, so this case will be of wider interest. As an aside, the fact that the judgment relates to an assessment issued more than a decade ago (!) is a sobering reminder of the glacial pace at which tax disputes can sometimes unfold.

Referring to the Supreme Court case of *HMRC v Tooth* [2021] UKSC 17, the parties agreed that the burden was upon HMRC to prove, on the balance of probabilities, that two key requirements for a valid assessment were met. First, an actual HMRC officer must make a discovery – that is, form a belief – that there has been a loss of tax (the 'subjective test'). Secondly, that belief must be one that might have been formed by a hypothetical reasonable HMRC officer (the 'objective test').

Mr Wilby argued that for the FTT to judge whether the subjective test was met, HMRC had to identify the officer who had made the discovery so that that officer's state of mind might be examined. Readers would be forgiven for thinking that this line of reasoning strayed towards a philosophical argument as to the number of angels able to dance on the head of a pin, but the FTT did not dismiss the point as an effort to escape assessment on the grounds of a mere technicality. The judge agreed that, per *Tooth*, HMRC is not entitled to use the collective knowledge of HMRC to justify an assessment. However, the judge decided that an assessment was not automatically invalid if the HMRC officer that made the discovery could not be identified. In this case, detailed evidence as to the nature of HMRC's process in issuing the assessment was sufficient to prove that the discovery had been made by one of three HMRC officers, albeit it was impossible to identify which of the three.

The judge stated that: 'It might be a rare case in which [HMRC can establish the subjective test is met] in the absence of evidence from the officer in question', but Mr Wilby's was one such case. As such, while the case reassures HMRC that assessments can be validly issued without having to identify the discovering officer, the FTT has not shut the door fully on taxpayers who might wish to run a similar argument.

Information notices: HMRC directed to close enquiry as no more evidence available

In *Newpier Charity Ltd v HMRC* [2022] UKFTT 373 (TC), Newpier (a charity) had claimed tax relief on income and gains applied against a loan taken out for the purchase of shares in 1988; Newpier stated that the purchase of the shares was a permitted charitable investment and the repayment of the loan was for wholly charitable purposes.

HMRC opened an enquiry and issued information notices asking for historic information going back to 1988. Newpier filed an application for a closure notice to be issued on the basis that the charity did not have the information requested by HMRC, and in any event it was irrelevant to the enquiry.

HMRC stated that the information was reasonably required to assess whether income had been used for charitable purposes, but Newpier argued that it was unreasonable to ask for information relating to transactions that happened more than 20 years ago, and the nature of the relationships involved (a private family had allegedly acted as guarantors for the loan) was such that there may not have been any documentation in the first place. Further, HMRC had no power to assess for those periods.

The FTT, whilst acknowledging that HMRC's concerns may be legitimate, found in Newpier's favour, stating that the information requested was simply not available and, as such, there was no reason to keep the enquiry open. They therefore decided that HMRC should make a decision based on the information available to them and ordered that HMRC issue a closure notice (which may ultimately not have been in Newpier's favour).

The broad takeaway from the case (other than ensuring the court is given all documents on which the parties intend to rely, which was at issue here) is that taxpayers may reasonably push back against broad requests for historic information, even if 'staleness' arguments may not stand following the decision in *Tooth*.

Challenging information notices can pay-off

In *Davies v HMRC* [2022] UKFTT 369 (TC), another win for the taxpayer, the FTT allowed the taxpayers' appeal against FA 2008 Sch 36 information notices covering years in which HMRC had not opened enquiries and ordered HMRC to issue a closure notice.

An HMRC officer opened an enquiry into the 2017/18 tax year on the basis that he considered the declared income of the appellants (Mr Davies and his wife, who ran a property investment partnership) insufficient for them to be able to afford to buy and refurbish their large home. HMRC initially suspected that there was undeclared income as their declared funds were not sufficient to meet mortgage costs and to fund the extensive refurbishments. Additionally, Mr Davies had made public claims in a book he had authored, about his apparently substantial profits and numerous foreign holidays all being funded from his property development activities.

HMRC requested additional information for the years prior to the year of the enquiry, including, among other things, bank statements for all bank accounts held around the world, and details, since April 2014, of all refinancing done for all properties owned by the couple (whether by the business or personally). The question was whether HMRC was entitled to call for the information relating to years not under enquiry.

As in the cases of *Hackmey* [2022] UKFTT 160 (TC) and *Jenner* [2022] UKFTT 203 (TC), the burden of proof was on HMRC to show that (1) the information was reasonably required for them to be able to assess the position in the tax year for which the enquiry had been opened, and (2) where an information notice had been submitted for earlier years, additional conditions were met. The relevant conditions were that (1) notice of an enquiry had been given (which it had not for years before 2017/18), or (2) an HMRC officer had reason to suspect an underpayment of tax or that relief given had become excessive.

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The FTT summarised the position as follows: 'a suspicion must be objectively justified, and the officer must explain what facts and evidence they are relying on which have given rise to their suspicion.' That suspicion must have continued until the present day, otherwise the documents would no longer be reasonably required to check the position.

The HMRC officer already held a suspicion that there was undeclared income at the date of the notice, and so the second condition was satisfied. The fact that the reason for this belief had been dealt with by additional discussion with the taxpayers, and the officer's suspicion had switched to a belief that there had been excessive relief claimed, did not matter as a suspicion remained.

The FTT agreed that, at the time the information notice was issued, there was sufficient doubt about the means of the taxpayers to make it objectively reasonable for HMRC to be concerned about how they could afford their lifestyle.

The question then arose as to whether the information requested was reasonably required for HMRC to assess the position. The FTT did point out that in HMRC's own guidance they state that it is impractical to look at every entry in a borrowing account and officers are told to use 'a reasonable basis as an approximation'. They acknowledged that obtaining the information would be an onerous task for the taxpayers and indeed may not give HMRC the information it needs. The FTT therefore allowed the appeal.

This case is another reminder to taxpayers to consider carefully whether information requested by HMRC is indeed 'reasonably required', whether HMRC has reason to suspect there has been an underpayment, or whether HMRC is simply fishing to find information that allows them to subsequently form a suspicion not already held.

More nudge letters for PSCs and regarding exceptional circumstances

HMRC is again issuing taxpayers 'nudge letters' relating to claims they made for days spent in the UK due to 'exceptional circumstances' and which should not, therefore, count towards their 'day count' under the statutory residence test.

HMRC is asking taxpayers and their advisers to check the residence pages of their 2020/21 self-assessment returns, noting that they are seeing the following common errors:

- claims for exceptional circumstances lasting more than 60 days (readers will recall that the cap on days in the UK for exceptional circumstances is 60 days per tax year, regardless of whether those exceptional circumstances continue beyond 60 days); and
- claims for Covid-19 related workdays in the UK that exceed the limit of 57 days (taxpayers are reminded in the letters that the relevant period for which this claim could be made was from 6 April 2020 to 1 June 2020 only).

The letters ask the taxpayers and their agents to review the information submitted and, if inaccurate, remedy the errors within a set timeframe of 60 days.

This round of nudge letters comes shortly after nudge letters sent to people who are no longer listed as persons with significant control (PSCs) on Companies House records, and is swiftly followed by another nudge letter campaign targeted at PSCs. Those PSCs who have declared income under £100,000 are encouraged to review their tax returns (as the £100,000 figure is lower than HMRC expect), and those who are not filing returns at all are asked to reconsider whether they need to file a return.

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The latest rounds of nudge letters suggest a focus by HMRC on visibly encouraging tax compliance (and being seen to do something about possible avoidance) while appearing to be understanding and allowing taxpayers to correct errors.

Not every return will have an error, but it is worth taking the opportunity to correct returns within the allotted time-period and avoiding penalties down the line. ■

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- ▶ *Averdieck*: were grounds mixed use? (D Whiscombe, 2.11.22)
- ▶ Cases: *D Wilby v HMRC* (12.10.22)
- ▶ Other cases that caught our eye (*Newpier*) (28.10.22)
- ▶ Cases: *B Davies and others v HMRC* (28.10.22)