Briefing

Private client review for October

Speed read

This month, we comment (briefly) on the recent 'mini-Budget', ensuing economic turmoil and the government's subsequent U-turns, leaving taxpayers with uncertainty as to the future fiscal landscape. HMRC has demonstrated its use of data from other government departments in their latest 'nudge letter' campaign. Two recent cases – *Harrison* and *Watt* – throw light on the tribunals' (contrasting) approach to assessing 'reasonable excuse' regarding the late filing of personal tax returns. The Court of Appeal's recent decision in *Skinner* confirms that entrepreneurs' relief can apply even if a trust beneficiary's life interest in the business asset being disposed of has existed for a very brief period. Finally, the FTT's decision in *Sehgal* merits detailed study for any remittance basis taxpayers entering into agreements which have a connection to the UK.

Edward Reed
Macfarlanes
Edward Reed is a partner in the private client team at Macfarlanes. He advises internationally mobile families on their asset structuring, personal tax and succession planning, wills, trusts and personal tax planning. Email: edward.reed@macfarlanes.com; tel: 020 7849 2568.

Klara Kronbergs
Macfarlanes
Klara Kronbergs is a private client knowledge lawyer at Macfarlanes. She has experience in advising on a broad range of tax, trust, estate and succession planning issues for UK and international clients. Email: klara.kronbergs@macfarlanes.com; tel: 020 7791 4376.

Growth Plan and the Medium-Term Fiscal Plan 2022: a spectacular reverse ferret

In a staggering month in Westminster, the (then) chancellor, Kwasi Kwarteng, published his 'Growth Plan' for 2022 on 23 September, announcing the biggest package of tax cuts in decades. Following Mr Kwarteng's dismissal and Jeremy Hunt's subsequent appointment as chancellor (on 14 October), the 'Growth Plan' has now largely been reversed, principally by Mr Hunt's 'Medium-Term Fiscal Plan' announcements of 17 October. With so much back and forth in such a short space of time, private clients (and their advisers!) would be forgiven for losing track of where we have ended up on tax rates and other policies.

- **Income tax rates:** Initially, it was proposed to abolish the 45% additional rate of income tax from April 2023, but this plan was scrapped on 3 October, foreshadowing a number of further U-turns. The already planned 1% cut to the basic rate of income tax (from 20% to 19%) was to be brought forward to April 2023. However, Mr Hunt confirmed on 17 October that the 20% rate will remain 'indefinitely' until economic circumstances allow it to be cut.
- **NICs/Health and Social Care Levy:** National insurance rates will be reduced from 6 November 2022, effectively removing the temporary 1.25% increase (which took effect in April 2022) for the remainder of the 2022/23 tax year. The 1.25% Health and Social Care Levy will not come into force as a separate tax from 6 April 2023 as previously planned. Mr Hunt's announcements on 17 October confirmed that these aspects of the Growth Plan would remain in place.
- **Dividend tax rates:** From April 2023, the 1.25% increase to dividend tax rates (which took effect in April 2022) was to be reversed. Mr Hunt has now scrapped this plan, confirming that the increase will remain, generating an estimated £1bn per year.
- **Corporation tax rate:** Previous plans to increase the main corporation tax rate to 25% were to be cancelled, with the rate set to remain at 19% from April 2023. In one of the first of the major tax U-turns (announced on 14 October), it was confirmed that the corporation tax rate will rise to 25% from April 2023.
- **SDLT:** From 23 September (the date of the mini-Budget), the threshold from which SDLT must be paid was doubled to £250,000 for all home purchases, and thresholds for first-time buyers' relief increased. So far, these tax cuts have not been reversed.

Following the announcements of 17 October, the chancellor is due to unveil his full 'Medium-Term Fiscal Plan' on 31 October, alongside forecasts from the Office for Budget Responsibility. Meanwhile, private clients would be wise not to make any plans on the basis of previous announcements (at least until the position is confirmed on 31 October), and to watch this space for possible further changes.

Joined-up thinking: the use of data linking by HMRC

Enhanced transparency in relation to corporate and trust structures has been a global trend in recent years. In the UK, certain transparency initiatives such as the trust registration service require information to be submitted directly to HMRC. However, other regimes (such as the register of overseas entities and the persons with significant control register) require entities to file the appropriate information with other government departments (such as Companies House). HMRC's latest 'nudge letter' campaign demonstrates the use of data linking between government departments, with HMRC making use of data provided to Companies House.

Since 2016, UK companies have been required to declare information to Companies House about individuals who qualify as 'persons with significant control' (PSCs) in relation to the company. This includes individuals who hold more than 25% of the shares in a company. Recently, HMRC has used the information on the PSC register to identify individuals who: (a) were previously listed as PSCs at Companies House but are now no longer so listed (indicating that they may have disposed of their shareholding in the company); and (b) have not reported any share disposals in their tax returns. In letters to such individuals, HMRC advises the recipients to amend their tax returns (and to pay any overdue tax) if appropriate.

This campaign demonstrates that HMRC is drawing inferences from wider information available to them in order to maximise tax compliance.

When is a reasonable excuse not reasonable (for the late filing of personal tax returns)?

Two recent cases – *Harrison v HMRC* [2022] UKUT 216 (TCC) and *Watt v HMRC* [2022] UKFTT 329 (TC) – throw light on the tribunals' (contrasting) approach to assessing 'reasonable excuse' regarding the late filing of personal tax returns.

FA 2009 Sch 55 para 23(1) provides that a penalty for late filing of an income tax return does not bite if the taxpayer can prove that there is a 'reasonable excuse' for failure to file on time. Paragraph 23(2) clarifies that where the taxpayer had a reasonable excuse but this has ceased, that excuse will continue to apply, provided the failure is remedied without unreasonable delay.

In *Harrison*, the applicant had suffered a litany of personal misfortunes, including a violent carjacking, his mother's death, the sectioning of his daughter and significant financial and operational challenges with his business, resulting in his suffering depression. He argued that this was the key reason why he had filed his 2014/15 self-assessment return (due by end of January 2016) more than two years late (on 13 September 2018).

On appeal, the UTT upheld the FTT's decision to award a £42,000 'super-penalty' for the late filing. Whilst both conceded that there was a reasonable excuse for the failure to file the return by the original 2016 deadline, this did not continue until September 2018. It could not therefore be said that the failure to file had been remedied without unreasonable delay. Further, the fact that during this time, Mr Harrison, notwithstanding his depression, had continued to carry out complex work-related tasks, suggested he should have been able to remedy the filing failure sooner than he had done.

Contrastingly, in *Watt*, the filing delay was essentially due to the appellant's unfamiliarity with the online filing system (which was looked at more kindly than, initially, a reporting error due to limitations with the filing software in *Tooth*, covered previously in this column). After previously filing paper returns, Ms Watt was sent a notice to file her 2019/20 return online, which she attempted in September 2020. She believed that she had successfully filed, because she paid the tax which the system had calculated as being due and received a message in her tax account confirming that the right amount of tax had been paid. In reality, she had omitted to complete the final stage of the return submission process and after being alerted to the error by HMRC in March 2021 (although in terms that Ms Watt did not initially understand), submitted a paper return that August.

The FTT found in her favour, as she was genuine in her belief that she had submitted the return and once it had been definitively explained that she had not, she swiftly remedied the situation. This amounted to a reasonable excuse and the penalties were cancelled.

Whilst the facts of the cases were very different, it is interesting that quantum may play a role: the FTT was not convinced by the appellant's argument when £42,000 of tax was at stake in *Harrison*, compared to £1,300 in *Watt*. Taxpayers may perhaps take comfort that if they act promptly to remedy a discrepancy, their case may be considered kindly; whereas a longer delay may not be deemed reasonable, especially if the taxpayer has been capable of otherwise managing their affairs.

The Quentin Skinner 2015 Settlement: a matter of construction?

The Court of Appeal's recent decision in *The Quentin Skinner 2015 Settlement L and others v HMRC* [2022] EWCA Civ 1222 is interesting because it:

- confirms that entrepreneurs' relief ('ER') (now known as business asset disposal relief) can apply even if a trust beneficiary's life interest in the business asset being disposed of has existed for a very brief period; and
- underlines that the modern approach to statute drafting is consistency and independence – sections are capable of being interpreted on their own merits and should be construed on this basis, without reading across to other provisions or reliance on historic versions of the legislation.

On 30 July 2015, Mr Skinner established three trusts, granting a life interest to each of his three children. On 11 August 2015, he settled shares in DPAS Ltd in each of the three trusts.

On 1 December 2015, the trustees of each of the trusts sold the shares and an ER claim was filed. For ER to apply to the disposal of trust business assets, three conditions must be satisfied:

(i) the trustees of a settlement must make a disposal of 'settlement business assets';
(ii) there must be an individual who is a 'qualifying beneficiary' (i.e. an individual with an interest in possession in the business assets); and
(iii) the 'relevant condition' must be met. In this case (under the statutory provisions in place at the relevant time), the relevant condition was that, for at least 12 months in the previous three years, DPAS Ltd must have been the qualifying beneficiary's 'personal company' (broadly speaking, owning at least 5% of the shares in their personal capacity) and the qualifying beneficiary must have been an officer or employee of DPAS Ltd.

> The decision should mean that where HMRC seeks to read into legislation words or concepts that do not expressly appear in the relevant sections, there is now clear authority that this approach is likely to be wrong

It was accepted that conditions (i) and (iii) were satisfied. However, HMRC argued (relying on wording in a subsequent provision in the legislation) that, in relation to condition (ii), it was necessary for the beneficiary to be a qualifying beneficiary throughout the period of 12 months during which the relevant condition must be met. The taxpayers disputed this, arguing that an individual need only be a 'qualifying beneficiary' at the time of disposal.

The court rejected HMRC's interpretation and accepted the taxpayers' view. The specific section of the statute governing the relief for trustees is clear. Where a piece of legislation is clear, it is not right to seek to rely on a later provision to change or add to its character.

The decision should mean that where HMRC seeks to read into legislation words or concepts that do not expressly appear in the relevant sections, there is now clear authority that this approach is likely to be wrong. For practitioners, it will also mean that more focus than ever will be needed on reading the blackletter law.

Sehgal: the remittance basis and the meaning of service

UK residents who are non-UK domiciled (and not deemed domiciled) are usually eligible to pay tax on the remittance basis (and so are only subject to UK tax on their foreign income and gains if such income and gains are 'remitted' to the UK).

A remittance can obviously include physically bringing property to the UK (such as importing a car purchased using foreign income) or paying for a service received in the UK (such as using foreign income to pay a plumber to carry out work at a UK home). However, uncertainty persists around aspects of what else may constitute a remittance.

In *Sehgal v HMRC* [2022] UKFTT 312 (TC), the FTT considered whether entering into an agreement to waive a debt or release an indemnity could give rise to a taxable remittance.

The facts of the case are complex but revolve around a side letter entered into as part of an agreement by the taxpayer to sell a company (Company A) to a third party purchaser. The side letter had three relevant terms:

- The taxpayer was released from an indemnity it had given to the purchaser regarding an outstanding debt owed to a subsidiary of Company A by another of the taxpayer's companies (Company B);
- Company B was released from its obligation to pay the debt; and
- The purchaser agreed to ensure that Company A's subsidiary did not pursue Company B for payment of its debt.

HMRC argued that these contractual rights were themselves 'property' which was used or received in the UK since they accrued at least in part to UK companies.

The FTT found that, where a contractual right was conditional (i.e. it fell away on performance of the contract), it could not amount to 'property' for remittance purposes

HMRC also said that the purchaser's agreement to release the indemnity, procure the waiver of the debt and arrange for its subsidiary not to pursue it was a service provided in the UK (the debts were UK situated).

The FTT found that, where a contractual right was conditional (i.e. it fell away on performance of the contract), it could not amount to 'property' for remittance purposes.

It did, however, find that an agreement to release an indemnity, and an agreement to waive a debt due *from a third party* (but not a simple waiver between creditor and debtor) could amount to services for remittance purposes. Where the underlying obligation was owed by a UK entity, the service would be performed in the UK – so there would be a remittance if the payment for the service (i.e. the consideration for the release/waiver) derived from non-UK income or gains.

This conclusion may be a surprise to many observers, as it appears to extend the meaning of 'service' significantly beyond previously understood limits. That said, HMRC (who lost the case despite winning the argument on services) do maintain in correspondence that being released from a debt is a 'service' for Condition A under ITA 2007 s 809L(2)(b) and are widely expected to appeal, so more guidance may be forthcoming shortly.

In the meantime, remittance basis taxpayers should take advice before entering into any agreements with a UK connection if the consideration to be provided represents unremitted overseas income/gains. ■

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- Growth Plan 2022: Eye-catching announcements for private clients (M Radcliffe, 27.9.22)
- How to win reasonable excuse cases (11.10.22)
- Cases: *The Quentin Skinner 2015 Settlement L and others v HMRC* (26.9.22)
- No gain, no pain: *Sehgal* and the remittance basis (O Marre, 6.10.22)

Five recent highlights

1. Partnerships and the *BlueCrest* appeals: Andrew Howard (Ropes & Gray) reviews the *Bluecrest* appeals



2. UK implementation of Pillar Two: Laura Hodgson, Elena Rowlands & Jessica Kemp (Travers Smith) analyse the UK's draft legislation.

3. Purpose-based rules: Have we hit *BlackRock*-bottom, asks Constantine Christofi (RPC).


4. Significantly influential? Amanda Hardy QC & Oliver Marre (5 Stone Buildings) assess the impact of the *BlueCrest* appeal on LLPs.


5. The CIR regime and acquisition finance: Matthew Mortimer & Kirsten Hunt (Mayer Brown) explain how the CIR regime applies to UK acquisition finance transactions.

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