Briefing

Private client review for July

Speed read

This month, we examine two recent taxpayer losses relating to the concept of 'reasonable excuse': one (in *Archer*) regarding the late payment of tax whilst judicial review proceedings were ongoing, and the other (in *Hughes Property Partners*) involving the late filing of an ATED return. We also comment on the FTT's anonymised decision in *Foreign National*, where HMRC's request for information was held to be reasonably required and did not amount to a 'fishing expedition'. In *Suterwalla*, the taxpayer manages to break HMRC's strong record in SDLT cases with a win relating to mixed use rates. HMRC has started writing to UK resident taxpayers named in the Pandora Papers – we consider the implications for taxpayers. Finally, HMRC statistics show an estimated 99.2% increase in the number of additional rate taxpayers between 2020/21 and 2023/24.

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.

Nisha Majumdar
Macfarlanes
Nisha Majumdar is an associate at Macfarlanes who advises on a wide range of private client matters, including tax, wills, trusts and succession planning. She acts for a variety of clients including high-net worth individuals, family offices and trustees, with much of her work including an international element. Email: nisha.majumdar@macfarlanes.com; tel: 020 7849 2229.

Am I being unreasonable? *Archer* and *Hughes Property Partners Ltd*

The concept of reasonable excuse was once again under examination in the cases of *Archer v HMRC* [2023] EWCA Civ 626 and *Hughes Property Partners Ltd v HMRC* [2023] UKFTT 453 (TC).

In *Archer*, the taxpayer was appealing against surcharge notices which had been issued by HMRC because the taxpayer refused to pay a sum of income tax while they sought judicial review of the validity of enquiry closure notices. Once the judicial review process had been exhausted, the taxpayer paid the tax promptly. The question was whether they had a reasonable excuse for delaying payment whilst seeking judicial review.

The taxpayer argued that the existence of the judicial review proceedings made it reasonable for them to defer payment, and that if they had paid prior to the conclusion of the process, it would have risked undermining their claim.

Although the Court of Appeal agreed that paying on time might have frustrated the judicial review process in its early stages, delaying payment ceased to be reasonable once the taxpayer had lost at first instance. Notably, the court reached this arguably harsh conclusion despite the taxpayer receiving permission to appeal shortly after the first instance decision, having been granted interim relief blocking HMRC from enforcing bankruptcy proceedings for non-payment, and (in the court's view) there still being an element of risk that paying tax would have jeopardised the judicial review proceedings. Had the taxpayer provided further evidence for the reasons for delaying in this period (although the court did not specify exactly what evidence would be required), it seems the Court of Appeal might have been persuaded given these facts, but the continuation of the proceedings was not enough.

Archer should therefore be seen as a tale of caution: reasonableness does not stand still, and neither should the evidence to back it up.

Following on from our commentary in February (*Tax Journal*, 17 February 2023), in *Hughes Property Partners*, it was again confirmed that reliance on advisers is not enough to amount to reasonable excuse. The taxpayer, a property developer whose accountant was encountering annual tax on enveloped dwellings (ATED) for the first time, was appealing against penalties issued following the late filing of an ATED return.

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They argued that they had a reasonable excuse for the late filing, as HMRC had not made any request to file an ATED return and the accountant had found it difficult to obtain filing guidance from HMRC by telephone due to difficulties caused by the Covid-19 pandemic.

The taxpayer also claimed the penalties should be reduced due to special circumstances, including pressures their accountant had been facing at the time due to the pandemic (such as a large quantity of furlough claims). Ultimately, a return had been filed shortly after receipt of a notice to file an ATED return for another of the taxpayer's properties.

The FTT held that lack of knowledge on the part of the taxpayer's accountant and difficulty speaking with HMRC did not amount to reasonable excuse. There is no obligation on HMRC to issue filing notices for ATED, and HMRC's website provides ample guidance on ATED filing obligations and processes (the underlying point being the accountant should simply have done their homework).

The FTT also found that there were no special circumstances that warranted a reduction in the penalty. Although the pandemic was exceptional, there was no clear connection to the failure to file – prioritising furlough claims was a choice rather than a special circumstance.

Whilst the outcome is unsurprising given earlier decisions on adviser reliance, it is a noteworthy example of Covid-related difficulties not being enough when trying to persuade a tribunal of reasonableness or special circumstances.

Schedule 36 information notices: FTT dismisses non-UK resident's appeal

We have commented previously in this column on cases concerning information notices under FA 2008 Sch 36, where taxpayer success has been mixed. The recent FTT's decision in *Foreign National v HMRC* [2023] UKFTT 475 (TC) represents a victory for HMRC.

The taxpayer was not, and never had been, UK resident. In 2018, the taxpayer's agent notified HMRC of the taxpayer's intention to benefit from the non-resident landlord scheme in respect of a UK property rental business that had commenced in November 2010. In response, HMRC issued notices to file tax returns and subsequently also opened enquiries for the tax years from 2014/15 to 2016/17. HMRC had particular concerns that the taxpayer's property transactions met the 'badges of trade' and so could be considered property trading.

An information notice under Sch 36 was issued by HMRC in July 2019, requesting a variety of items, including banking records, rental income details, and information on the taxpayer's residence status. In August 2019, HMRC also issued a 'jeopardy amendment' (issued where HMRC believes there is likely to be a loss of tax to the Crown) in respect of the taxpayer's return for 2015/16.

The taxpayer appealed against the information notice, arguing that the items requested by HMRC were not 'reasonably required'. In particular, the taxpayer suggested that:

- HMRC could not reasonably require further information on matters to which the jeopardy amendment related, on the basis that the HMRC officer in question had clearly already made up his mind about the taxpayer's tax position for that year (as, for a jeopardy amendment to be made, the officer must 'form an opinion' that the tax stated in the return is insufficient);
- HMRC was using the information notice as a way of obtaining information about the taxpayer's family; and
- the information notice amounted to a 'fishing expedition' by HMRC.

The FTT rejected all of these arguments.

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The FTT noted that that an enquiry can continue after the making of a jeopardy amendment: the making of the amendment does not end the enquiry; rather, it is a closure notice which does so. The HMRC officer had also made it clear that he had not reached a definitive decision and was open to receiving further information and to take it fully into account in considering the taxpayer's tax position.

It was accepted by the tribunal that 'inevitably, whenever HMRC ask for information from a taxpayer that relates to their dealings with another person, they will learn something about that other person.' However, 'provided the information HMRC seek is 'reasonably required' to check the tax position of the taxpayer in question, the fact that the information will also tell HMRC something about someone else does not mean that they cannot seek that information from the taxpayer.' We noted the recent decision in *Leen v HMRC* [2023] UKFTT 407 (TC) in last month's column (*Tax Journal*, 16 June 2023), in which the taxpayer objected to HMRC's request for information which related to his personal services company, on the basis that the enquiry related to his personal tax position rather than that of the company. However, in that case too, the FTT agreed with HMRC's stance that the information requested regarding the company was relevant to checking the taxpayer's tax position.

The FTT agreed with the taxpayer that, as a matter of principle, HMRC is not permitted to go on a 'fishing expedition'. However, the information notice here did 'not ask indiscriminately for everything available' and, instead, was 'a carefully drawn-up list of material which [the HMRC officer] … sees as necessary to check what he regards as the areas of doubt and uncertainty he has identified in his understanding of [the taxpayer's] tax position.' This contrasts with the view of the tribunal in *Hitchins and others v HMRC* [2023] UKFTT 127 (TC), in which it was concluded that questions asked by HMRC in the course of an enquiry, which had been open for over eight years, amounted to a 'fishing expedition' and, as such, were not reasonably required to check the taxpayer's tax position.

Finally, a unique aspect of this case is the fact that the FTT accepted the possibility that publication of its decision could cause the taxpayer problems in their home jurisdiction (which does not have an established human rights regime and has not abolished capital punishment). Whilst this did not affect the validity of the Sch 36 notice, it is the reason for the decision being published anonymously.

SDLT: a rare victory for the taxpayer

We have commented in previous columns on a recent string of victories for HMRC in the context of SDLT. However, in *Suterwalla and another v HMRC* [2023] UKFTT 450 (TC), the taxpayer managed to break HMRC's strong record with a win relating to mixed-use rates.

By way of reminder, SDLT is paid at a higher rate where the property consists 'entirely' of residential property. In simple terms, residential property is a building used or suitable for use as a dwelling, and land that is or forms part of the garden or grounds of such a building.

In *Suterwalla*, the property in question comprised a dwelling house, garden and tennis court, and an adjoining paddock. The FTT considered a number of factors in concluding that the paddock did not form part of the grounds of the property and, as such, was not residential in nature (meaning that the lower SDLT rates for mixed use properties applied):

- The paddock was registered as a separate title with the Land Registry from the dwelling house, garden and tennis court. It could not be seen from the house.
- It was accepted that the taxpayer would have excluded the paddock from their purchase, had this been possible.
- On the same day as the taxpayer completed on the purchase, they granted a commercial grazing lease to another local in respect of the paddock.

This decision shows that, despite recent success for HMRC, with the right set of facts, it remains possible for taxpayers to succeed on a claim for mixed-use SDLT rates to apply. However, as mentioned in previous columns, a consultation on possible reforms to SDLT legislation (highlighting the potential for abuse under existing rules) was published in November 2021. Although no changes to the rules have been announced, this remains a possibility and taxpayers can be certain that HMRC will continue to scrutinise claims for lower rates to apply.

Suterwalla shows that, with the right set of facts, it remains possible for taxpayers to succeed on a claim for mixed use SDLT rates to apply

Opening Pandora's Box: HMRC sends letters to taxpayers named in the Pandora Papers

Following the release of the so-called Pandora Papers in October 2021, HMRC has started writing to UK resident taxpayers named in the 11.9m documents warning them to report all overseas income and gains on which they pay UK tax, or face penalties of up to 200% of any tax due. Taxpayers are directed to disclosure facilities if they have anything to report.

The letters were accompanied by an HMRC press release which notes that 'tax evasion is increasingly global – but, unfortunately for tax criminals, so is HMRC's reach, accessing data and intelligence through international collaboration.'

What is not clear, however, is the extent to which HMRC are taking a targeted approach. Will all named UK residents be contacted, or only those where HMRC has specific grounds for suspecting non-compliance? This remains to be seen: the letters sent so far are an initial tranche with more to follow later.

A question for those receiving the letters is how they respond. Are these simply nudge letters, or is a different approach warranted? A template letter used as the basis for the letters states that taxpayers do not need to do anything if they think their tax affairs are up to date, but then goes on to say that HMRC's review is ongoing and they may 'investigate some people's tax records further'. Careful thought will be needed from taxpayers and advisers alike.

What a drag: HMRC statistics show large increase in additional rate taxpayers

HMRC statistics show an estimated 99.2% increase in the number of additional rate taxpayers between 2020/21 and 2023/24 (a further 862,000 taxpayers).

What is behind the change? HMRC do not speculate on the reasons, but fiscal drag appears to be at play, with freezing of tax bands and overall wage growth both likely suspects.

What does this mean for tax receipts? Possibly not a great deal, as HMRC's figures also show that the liability borne by the top 1% of income taxpayers (who make up the majority of additional rate taxpayers) is expected to fall from 29.1% of total income tax receipts to 28.5% over the same period, but the change will be felt by those coming into the band for the first time. ■

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- Cases: *W Archer v HMRC* (13.6.23)
- Cases: *Foreign National v HMRC* (20.6.23)
- Challenging information notices (D Whiscombe, 13.7.23)
- Cases: *T Suterwalla and another v HMRC* (13.6.23)
- 20 questions: HMRC's civil and criminal powers (A Craggs & C Christofi, 11.5.23)