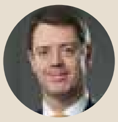
Briefing

Private client review for February

Speed read

This month, we comment on a couple of taxpayer victories arising out of the high income child benefit charge: in *Kensall* and *Goodall,* ignorance of the law was found to be a reasonable excuse, particularly where the taxpayers were not already within the self-assessment regime. Contrastingly, in *Cruise* and in *Golden Grove Trust,* the taxpayers were found not to have a reasonable excuse, where they had overly relied on their professional advisers. A similar theme emerges in *MPTL*, which also draws attention to the importance of following tribunal procedure and observing deadlines. In *HMRC v Taxpayer*, HMRC is back on track with a successful Sch 36 information notice request, following a string of losses for HMRC in this area. Finally, *Hall v HMRC* is an interesting examination of when the nature of an interest in possession under a will can alter due to tax consequences outside a testator's control.



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Ignorance of the law can be a 'reasonable excuse'

We last covered the abstruse topic of the high income child benefit charge (HICBC) in relation to *MRC v Wilkes* [2021] UKUT 150 (TCC), where the Upper Tribunal agreed that the HICBC was not 'income' to be discovered under TMA 1970 s 29. HMRC then tweaked the law. Two recent cases on the HICBC show that ignorance of the law can be a reasonable excuse for failure to meet tax liabilities.

Kensall v HMRC [2023] UKFTT 11 (TC) concerned Mr Kensall's appeals against assessments and penalties charged to him by HMRC for three tax years following his failure to notify HMRC of his HICBC liability.

Although the FTT dismissed his appeals against the assessments themselves (following changes introduced by FA 2022 which permitted discovery assessments regarding the HICBC with retroactive effect), Mr Kensall's appeals against the penalties were allowed on the basis that he had a reasonable excuse (following *Perrin v HMRC* [2018] UKUT 156 (TCC)). Whilst HMRC adduced evidence to show that a self-assessment letter (SA252) and nudge letter were sent to Mr Kensall, the judge found that Mr Kensall did not receive these documents. The fact that Mr Kensall was not a financially sophisticated taxpayer, was outside the self-assessment regime and his partner had been receiving child benefits since 2002 were central to the finding that it was objectively reasonable for him to have been ignorant of the change in law regarding the HICBC.

The FTT adopted a similar approach in *Goodall v HMRC* [2023] UKFTT 18 (TC). Mr Goodall received assessments and penalties for a failure to pay the HICBC for two tax years. No self-assessment letter was sent to Mr Goodall and he was found not to have received the nudge letter. The FTT felt it was objectively reasonable for Mr Goodall to have failed to access information about the HICBC available on HMRC's website and that a taxpayer is not obliged to sift through the gamut of HMRC information in search of a change in tax law, without notice of such a change. The fact that Mr Goodall was not a self-assessment taxpayer was again an important consideration in concluding that he had a reasonable excuse to be unaware of the introduction of the HICBC.

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Whilst the HICBC is becoming a minority sport, with relevant cases subject to their own considerations, each taxpayer here acted swiftly and without unreasonable delay to remedy their breach once made aware of it (Mr Goodall even borrowing money to pay what he owed). As noted previously, the tribunals appear to be more kindly in outlook where this is the case, with the opposite often being true where longer delays are in point.

The flipside: reliance on advisers is not a reasonable excuse

Failure to read electronic notices and leaving matters to advisers are not reasonable excuses when things go wrong.

In *Cruise v HMRC* [2023] UKFTT 41 (TC), a taxpayer sought to appeal penalties charged for the late filing of their self-assessment tax return. The taxpayer had subscribed to HMRC's online services and HMRC issued a notice to file and notices of the penalties electronically to the secure mailbox of the taxpayer's online personal tax account. HMRC also sent email alerts to the taxpayer's verified email address. No return was filed by the taxpayer and HMRC subsequentially applied penalties.

The taxpayer appealed the penalties, arguing reasonable excuse as: (a) details of tax due and penalties to be paid were not sent to his home address; and (b) the taxpayer employed an accountant and did not realise he would be held to account for any errors made.

The FTT held that a taxpayer's failure to check their personal tax account or open the email alerts in a timely fashion is not a reasonable excuse. The notices delivered electronically were effectively delivered, per the Income and Corporation Taxes (Electronic Communications) Regulations, SI 2003/282. Additionally, mere reliance on advisers does not provide a reasonable excuse.

HMRC had further success in *Golden Grove Trust v HMRC* [2023] UKFTT 27 (TC), where the FTT refused permission to make late appeals against an assessment and a decision.

The taxpayer (a charity) was issued with a VAT assessment as well as a decision that input tax incurred was not recoverable. The taxpayer was not experienced in VAT matters and so instructed a well-known London firm of accountants to advise. The taxpayer however missed the deadlines to appeal under VATA 1994 s 83G and sought permission for late appeals.

In deciding whether or not to allow the application, the FTT applied the three-stage test in *Martland v HMRC* [2018] UKUT 178 (TCC), looking at (i) the length of the delay, (ii) the reasons for the delay, and (iii) the overall circumstances of the case. It held:

- the delays involved were significant (over a year in respect of the decision and in excess of two years for the assessment) and there seemed to be no good reason for them;
- the delays occurred because of the accountant's failure to make the appeal before the statutory deadlines and because of the taxpayer's confidence in the accountant's handling of the case. Primary responsibility for the delays rested with the adviser, whose evidence was found to be unreliable and lacking credibility; and
- despite the adviser misleading the taxpayer as to what had happened, in considering whether the taxpayer had a good reason for the delay because it relied on the advisor, the FTT held that the taxpayer must bear some responsibility and should have followed up on matters more effectively than it did.

These cases serve as a reminder to taxpayers that mere reliance on their advisers is not a reasonable excuse: taxpayers should give correspondence from HMRC timely and appropriate attention. The tribunal does not seem to be impressed with taxpayers who do not take initiative, whereas the opposite can be rewarded (per *Kensall*).

The taxpayer must take responsibility, revisited

The ruling in *MPTL v HMRC* [2022] UKFTT 472 (TC) further emphasises the importance of procedure and deadlines in appeals against HMRC, as well as the fact that the taxpayer, rather than their advisers, bears ultimate culpability for procedural errors.

MPTL applied for permission to bring a late appeal, despite HMRC's letter accompanying its assessment making it clear that the company had 30 days to appeal the assessment, to the Tribunal. This time-limit was not met, due to a 'mistake' by MPTL's accountants, who were instructed to handle the matter.

The FTT applied the three-stage *Martland* test (described above). It concluded that notifying HMRC of an intention to lodge an appeal (which the accountants had done) did not excuse a subsequent failure to file the actual notice of appeal with the FTT itself. The FTT ruled that HMRC is under no duty to set out the procedure to commence an appeal within the specified deadline, especially when the taxpayer is represented by professional agents (who should be aware of this). In any event, HMRC had provided details of the appeals procedure in their letter to MPTL and therefore there was no good reason for MPTL to have delayed filing its appeal.

Crucially, the FTT held that: 'MPTL cannot distance itself from the actions of its … advisors ... failures by MPTL's professional advisors are to be treated as failures by MPTL itself'. The message is clear: taxpayers, rather than their advisers, are ultimately responsible for their tax affairs (albeit secondary claims against advisers can be contemplated, if professional standards have been breached).

Schedule 36 notices resurface and legal privilege considered

We have previously commented in this column on the successful challenge of FA 2008 Sch 36 information notices, where it was held that the information requested was not 'reasonably required' by HMRC (for example, *Davies v HMRC* [2022] UKFTT 369 (TC)). However, in *HMRC v Taxpayer* [2023] UKFTT 71 (TC), HMRC's application for a Sch 36 third-party information notice was upheld.

The information notice was addressed to a firm of solicitors in Northern Ireland, regarding a property purchased by a taxpayer, where the firm had acted for the taxpayer on the purchase. The notice also covered a property disposed of by the taxpayer, where the firm had acted on the disposal. HMRC issued the notice on the suspicion that the taxpayer had not fully disclosed income and gains from assets held through three offshore trusts, after the taxpayer had not provided information and documents which had been reasonably requested by HMRC.

The FTT found it was reasonable and proportionate for HMRC to seek information from a third party where the taxpayer had failed to comply with previous information requests. It further found that not all the information relating to a conveyance would be the subject of legal professional privilege. The effort required from the firm to provide the requested information was also not disproportionately onerous. The duty of confidentiality owed by the firm to the taxpayer was overridden by the statutory obligation to provide information to HMRC under the provisions of Sch 36. Lastly, the FTT found there was no breach of article 8 of the ECHR as there was a public interest in effective tax inspections and that the interference was subject to effective and adequate safeguards put in place by HMRC.

In contrast with other decisions such as *Jenner v HMRC* [2022] UKFTT 203 (TC), where the information requests were found to amount to fishing expeditions, here the notice was held to be reasonably required to check the taxpayer's position. One wonders whether a differentiating factor here is also the complexity and quantum of the taxpayer's affairs: whilst quantum is not explicitly covered in the judgment, given that three offshore trusts were involved, one might guess this was substantial and potentially more so than the sums at stake in *Jenner* and *Davies*.

When is an interest in possession not an interest in possession?

In *Hall v HMRC* [2023] UKFTT 32 (TC), the FTT held that an interest in possession (IIP) in a property did not arise where the executors' only option to pay the inheritance tax (IHT) due on the estate was to sell the property.

The deceased's will provided that her friend and neighbour, Mr Boggia, would be granted a right to live in her house during his lifetime without charge (subject to insurance and maintenance costs). Readers may be forgiven for thinking that this sounds very much akin to an IIP. The deceased's estate comprised of little besides the house and so there was insufficient cash in the estate to satisfy the IHT liability arising on her death. It was suggested that the house would have to be sold to raise the necessary funds; however, the residuary beneficiaries decided instead to pay the IHT from their own funds (leaving Mr Boggia to occupy the house).

On Mr Boggia's death, IHT was paid on the basis that he held an IIP in the house at the time of his death. However, the will trustees later sought to reclaim this payment on the basis that Mr Boggia had not held an IIP in the house at all, and only had a limited right of occupation of that particular property. HMRC issued a notice of determination which was the subject of the appeal.

It was common ground that:

- the will would have given Mr Boggia an IIP in the house had there been sufficient liquidity in the rest of the estate to pay the IHT liability; and
- had the property been sold to pay the IHT liability, no IIP would exist.

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To decide what right Mr Boggia had under the will, the FTT considered what route the executors could have been compelled to take, in the absence of any consent by any of the parties. It held:

- the residuary beneficiaries could have compelled administration of the estate and HMRC could have compelled the payment of the IHT liability;
- the only route that could have been compelled for the payment of the IHT liability would be the sale of the house; and
- had the house been sold there would be no IIP.

Therefore, due to the presence of a creditor once the estate contained only the property, Mr Boggia could not enforce a right under the will to live there and so the FTT found Mr Boggia did not have an IIP.

This is perhaps a counterintuitive result, and the particular circumstances are unlikely to arise very frequently in practice. However, it is notable that something which may appear to be an IIP on the face of a will – and which could therefore be taken for granted as such – can have its nature changed by unforeseen circumstances outside a testator's control. ■

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- Cases: *HMRC v J Wilkes* (5.1.23)
- The high income child benefit charge post-*Wilkes* (M Lemos & J Austen, 29.7.21)
- Cases: *M Kensall v HMRC* (17.1.23)
- Couldn't careless? Reasonable care and the role of professional advisers (A Craggs & C Christofi, 16.2.23)
- How to win reasonable excuse cases (Tolley, 11.10.22)
- *MPTL*, IR35 & late appeals (R Maas, 26.1.23)