

## Penalties for getting client returns wrong? (Lecture P1287 – 8.44 minutes)

### *Background*

The penalty regime for errors in tax returns etc. (FA 2007, Sch 24) broadly provides that if a taxpayer document (e.g., an individual's self-assessment return) contains an inaccuracy such as an understated profit, overstated loss or inflated claim to a tax repayment, a penalty may be due.

However, what if the tax return error was caused by someone else, such as the taxpayer's agent?

### *The 'another person' penalty*

The penalty regime for errors was extended (in FA 2008) to provide for penalties where an error in a taxpayer's document is attributable to another person (FA 2007, Sch 24, para 1A). This provision is sometimes referred to as the 'other person' penalty.

In the above example of a tax return error, the other person ('T' in the legislation, but assuming in this example that T is an agent) is liable to a penalty broadly if the error was attributable to the agent deliberately supplying false information (directly or indirectly) to, or withholding information from, the taxpayer with the intention of the return containing the inaccuracy.

The 'deliberately' requirement is important. The agent would need to have known that the false information (or the withholding of information) would result in the taxpayer's return containing an error that leads to what the legislation refers to as a 'relevant inaccuracy' (e.g., an understated tax liability).

### *It's all your fault!*

If the taxpayer is faced with a penalty for an inaccurate tax return, they might (and often do!) consider trying to blame their agent for the error, as a convenient escape from a penalty.

However, the taxpayer would still need to demonstrate that the tax return error arose despite them having taken reasonable care. Furthermore, in the context of the 'other person' penalty, it would need to be shown that the agent deliberately caused the error.

HMRC acknowledges in its Compliance Handbook manual (at CH84545): "It is extremely unlikely that a tax adviser would be liable to this kind of penalty". However, this statement from HMRC is in the context of a tax adviser who receives information from the taxpayer and gives advice based on that information. What about errors in tax returns?

Even if an agent can be blamed for the tax return error, it's possible for both the taxpayer and the agent (or other person) to be separately liable to a penalty in respect of the same error (FA 2007, Sch 24, para 1A(3)), if the taxpayer hasn't taken reasonable care to avoid the error. The taxpayer would be liable under the general penalty rule that applies to taxpayers, and the agent would be liable to the 'other person' penalty as mentioned. However, the aggregate amount of the penalties will not normally exceed 100% of the potential lost revenue (although a higher maximum than 100% can apply if the error involves an offshore matter or an offshore transfer; see FA 2007, Sch 24, para 12(4), (5)).

### *Information withheld*

In *Hutchings v Revenue and Customs* [2015] UKFTT 9 (TC), the 'other person' was not an agent or tax adviser, but a family member.

In that case, an individual ('RH') made a lifetime gift to his son ('CH'). The gift was of funds held in an offshore account and was made in or around March 2009. RH died in October 2009. CH was a residuary beneficiary of RH's estate. RH's executors wrote to various members of the deceased's family, including CH. Their letter asked the family members to disclose if they had received any gifts from the deceased. CH did not reply to the letter.

The executors subsequently submitted an inheritance tax (IHT) return (form IHT400) to HMRC in relation to the deceased's death. The return did not refer to cash held by RH or the transfer of funds in that account to CH seven months before his death.

HMRC subsequently assessed CH to IHT on the basis that he had received a lifetime gift of the offshore funds. HMRC also issued a penalty under the 'other person' provision (FA 2007, Sch 24, para 1A) in respect of the error in the IHT return. The First-tier Tribunal dismissed CH's subsequent appeal. The tribunal held: (1) that the inaccuracy on the IHT return was attributable to CH; (2) that CH withheld information from the executors; (3) that the withholding of information was deliberate; and (4) that CH didn't answer the executors' questions on gifts with the intention that the IHT return would not contain the information about the gift to him. The tribunal concluded that the conditions for the 'other person' penalty were met.

### *Take care*

Finally, whether the 'other person' is an agent or someone else, taxpayers should always exercise due diligence and reasonable care when checking information from other persons. Otherwise, the taxpayer may be liable to a penalty instead of, or as well as, the other person.

Having said that, HMRC accepts (in its Compliance Handbook manual at CH81168, in Example 1) that the taxpayer will have taken reasonable care to avoid a tax return inaccuracy (and so won't be liable to a penalty in addition to the other person) if it was not possible for the taxpayer to independently check that the information given by the other person was correct.

*Contributed by Mark McLaughlin*