

Tax enquiry cases update (Lecture P1355 – 17.46 minutes)

This article considers four recent tax tribunal cases that are relevant to tax enquiries. Practitioners need to remember that each case that reaches the tribunal is decided on the facts of that case. However, tribunal decisions can give practitioners an indication of how the tribunal may deal with a particular situation.

Newpier Charity Limited v HMRC [2022] UKFTT 373 (TC)

This case related to an application for charity tax relief in the charity's accounts, and the HMRC enquiry into those accounts. HMRC issued various information requests to the taxpayer. Over a period of time, the taxpayer supplied various information to HMRC, but there came a point where nothing further could be provided. The situation is one that practitioners will be familiar with. HMRC continued to seek information and said they could not close the enquiry without it.

The taxpayer applied to the tribunal for a closure notice. The burden of proof in such applications is for HMRC to demonstrate why the enquiry should be allowed to continue. HMRC stated that it needed further information, without which it would be unable to reach a conclusion of the deductibility of certain items as it still had concerns.

The tribunal reviewed the position and accepted that no more evidence was available. The tribunal directed HMRC to close the enquiry (within four weeks) and base its conclusion on the evidence it had. The next step would be for HMRC to issue a closure notice denying the relief claimed. The taxpayer will be able to appeal against the notice and will have the burden of proof of showing that the closure notice is incorrect.

The result may be something of a Pyrrhic victory for the taxpayer. The case is a reminder that there is a process for breaking an impasse where HMRC continues to seek information, and that information is not available. The issue of a closure notice does not resolve the underlying dispute, but it does enable the case to progress to the next stage.

Dominic Kiernander v HMRC [2022] UKFTT 337 (TC)

This case concerned an application to the tribunal for the admission of a late appeal (against amendments made under section 28A Taxes Management Act 1970). One of the grounds of appeal was that delays by the taxpayer's agent in dealing with the appeal had been brought about by the coronavirus.

There was a delay in excess of seven months in submitting the relevant appeal. The appeal referred to a disruption to the firm's "working practices". The judge considered the three-stage approach to be applied to the facts and evidence in accordance with the judgment in *Martland v HMRC* [2018] UKUT 178 (TCC) to determine whether the time limit to submit the appeal should be extended by the tribunal.

In the *Kiernander* case, the judge acknowledged that there might be reasons why coronavirus had created delay but commented on the absence of any specific circumstances or detailed effects of coronavirus that caused the delay. The judge said "...there is an absence of evidence in this case to demonstrate any specific circumstances or detailed effects of the pandemic that gave rise to this delay. On the basis of objective reasoning and taking into consideration all of the circumstances of this case, I do not accept the generic pandemic excuse given to be a good reason for such a delay".

Practitioners are reminded of the need to provide specific details, with evidence, of why a delay occurred when submitting an application for a late appeal, to increase the likelihood of that application being accepted. That applies, as noted in this case, where the pandemic is cited as the reason for the delay.

Clive Kingdon, Terry Stead and Anne Kingdon v HMRC [2022] UKFTT 407 (TC)

This case, at its simplest, concerned the date that a partnership incorporated its business. The position was complicated because the taxpayers' former accountant was convicted of cheating the public revenue, and there was a lack of evidence. Significant delay by HMRC in dealing with the enquiry into the taxpayers' affairs hampered the value of the appellants' oral evidence.

HMRC had opened an enquiry into the 2005/06 partnership return, and subsequently closed the enquiry without any amendments. Following the discovery of new evidence after a raid on the taxpayers' former accountant, HMRC assessed the appellants to partnership income for 2005/06.

There was conflicting information about the relevant date, although very little direct evidence. There were only three letters, which contradicted each other. The tribunal was dismissive of the evidence which came from the former agent and determined that it could not be relied upon.

The taxpayers' oral evidence was, given the various delays and the criminal investigation into the former agent, of little value for the tribunal. However, the appellants, as the partners who were carrying on the business, were deemed to be the best source of information.

The tribunal determined that the transfer had taken place at the end of March 2005 or 1 April 2005, rather than the later date of 2 August 2005, contended by HMRC. The tribunal accepted the taxpayers' appeals against the assessments and penalty determinations for 2005/06, which were the subject of the hearing.

The tribunal determined that the taxpayers did not act negligently. They had put their financial and tax affairs in the hands of an ostensibly competent firm of local accountants and tax advisers, who initially demonstrated no lack of competence or ability. When the appellants determined that their accountants were not acting in their best interests, following a General Commissioners hearing in January 2009, they sacked them. The tribunal noted that by placing those matters in the hands of their agent, they were "behaving wholly responsibly", and that behaviour continued when they sacked their agent.

The case highlights the need for relevant business events to be documented (in this case there were not any board minutes, or similar documents, to evidence the date of the transfer of the business to the company). In addition, there cannot be any doubt that the taxpayers had helped their credibility by sacking their agent when they determined, following the General Commissioners hearing, that he was not acting in their best interests.

Mr Patrick Dowds v HMRC [2022] UKFTT 402 (TC)

There are very few cases concerning HMRC's Code of Practice 9 procedure, the Contractual Disclosure Facility, that reach the tribunals. The Contractual Disclosure Facility is HMRC's civil process for the investigation of cases where they suspect fraud.

In this case, HMRC had issued assessments for several years relating to income tax, PAYE, NIC and VAT, together with associated penalties. HMRC were seeking significant penalties, partly because of the taxpayer's failure to engage with the process and accept that the underpayment of tax arose from his deliberate conduct. The taxpayer accepted the figures on which the substantive assessments and determinations were based, as they were contained in a Disclosure Report prepared on his behalf.

The tribunal did not accept any of the representations made by the taxpayer, and upheld HMRC's assessments and penalties on the basis of deliberate or fraudulent behaviour.

The taxpayer had admitted to fraudulent conduct during a previous HMRC enquiry and agreed to a settlement with HMRC in September 2002 (£20,000). HMRC later started another enquiry into the taxpayer's affairs, initially using the Self-Assessment enquiry provisions and subsequently escalated to their civil fraud process. The taxpayer declined the offer to participate in the Contractual Disclosure Facility, on the basis that he had not committed any fraud but said that he would cooperate with the HMRC investigation. The taxpayer subsequently commissioned a Disclosure Report, which was submitted to HMRC with details of additional tax liabilities.

The taxpayer had put forward various grounds for appeal as to why the errors eventually disclosed by him did not arise as a result of his fraudulent conduct, such that a lesser penalty would be due.

The taxpayer had suggested that the inaccuracies were connected to his time spent as an informant for HMRC. The taxpayer referred to the actions of a particular HMRC officer, subsequently dismissed and convicted of dishonesty in the criminal court. The taxpayer blamed HMRC for the concealment and diversion of his income.

The taxpayer contested that, following his exposure, he was forced to make protection payments and had to conceal his income in order to divert the hidden monies to make the payments. The tribunal rejected the taxpayer's contention, because the taxpayer had mentioned the informant activities only at a late stage and the taxpayer had not been able to provide any supporting evidence. The taxpayer had also made conflicting statements about the effects on his tax returns. In addition, the HMRC officer was dismissed in 2003, and Mr Dowds' fraudulent activity continued until 2013.

Another ground for appeal provided by the taxpayer was that he was not well enough to attend the hearing. The taxpayer supplied medical reports which indicated that he was suffering from a "generalised anxiety disorder". The tribunal also rejected this contention, as the medical condition related to his current health rather than the period during which the inaccuracies had continued, which exceeded ten years.

The case serves as a reminder of the need to evaluate the taxpayer's position before proceeding to the tribunal, and to ensure that any evidence supports the contentions being made.

Contributed by Phil Berwick, Director at Berwick Tax