

Tax and penalties following HMRC advice (Lecture P1414 – 11.59 minutes)

HMRC frequently offer advice or information to taxpayers. This could be given to a single taxpayer based on their own circumstances, or to the wider body of taxpayers. If the advice is case specific, it may be given in writing, or it might be given face-to-face, or possibly by phone. HMRC has published guidance on its website, entitled: 'How HMRC advice and information can help you' (www.gov.uk/guidance/when-you-can-rely-on-information-or-advice-provided-by-hm-revenue-and-customs).

Incorrect HMRC information and advice

What happens if an HMRC officer gives the taxpayer incorrect advice or information? HMRC accepts that in exceptional circumstances its incorrect advice and information can be binding, provided (among other things) that it is reasonable for the taxpayer to expect to rely on the incorrect advice, that the taxpayer would suffer real and significant detriment if the correct tax position was applied, and that it would be so unfair for HMRC to act in a different way from the advice and information given that it would amount to an abuse of power (see HMRC's Admin Law Manual at ADML1300 for a full list of tests).

CRCA 2005, s 5 sets out HMRC's responsibility for the collection and management of taxes. HMRC's view (at ADML1200) is that this legislation offers some discretion. However, HMRC considers that the legislation only permits collection of taxes which are properly due to be foregone if HMRC would obtain a higher net return for the Exchequer by honouring the incorrect advice.

Applying to the court

If sought HMRC to correct its advice or information to the taxpayer's detriment, the taxpayer could consider applying to the High Court for judicial review of HMRC's actions. For example, where HMRC has given incorrect advice, the courts might rule that to apply the strict letter of the law would be so unfair as to amount to an abuse of HMRC's power. However, the circumstances would need to be exceptional for a court to consider HMRC's conduct to be an abuse of power.

There is also a legal principle of 'legitimate expectation'. This principle broadly states that if an individual's reliance on promises, representations or established practices of a government body such as HMRC is legitimate or reasonable, there is an obligation on the public body to fulfil rather than frustrate those legitimate expectations. However, court cases can be very expensive and time-consuming, and the outcome is often very unpredictable.

New case law and legislation

Aside from applications to the court, and whilst there is no express statutory obligation to do so, HMRC might consider allowing the taxpayer to rely on the incorrect advice and information given. This is provided: firstly, that the taxpayer gave HMRC all the relevant facts; secondly, that HMRC's advice and information was clear and uncertain; and thirdly, that the taxpayer had already relied on the advice and information and would be worse off if HMRC didn't act in line with it.

What happens if a taxpayer is given advice based on HMRC's understanding of the law at that time, and the advice is favourable to the taxpayer and is followed, but that advice later turns out to be incorrect following a subsequent decision by the courts?

HMRC's position in those circumstances is that its obligation to collect the 'right' amount of tax may mean that it can no longer be bound by the advice, information or guidance it has previously given. However, HMRC may decide not to apply the new understanding of the law retrospectively, and might only apply it going forward instead. Of course, if HMRC's advice was correct at the time it was given, but is later rendered incorrect by new legislation, if that new legislation is introduced retrospectively HMRC will not be bound by any advice previously given by HMRC covering the period of retrospection.

HMRC guidance (at ADML1000 and following) includes guidance to help its officers decide when HMRC is bound by incorrect case-specific advice.

Clearance applications to HMRC

Very often, a taxpayer's request to HMRC for advice or guidance will take the form of a clearance application. Tax law provides for applications to HMRC for advance clearance on the tax treatment of certain transactions or events. Common examples of 'statutory clearance' applications include: seeking HMRC's assurance that business disposals will not be subject to a counteraction notice under the 'transactions in securities' income tax anti-avoidance rules (ITA 2007, s 701 and CTA 2010, s 748); or for HMRC's agreement that share exchanges or business reconstructions will not be challenged on avoidance grounds for capital gains relief purposes (TCGA 1992, s 138(1)); or that capital treatment would be considered to apply to a company purchase of its own shares (CTA 2010, s 1044).

In addition to statutory clearances, HMRC also offers a 'non-statutory clearance' service in some other areas of uncertainty (www.gov.uk/guidance/non-statutory-clearance-service-guidance).

The taxpayer must make it clear that they are seeking fully considered advice and must indicate what the advice will be used for. A clearance is broadly a written confirmation of HMRC's view on the application of the law to a particular transaction or event, which the taxpayer can generally rely upon. However, this is conditional on the information supplied to HMRC being complete, accurate and correct to the best of the applicant's knowledge and belief; clearance applications need to be drafted very carefully. A principle was established in *R v IRC, ex p. MFK Underwriting Agencies Ltd* [1989] STC 873 that the taxpayer "...should have put all his cards face upwards on the table". The transactions must also be carried out exactly as described in the clearance application. Otherwise, HMRC are likely to regard a clearance previously given as being null and void.

Care is needed with clearance applications where transactions involve subjective matters such as share valuations, which can vary widely from one valuer to another. For example, in *Boulting & Anor, R (On the Application Of) v Revenue and Customs* [2020] EWHC 2207 (Admin), HMRC gave advance clearance that capital gains tax treatment would apply on a company purchase of own shares from a shareholder. However, HMRC later treated the clearance as void because the shares were each worth £66,900, not £600,000 according to the valuation used in applying for the clearance. The High Court held that given the very wide disparity between the parties, the share valuation may potentially have a bearing on whether the purchase of the shares was wholly or mainly for the purpose of benefiting the company's trade.

Other government bodies

Sometimes, an individual may be given advice by a government body other than HMRC about a transaction, which has tax implications for the individual. If the transaction involves disposing of an asset (e.g., a property), the taxpayer should seek tax advice before undertaking the transaction,

because the non-tax government body will not be particularly concerned about the tax implications of the transaction.

For example, in *Salokun v Revenue and Customs* [2023] UKFTT 962 (TC), HMRC issued to a taxpayer capital gains tax assessments for undeclared property disposals, and penalties for the filing of inaccurate tax returns based on the taxpayer's disclosures being prompted and his behaviour being deliberate. The taxpayer appealed. His primary contention was that the properties were sold to raise funds to pay for the care of his wife, who was in extremely poor health, and that he'd been instructed by the government to sell his properties for this purpose. On that basis, the taxpayer believed he should not have to pay the tax or penalties. Unsurprisingly, notwithstanding the government's 'advice', the First Tier Tribunal held that the taxpayer had made a conscious decision not to disclose the relevant information about the property disposals. Consequently, HMRC's assessments were valid. Furthermore, the tribunal found that the taxpayer's non-declaration of the property disposals and capital gains was deliberate. The taxpayer's appeals were dismissed.

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