

Careless behaviour by tax agents? (Lecture P1324 – 10.36 minutes)

Where an individual's tax return is submitted online to HMRC within the normal time limit of 31 January following the end of the relevant tax year, HMRC may generally open an enquiry into the return up to the end of the 12-month period after the day on which the return was delivered (TMA 1970, s 9A).

Discovery assessment time limits

If this enquiry 'window' has closed because the time limit for opening an enquiry has expired, HMRC may use its 'discovery' powers to assess closed years. This may happen broadly if (for example) HMRC discovers that tax has been under-assessed due to either of the following (TMA 1970, s 29(4), (5)):

- careless or deliberate conduct of the taxpayer or a person acting on his behalf; or
- something of which the HMRC officer could not have been reasonably expected to be aware when the enquiry window closed (or a closure notice was given) based on the information made available to them before that time

For income tax and CGT purposes, the ordinary time limit for HMRC to make a discovery assessment is four years after the end of the tax year to which it relates (TMA 1970, s 34(1)). However:

- a discovery assessment in a case involving a loss of income tax or CGT brought about carelessly may generally be made up to six years after the end of the tax year (TMA 1970, s 36(1));
- In cases of lost income tax or CGT involving an 'offshore matter' or 'offshore transfer', the assessment time limit increases to 12 years (TMA 1970, s 36A); and
- where the loss of income tax or CGT has been brought about deliberately, HMRC may make a discovery assessment up to 20 years after the end of the relevant tax year (TMA 1970, s 36(1A)).

Taxpayer or person acting

Where the normal four-year time limit for a discovery assessment has passed, HMRC sometimes contend that a tax return error was careless (or possibly deliberate), even though it may be highly arguable that it was neither. There is no statutory definition of 'careless' in the context of discovery assessments, although the legislation relating to penalties for errors states that a 'careless' inaccuracy is due to a failure to take 'reasonable care' (NB for the purpose of these notes, it is assumed that carelessness is involved).

The legislation dealing with discovery assessments for a careless loss of income tax or CGT refers to the loss being brought about by the person who is the subject of the assessment. In this context, that person is the individual self-assessment taxpayer. However, for discovery assessment purposes, the reference to the loss being brought about by the 'person' is extended to include a person acting on the taxpayer's behalf.

What does it mean?

What does "acting on the taxpayer's behalf" mean? HMRC guidance on this point in its Enquiry manual (at EM3232) refers to the First-tier Tribunal's definition of a person acting on behalf in the

case *The Trustees of Bessie Taube v HMRC* [2010] UKFTT 473 as “a person who takes steps that the taxpayer himself could take or would otherwise be responsible for taking”. The tribunal added: “Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer”.

This definition was later approved by the Upper Tribunal in *HMRC v Hicks* [2020] UKUT 0012. In that case, Mr Hicks entered into a tax avoidance scheme operated by a firm of tax consultants. HMRC received the taxpayer’s tax returns for 2009/10 and 2010/11 in January 2011 and January 2012 respectively. When preparing the returns, for any entries or information regarding the scheme, Mr Hicks’s agent simply included whatever the tax consultants provided him with. In March 2015, HMRC issued discovery assessments for 2009/10 and 2010/11.

When the case reached the Upper Tribunal, it was concluded that the insufficiency in the relevant assessments was brought about because Mr Hicks’s agent gave advice which a reasonably competent tax adviser could not have given on an aspect of the avoidance scheme and, similarly, the agent failed to give the advice which a reasonably competent tax adviser ought to have given to the effect on another aspect of the scheme. The insufficiency in the assessments was brought about not by the taxpayer, but by a person acting on his behalf, within the discovery assessment condition regarding carelessness (in TMA 1970, s 29(4)).

HMRC’s appeal was allowed on that basis. HMRC could therefore rely on the extended time limit assessment period of six years in respect of the discovery assessments for 2009/10 and 2010/11.

‘Careless’ adviser

HMRC relied on the Upper Tribunal’s decision in *Hicks* in the subsequent case *Callen v Revenue and Customs* UKFTT 40 (TC). In that case, Mr Callen had also participated in a tax avoidance scheme, during the tax year 2008/09. He attempted to set off scheme losses against his trading income in 2008/09, and to carry forward the balance against income of the same trade in 2009/10.

Unfortunately for Mr Callen, the avoidance scheme did not work. HMRC raised a discovery assessment for 2009/10 on 30 March 2015, on the basis that the loss of tax was brought about carelessly. On appeal, the First-tier Tribunal noted that Mr Callen’s accountant had barely any prior experience of marketed tax avoidance schemes. He did not carry out any research himself regarding the tax legislation relied upon or the matters addressed in a Counsel’s Opinion produced for the tax consultants, even though the accountant had never advised about that legislation or about any marketed tax avoidance schemes.

The First Tier Tribunal noted that Mr Callen’s accountant did not review any scheme documentation and simply relied on a spreadsheet provided by the tax consultants for the figures to insert into Mr Callen’s tax returns. His accountant didn’t check the underlying documentation and simply relied on the tax consultants to provide reassurance that the scheme worked and provided the relevant figures. The tax return preparation process simply involved Mr Callen’s accountant asking the tax consultants what figures to put in the boxes, which they then checked and returned before the return was sent for the appellant to sign. The accountant did not carry out any independent consideration of what entries should be completed in Mr Callen’s tax return.

The First Tier Tribunal concluded that the accountant acting on behalf of Mr Callen carelessly brought about the insufficiency in Mr Callen's tax liability as a result of compiling tax returns on the basis of deductions claimed in Mr Callen's tax return without adequate consideration of them. Mr Callen's accountant had also included trading deductions for professional fees of £250,000 even though the appellant only spent £95,000, and the remaining fees were contingent on the success of the scheme transactions, without any indication on the returns to that effect. The discovery assessment for 2009/10 was made within the statutory time limits by HMRC. Mr Callen's appeal was dismissed.

Contributed by Mark McLaughlin