Traps for the unwary

Management of taxes | Personal tax



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Robin Williamson considers the challenges involved in relying on HMRC guidance

Key Points

What is the issue?

Where official guidance is wrong, misleading or incomplete, users are at risk.

What does it mean to me?

Errors and omissions from official guidance on GOV.UK may be irksome enough to professional advisers, but to unrepresented taxpayers who have only that guidance or helpline advice to rely on, it could lead to missing out on entitlements or even incurring penalties for unwittingly doing the wrong thing, as a recent Tribunal case brings out.

What can I take away?

GOV.UK content developers are becoming more open to consultation and feedback and as tax professionals we should not hesitate to point out anything we spot, using the feedback tools on each page.

Where official guidance is wrong, misleading or incomplete, users are at risk in two respects. First, if the guidance does not make users aware of a particular requirement, and they become unknowingly non-compliant by relying on it, they may face a penalty. Secondly, if the guidance is misleading in some respect, users may miss out on something to which they are in fact entitled even though they are not told. In either case, it is the taxpayer who bears the cost of official error.

These are fairly obvious points that the CIOT, ATT and LITRG representatives have all raised in many different forums since HMRC was required to close down its own website and yield place to GOV.UK. They are particularly pertinent when unrepresented taxpayers are seeking answers because they are more likely to place reliance on what they see on a Government website or read on a Government form or publication. They are also more likely to believe what they are told by a helpline adviser and act accordingly. As tax professionals we know that what we are told is not always correct, so we suggest that taxpayers (a) take a careful note of every telephone conversation with a helpline adviser, and/or (b) take a screenshot of every page on GOV.UK on which they propose to rely, (c) note the date and time of the call, or accessing the website, and (if a call) the adviser’s name as well as a brief note of the advice given. At LITRG we are concerned with unrepresented taxpayers for whom this may be particularly pertinent. One can never assume that one will be exonerated if a mistake is made in reliance on incorrect guidance.

Penalised for relying on official guidance

The First-tier Tribunal case of *Mark Richard Beardwood v C&E Commrs* [2018] UKFTT 0099 (TC) is a prime example of the situation where the taxpayer was penalised by HMRC because he relied on incorrect guidance, and he had to go as far as the First-tier Tribunal before being exonerated.

In *Beardwood*, the taxpayer and his wife went abroad to live and work for a few years, and let their home while they were away. Before they went they took steps to put their tax affairs in order, including registering as non-resident landlords using form NRL1 and checking GOV.UK to ascertain their duties in respect of filing tax returns. The website guidance led them to believe that they did not need to file a tax return in 2010/11 because their rental income (which was their only UK income that year) did not exceed their personal allowances, but in 2011/12 it did and they duly filed returns for that year. HMRC, claiming that they had issued a notice to file a 2010/11 return on 6 April 2011 (although the appellant did not receive it at his address in Vietnam, nor could HMRC prove that they had sent it and no copy was included in the papers before the tribunal), issued non-filing penalties of £1,600 in total for 2010/11. The taxpayers appealed on grounds of reasonable excuse.

Incredibly, one HMRC team waived the wife's penalties, while another pursued the appellant to the First-tier Tribunal, even though the facts were indistinguishable. The tribunal, describing the appellant's conduct as 'exemplary', noted that 'the website guidance is at best unclear in places and caused puzzlement to the tribunal with its conflicting, vague and inconsistent advice'. It also observed that 'HMRC's submissions on this matter at the hearing and in the statement of case are unclear, and the Tribunal is in some doubt about their accuracy. . . This is a case which the Tribunal considers should never have come before it.' It went further: 'The tribunal considers that HMRC have wasted everyone's time in bringing a case which has very little merit on their side and where the taxpayer seems to have acted in an exemplary manner. Nothing would have been gained by the issue and completion of the return, no tax was at stake, and another HMRC department had already realised that the appellant's wife, who was in very similar circumstances, should not be penalised.'

So the Tribunal rightly castigated HMRC for having brought the case when the taxpayer had done all he should by trying to find out what his obligations were and complying with what he was told by official guidance. When asked what more the taxpayer could have done, HMRC replied that he should have phoned the HMRC helpline. This response would present any taxpayer with an interesting dilemma: do

I take official guidance at face value, or do I double-check it with the helpline? If the two conflict, which do I believe? No taxpayer should be put in the position where he could be penalised for making the wrong choice on the toss of a coin.

GOV.UK website guidance still gives the same erroneous impression as it seemingly did then, albeit in a different context. For example, the text on GOV.UK first says: 'You pay tax if your income is more than your tax-free allowances and any reliefs you're eligible for', then a few lines further down: 'If you [need to pay income tax], you may need to complete a self-assessment tax return or contact HMRC to declare all your income, including what you've earned through online networks.' Putting the two statements together, it is easy for someone unversed in the law of taxation to conclude that a tax return only needs to be filed if one's income exceeds one's personal allowances and other reliefs.

Missing out by relying on guidance

Turning to the situation where someone misses out on an entitlement to a relief or exemption because of wrong or misleading guidance, it is ironic that entitlement to one of the Government's flagship policies – the transferable marriage allowance – is itself misrepresented on GOV.UK. The text indicates that one cannot benefit from claiming the marriage allowance if the income of the lower earner is not £11,850 or below. In fact there are circumstances in which a marriage allowance claim can benefit a couple even if the lower earner has income greater than the personal allowance, particularly if his or her savings income is subject to the zero per cent starting rate on savings, or is covered by the personal savings allowance. The calculator compounds the mistake by stating, if as lower earner you insert an income in excess of the personal allowance, that as a couple you will not benefit because your income is more than £11,850.

Now, as tax advisers we can easily construct examples of couples who do benefit from the transferable marriage allowance even if the income of the transferor is over £11,850. But the majority of the population will accept what the official source tells them, even if it is technically wrong. It would be an interesting exercise for a statistician to work out how many couples could have benefited from the marriage allowance but for the fact that the lower earner had income higher than the personal allowance, and was discouraged from claiming by official guidance.

The Government Digital Service (GDS) seems to operate on the basis of ‘user need’, so that information is only published on GOV.UK if there is seen to be a ‘user need’ for it. The ‘user need’ philosophy is probably what gives rise to GDS’s reluctance to correct the error on the marriage allowance pages referred to above, despite it being drawn to their attention frequently by LITRG over a long period; if the information as shown works for 80% of users, it is less important to cater for the needs of the remaining 20%. And to explain the situation accurately would probably involve tortuous verbal formulations. This is of course anathema to the arbiters of Government website writing style – but sadly, still very much a reflection of the complexity of the actual law which the guidance is supposed to explain.

The digitally excluded

While official guidance may not always be complete, accurate or clearly expressed, at least it is there in abundance for those who have access to computers and the internet and can find their way to and around GOV.UK. But there is a whole segment of society which does not possess those skills and accordingly has no access to the bulk of official guidance materials.

It was gratifying that in *LH Bishop Electrical Ltd & Others v C&E Commrs* [2013] UKFTT 522 (TC) the First-tier Tribunal found in favour of three appellants who, supported by LITRG, had appealed against notices requiring them to file their VAT returns online. The Tribunal found that so far as they applied to the appellants, the regulations were incompatible with the European Convention on Human Rights. The judge said: ‘I have found that because of its disproportionate application to persons who are computer illiterate because of their age, or who have a disability which makes using a computer accurately very difficult or painful, or those who live too remotely for a reliable internet connection, the regulations were an interference with Convention rights under [Article 1 of Protocol 1 – protection of property] and [Article 8 – right to respect for private and family life] combined with [Article 14 – prohibition of discrimination] which was not justified.’

It is unusual for the Human Rights Convention to form the basis of a decision in a tax case, and even rarer for it to operate in the taxpayer’s favour, so this is quite a landmark decision. HMRC did not appeal, but instead consulted carefully on how to change the regulations to make them compatible with the Convention. The regulations, as amended (VAT General Regulations 1995 SI 1995/2518, reg 25A(6)(c)), allow an exemption from online filing for a person ‘for whom the

Commissioners are satisfied that it is not reasonably practicable to make a return using an electronic return system … for reasons of disability, age, remoteness of location or any other reason'. The same exemption has been carried over into the draft regulations for Making Tax Digital for Business so that no person who satisfied the 'not reasonably practicable' test will be required to keep electronic records or report their quarterly results to HMRC electronically.

So far so good. But there is a possible downside in terms of the information and guidance available to those who are digitally excluded. The tax information on GOV.UK, leaving aside the fact that it is sometimes wrong, misleading or incomplete, covers material to which taxpayers do need access. As we have seen, what appears on GOV.UK is there because it is deemed to answer to a 'user need' – if it did not, it would not be posted on the website. It is not just people who can use a computer who have such needs. But HMRC, in common with much of Government, provides a wealth of information online but very little in paper form. Of course we must recognise that HMRC does not have the resource to do all that it would like to, but the effect of fully informing the digitally competent while providing little or no information accessible to the digitally excluded, it could be argued, is to discriminate, probably unlawfully, against the latter.

Conclusion – a silver lining?

We can at least report that both GDS and HMRC are now engaging the tax profession in serious discussions about the depth of the tax content on GOV.UK, and a project is underway to create a tier of more detailed information to supplement the currently available simple guidance. This will take some years but LITRG and CIOT hope to play a full part in its development. Also, GOV.UK content designers and user researchers now appear much more open to feedback than they may have been in the past. So anyone who spots a mistake or inconsistency should make use of the *Is there anything wrong with this page?* function that appears at the foot of each page. Particularly if this is then followed up with a detailed comment through the feedback option, they should now receive a proper response.