Critical importance

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Bill Dodwell looks at when we can rely on guidance from HMRC in our complex tax system

There's widespread acknowledgment that the guidance produced by HMRC is of critical importance in reducing the complexity of the UK's tax system. Our legislation is lengthy and so is our case law. Taxpayers – and even qualified tax advisers and HMRC officers – cannot be expected to know all our tax law. The Supreme Court, in Gaines-Cooper, endorsed the issue of guidance by HMRC as part of '…encouraging co-operation between the Revenue and the public…'

A fundamental question about guidance, though, is whether the taxpayer may rely upon it. Naturally, the question of reliance arises only where the guidance turns out to be incorrect and offers the taxpayer a lower tax liability than the strictures of the law mandates.

The main principle assisting taxpayers is that of legitimate expectation, a doctrine relevant to all public authorities. Perhaps the first significant expression of the doctrine in the tax world came in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd* [1989]. The Divisional Court noted it was accepted that a proper part of HMRC's function was, when possible, to advise the public of their rights as well as their duties; but for such advice to be relied on the taxpayer must make full disclosure of all the relevant facts and circumstances when seeking a ruling and the ruling or statement relied on must be unequivocal.

More recently, the principle has been the subject of a recent decision. In *Vacation Rentals* the Upper Tribunal ruled that the company did have a legitimate expectation that HMRC would apply the guidance it had set out in Business Brief 18/06 (which covered when card handling services should be treated as exempt from VAT).

Mr Justice Fancourt and Judge Timothy Herrington quoted Leggatt J. in *R (GSTS Pathology LLP & Ors) v Revenue and Customs Commissioners* [2013]: 'The principle that legitimate expectation should be protected is now well established as a ground for judicial review. For this principle to apply, the general requirements are: (1) the claimant has an expectation of being treated in a particular way favourable to the claimant by the defendant public authority; (2) the authority has caused the claimant to have that expectation by words or conduct; (3) the claimant's expectation is legitimate; (4) it would be an unjust exercise of power for the authority to frustrate the claimant's expectation. Although it has sometimes been said to be a requirement also that the claimant has relied to its detriment on what the public authority has said, the law now seems to be clear that such detrimental reliance is not essential but is relevant to 10 the question of whether it would be an unjust exercise of power for the authority to frustrate the claimant's expectation (see, eg, *R (On Application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No 2)* [2009] AC 413 , paragraph 6, per Lord Hoffmann).'

Vacation Rentals argued that they complied with the guidance set out in HMRC's Business Brief 18/06 on when credit card handling services should be treated as exempt from VAT. HMRC later issued assessments, claiming that the services

should be standard-rated. The company sought judicial review of HMRC's decision, contending that 'the policy is expressed in a way that is clear, unambiguous and devoid of relevant qualification'. The Upper Tribunal agreed. The judges further ruled against HMRC's contention that 'it would not be unfair or an abuse of power to resile from the guidance in that the Claimant was a "very sophisticated taxpayer", with access to high quality advice'.

Vacation Rentals sought to apply the Business Briefing only to periods covered by it – and did not seek to argue that it could bind HMRC indefinitely. The recent *Serpentine Trust* case, covered by Helen Adams and Talia Greenbaum in this issue (page 24), makes it clear that HMRC cannot bind itself to a future tax treatment contrary to the law, although First Tier Tribunal judge Anne Redston suggested that making a claim for legitimate expectation remained open.

The other principle to be considered is conspicuous unfairness. The lead case here is *R v Commissioners of Inland Revenue ex parte Unilever plc* [1996]. Unilever successfully argued that it was unfair for the Inland Revenue to refuse to accept late claims, after years in which it had. The principle has recently been reviewed by the Court of Appeal in *City Shoes (Wholesale) Ltd*. The case concerned whether HMRC could deny access to the favourable terms of the Liechtenstein Disclosure Facility to several BDO clients, which sought to settle offshore employee remuneration arrangements with the discount offered through the LDF. The Court held that it was open to HMRC to refuse access to taxpayers who had applied for registration under the LDF but had not been granted it whilst the Commissioners considered the matter and agreed a change in the facility with the Liechtenstein authorities. Only taxpayers whose registration had been accepted were permitted to benefit.

The Office of Tax Simplification recently recommended in their report on HMRC Guidance that 'HMRC should undertake a consultation on the circumstances in which a taxpayer can rely on published guidance'. These decisions reinforces that recommendation.