HMRC’s discretionary PAYE powers and the Hoey and Higgs cases

Employment Tax

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ITEPA 2003 s 684(7A)(b) provides HMRC with wide discretionary powers to collect PAYE direct from individuals. The CIOT has sought from HMRC details as to when they will use this discretion, how this power interacts with its powers in the PAYE regulations, and whether the power will be used retrospectively or prospectively.

The CIOT recently asked HMRC to clarify their application of the powers available to them under ITEPA 2003 s 684(7A)(b), which enable them to suspend the operation of PAYE by employers and assess employees directly.

Many of you will be familiar with the provisions in the PAYE Regulations (regs 72 and 81) that permit HMRC to collect tax from an employee where the person making a relevant payment has not complied with the requirements of the PAYE Regulations.

What you may be less familiar with is the general discretion available to HMRC under ITEPA 2003 s 684(7A) to disapply the PAYE Regulations and effectively circumvent the protections within the PAYE Regulations that limit the circumstances under which HMRC can pursue employees for unpaid PAYE.

Section 687(7A)(b) provides that:‘Nothing in PAYE regulations may be read … as requiring the payer to comply with the regulations in circumstances in which an officer of Revenue and Customs is satisfied that it is unnecessary or not appropriate for the payer to do so.’

Section 684(7A)(b) was discussed in the Hoey case (https://tinyurl.com/wmw3k3e), a loan charge case which Keith Gordon reported on in October 2019’s Tax Adviser (see www. taxadvisermagazine.com/loan_arrange) where the tribunal found it was not open to the tribunal to consider whether HMRC exercised their discretion properly. It was also the subject of the Higgs case (https://tinyurl.com/uvolgjh), where the tribunal found that it did not have the jurisdiction to consider s 684(7A)(b).

The CIOT was concerned that if the tribunal judges views are correct, s 684(7A)(b) gives HMRC wide – and apparently uncircumscribed – discretionary powers to collect tax direct from an employee in circumstances in which taxpayers and employers might have little reason to expect it. We therefore sought clarification from HMRC of four points to which HMRC provided the following responses:

Q1: When will HMRC use the discretion to collect tax from the individual?
A: 'HMRC is of the view that the PAYE Regulations provide a complete scheme for the deduction of and accounting to HMRC for tax by employers and other persons who make, or are treated as making, relevant payments of PAYE income. The PAYE regulations will apply for most individuals in receipt of employment income, and also act to protect employees from fraudulent or negligent employers who fail to pay to HMRC the tax they have deducted or should have deducted from an individual. The PAYE regulations were not intended to ensure that the employer, or any other person treated as making a relevant payment of PAYE income, should bear the cost of unwittingly becoming party to an individual's arrangements to avoid their tax liability. HMRC is able to disapply the PAYE regulations where an officer considers it "unnecessary or not appropriate" for the payer, or deemed payer, to apply those provisions.'

Q2: How do regs 72 and 81 interact with ITEPA 2003 s 684(7A)(b) and what is HMRC's approach to collecting tax from an individual in these circumstances?A: 'HMRC considers that the respective powers at ITEPA 2003 s 684(7A)(b) and regs 72 and 81 of the PAYE Regulations are overlapping, so the regulations do not limit the operation of s 684(7A)(b). HMRC does not consider that an inability to collect tax is, without more, sufficient to allow it to use s 684(7A)(b). As explained above, in most appropriate cases HMRC will seek to use regs 72 and 81 to collect tax from an employee rather than from an employer. Where an individual has participated in arrangements that HMRC consider disguise remuneration, then an officer may take a decision to invoke s 684(7A)(b).

'A First-tier decision was published 24 February 2020 covering similar ground to the Hoey case. This was the Higgs decision and related to the Edge Scheme litigation (see TC/2018/05042 https://tinyurl.com/uvolgjh). In that case taxpayers sought to argue that s 684(7A)(b) could not operate in respect of arrangements that HMRC considered disguised remuneration because of the existence of regs 72 and 81 of the PAYE Regulations. At paragraph 77 of the Higgs decision Judge Austen endorsed HMRC's view that the powers are overlapping, but he did not agree with Judge Gillett

in Hoey that this would render those regulations otiose. At paragraph 81 Judge Austen states that Parliament intended that HMRC should have both the discretion conferred by s 684(7A)(b) and the powers contained in the regulations, and that s 684(7A)(b) having a wide interpretation, and by extension broad areas of possible application, does not undermine the PAYE Regulations.'

Q3: When HMRC invoke ITEPA 2003 s 684(7A(b) do you envisage this to be prospective or retrospective in relation to communications with the payer/employer?
A: 'HMRC considers that the statutory language of ITEPA 2003 s 684(7A)(b) is clear in relieving the employer or deemed employer of the mandatory application of the PAYE Regulations, both in relation to obligations that have arisen and ones that will arise. This view is supported by Judge Austen in the Higgs decision where, at paragraph 82, he says that: "There is nothing in the statutory wording that cuts down the exercise of the discretion to a prospective application … I see no difficulty with the decision having prospective and/or retrospective effect."

'HMRC envisages that in some instances there will be communication with a payer or employer. However it also considers that its ability to use s 684(7A)(b) should not be restricted where it holds sufficient evidence for an officer to reasonably determine that the operation of PAYE is unnecessary or not appropriate, but where the identity of the employer is not clear.'

Q4: Does HMRC intend to publish guidance in the PAYE or COG manuals on the operation of this provision?
A: 'Currently HMRC does not intend to include guidance in either the PAYE or COG manuals. This is because most officers will not need to consider invoking ITEPA 2003 s 684(7A)(b) in their day to day work. HMRC consider this power is likely to be most appropriate in cases presenting an unusual or complex fact pattern, where a bespoke decision will be made taking account of the particular facts of the case.'