No formal investigation? No problem!

Mark McLaughlin looks at informal enquiries by HMRC and information notices issued during such enquiries

The well-trodden path by HMRC when launching enquiries into an individual's tax return is to issue a notice under TMA 1970, s 9A. A formal enquiry follows a structured process, which provides HMRC with certain powers, and importantly affords taxpayers some statutory protections. For example:

If the taxpayer has filed a self-assessment return and HMRC has not opened a formal enquiry into it, HMRC cannot issue an information notice in respect of that return except in certain limited circumstances (FA 2008, Sch 36, para 21).

Following the opening of an enquiry into an individual's self-assessment return under TMA 1970, s 9A, the taxpayer can apply to the First-tier Tribunal for a direction that HMRC issues a closure notice within a specified period (TMA 1970, 28A(4)).

A return which has been the subject of one enquiry notice within the statutory enquiry 'window' may not generally be the subject of another notice of enquiry under TMA 1970, s 9A.

It should also be noted that HMRC's unrestricted right to open an enquiry under TMA 1970, s 9A is limited by a strict time limit within which such an enquiry may be opened (normally up to 12 months from the filing date for the return); once the period expires, the return is final, subject only to a discovery assessment.

'Informal' enquiries

However, HMRC does not always open formal enquiries when looking into someone's tax affairs. Sometimes information and documents are requested informally. For example, the taxpayer may not have filed self-assessment returns for the period under review, which could cover many tax years. If the taxpayer refuses to cooperate with an informal request for information and documents, as indicated above HMRC could seek to obtain them by issuing an information notice (under FA 2008, Sch 36, para 1).

HMRC's practice of making enquiries outside the statutory framework for doing so was challenged by an application for judicial review in *JJ Management LLP & Ors, R (On the Application Of) v Revenue and Customs & Anor* [2020] EWCA (Civ) 784.

Taxpayer challenge

In that case, one of the claimants (BR) was a successful businessman, who was resident and domiciled in the UK. The other claimants were UK and non-UK corporate entities in which BR was beneficially interested.

In the early 1990s, BR opened a supermarket business in Tenerife, which grew significantly. Since at least June 2016, HMRC had been investigating BR's tax affairs. HMRC's investigation

was opened by a letter to BR. No formal enquiry was opened (under TMA 1970, s 9A). Following repeated requests for information and documentation, HMRC issued a formal information notice to BR in July 2017 (under FA 2008, Sch 36, para 1), and third-party information notices to other claimants (pursuant to Sch 36, para 3(1)).

The appellants' application for judicial review was on the grounds (among other things) that where HMRC had not opened an enquiry into a taxpayer's tax return under TMA 1970, s 9A, HMRC did not have a general power to conduct the sort of wide-ranging lengthy investigation that they had been conducting in relation to them.

HMRC's duties and discretion

Pausing there for a moment, it is worth reflecting on HMRC's duties and functions. HMRC's general responsibility for the collection and management of income tax, corporation tax and capital gains tax is set out in *TMA 1970, s 1.*

Furthermore, the powers and duties of HMRC (or the Commissioners for Revenue and Customs, to be more precise) are defined by law, in the Commissioners for Revenue and Customs Act 2005 (CRCA 2005). HMRC is responsible for (among other things) "the collection and management for which the Commissioners of Inland Revenue were responsible before commencement of this section" (CRCA 2005, s 5(1)(a)). HMRC are empowered to do anything which they "think" is necessary, expedient, incidental or conducive in relation to their functions,

However, HMRC appears to interpret this duty quite flexibly. In its Admin Law manual, HMRC states (at ADML3200): "HMRC is therefore responsible for the… collection of tax revenues… and must manage them in the most efficient way. This means that HMRC must apply the law correctly and the Commissioners cannot choose to move away from this position merely because the result seems unfair or unreasonable. To move away from the strict application of the law in this way would be contrary to the will of Parliament.

"However, there may be circumstances where applying the discretion would result in a more efficient management of the revenue and in such cases the Commissioners can choose to do so."

HMRC has sometimes exercised discretion under its powers of collection and management in the taxpayer's favour, although the circumstances in which they will do so in practice have diminished significantly following the House of Lords' decision in *R (oao Wilkinson) v CIR* [2005] UKHL 30. The tests which HMRC apply in considering whether its discretion under CRCA 2005, s 5 can be exercised are discussed in its guidance at ADML3400.

HMRC's powers of collection and management are normally considered in the context of whether they should be applied in the taxpayer's favour. However, can HMRC's discretion be exercised in reverse?

Formal and informal

Returning to *JJ Management*, the High Court ([2019] EWHC 2006 (Admin)) held that (under CRCA 2005, s 5(1) and TMA 1970, s 1) HMRC's functions included the collection of taxes; conducting an investigation into whether a taxpayer had declared all his income and paid

the correct amount of tax was expedient or conducive to the exercise of that function; and it was, therefore, something that HMRC had statutory power to do (under CRCA 2005, s 9(1)).

The statutory scheme was such that HMRC's functions included not only opening an enquiry into a return under TMA 1970, s 9A during the enquiry window, but also checking returns without opening a section 9A enquiry after the enquiry window had closed.

In the subsequent Court of Appeal hearing, the appellant argued (among other things) that the High Court judge erred in finding that CRCA 2005, s 9(1) empowered HMRC to conduct 'informal investigations'. However, the Court of Appeal disagreed, and concluded that the High Court was correct to hold that HMRC has the power to conduct such investigations.

HMRC's functions included not only checking tax returns without opening an enquiry under TMA 1970, s 9A, but also checking returns after the enquiry window had closed. Judicial review of the exercise of that power was available on ordinary public law grounds, but in practice it would take a wholly exceptional case on its legal merits to justify judicial review of a discretionary decision by HMRC to conduct an informal investigation of the kind conducted in the present case. The appellants' appeal was dismissed.

Nudge, nudge?

As if HMRC did not have sufficiently extensive powers before *JJ Management*, those powers now seem even wider. The Court of Appeal's judgment will be worrying for those taxpayers being asked questions as part of informal HMRC investigations, as there appears to be little protection for the taxpayer unless HMRC is acting unlawfully in its conduct. HMRC's practice of issuing 'nudge' letters to taxpayers as opposed to opening formal enquiries looks set to continue, and informal checks may become the means by which HMRC investigate (for example) incorrect claims by employers and the self-employed for government payments during the Covid-19 pandemic.

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