

When 'white space' disclosure can help the taxpayer

Steven Porter explains all, with reference to a recent tribunal ruling

A recent case in the first-tier tax tribunal (FTT) provides lessons for taxpayers on when it is appropriate to make 'white space' disclosures in UK tax returns.

In the case in question the taxpayers, acting through their agent, were found to have been careless in completing the tax returns despite disclosure in the white space on the returns. There are circumstances in which 'white space' disclosure will be helpful, however.

What is 'white space' disclosure?

White space disclosure is when a taxpayer or their agent includes some commentary in their UK tax return in a white box headed 'Any other information', with the instruction "Please give any other information in this space".

The FTT's ruling of carelessness came in the case of Mr and Mrs Johnson, who had entered into an interest rate hedging swap.

Following a Financial Conduct Authority review of the swap, the Johnsons were awarded compensation in 2013/14. The compensation was not included as taxable income in the tax return for that year, but a statement was included in the white space identifying that a compensation payment had been received. The statement referenced its amount and source and declared that the payment received was not taxable.

In early 2018, HMRC opened a check into the returns, which ultimately led to a discovery assessment in late 2018, bringing the redress payments into charge to tax. Carelessness penalties were also charged.

The Johnsons appealed, arguing that they had included the information in the return and so the discovery assessment was not valid. Their tax adviser clearly felt that he had protected his clients from future penalties and discovery by including the disclosure in the return.

The FTT said, however, that the tax adviser's approach was not correct. The tribunal highlighted that there are two circumstances in which a valid discovery assessment can be raised by HMRC where a taxpayer has submitted a return, and that only one of them needs to be met for an assessment to be raised:

- the potential loss of tax was due to careless or deliberate behaviour by the taxpayer or their agent, or
- at the time when an HMRC officer ceased to be entitled to open an enquiry into the return the officer could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the loss of tax.

It is only in the context of the second condition that the information included in the white space disclosure is relevant.

What the case means for taxpayers

In the case of the Johnsons, the FTT found that the actions of the agent were careless, because he did not do a thorough enough investigation into the facts of his clients and the nature of the redress payment when filling in the tax returns and reaching the conclusion that the redress payments were not taxable. The information in the white space disclosure was not relevant at all to the charge of carelessness.

There had been an earlier case in which the FTT had indicated that a white space disclosure could help defend against an accusation of carelessness. That case progressed to the Upper Tribunal which expressed doubt on this position, but it did not need to decide on the point.

A white space disclosure will, however, still be helpful to a taxpayer in some circumstances.

Under the 'reasonably expected' condition explained above, which is relevant where there has not been any careless or deliberate loss of tax, including the detail of why you have come to the conclusion you have elsewhere in the return and highlighting the potential alternatives, will protect you from a later discovery assessment, since you are "making the information available" to have been reasonably expected to be aware of the loss of tax. There has been a huge amount of case law on what is and isn't sufficient in this context, therefore it is vital for an adviser to consider how much and what information to disclose – it is not sufficient to disclose enough information to make HMRC ask more questions.

Although we have not yet had a binding precedent on the question of the relevance of white space disclosure to cases of carelessness, the interpretation of the discovery assessments in the case of the Johnsons must be right on a straightforward reading of the law.

Advisers should take note that including an uncertain position in the white space will not be enough to protect the taxpayer from discovery assessments if insufficient care has been taken in coming to the filing position in the return in the first place. Advisers must be diligent in reaching their conclusions first, and then consider whether a white space disclosure provides them with additional protection against assessments. It is also worth remembering that HMRC often defend a discovery assessment on the basis of both the conditions the FTT referenced, therefore advisers should be prepared to answer both questions.

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