When HMRC is wrong…

Mark McLaughlin looks at the tax and penalty implications for taxpayers who rely on advice from HMRC or another government body that turns out to be incorrect or misleading

HMRC offers taxpayers advice or information from time to time; for example, to a single taxpayer based on their own circumstances, or to a particular category of taxpayers, or to the wider body of taxpayers. If advice is taxpayer-specific it may be given in writing, over the telephone or possibly face-to-face.
HMRC has published guidance on its website, entitled 'How HMRC advice and information can help you '(https://tinyurl.com/mpxxjmbj). It states that HMRC's published information and guidance may not always give the taxpayer a definitive answer. In those circumstances, the taxpayer has the option to contact HMRC for the answer.

HMRC makes mistakes too!

Of course, like taxpayers (and advisers), HMRC staff are prone to errors when it comes to interpreting and applying often complex and difficult tax law. What happens if an HMRC officer gives the taxpayer incorrect advice or information?
HMRC accepts that incorrect advice given to a taxpayer will be binding if the following tests are all met (see HMRC's Admin Law Manual at ADML1300):

- The taxpayer made it plain they were seeking fully considered advice and indicated what it would be used for.
- The taxpayer provided all information relevant to the query.
- The advice given by HMRC was clear, unambiguous and without qualification.
- The taxpayer acted in reliance on HMRC's advice (i.e. they did or refrained from doing something as a direct consequence of the advice).
- The taxpayer would suffer detriment if the correct statutory position were applied (e.g. they would be financially worse off than if the correct advice had been given).
- To apply the correct statutory position would be so unfair as to constitute an abuse of power.

These are cumulatively challenging tests. If they are not all met and HMRC correct the taxpayer's tax position, a redress payment might be made (e.g. the reimbursement of reasonable costs the taxpayer may have incurred) upon a successful claim being made to HMRC.

Some discretion

HMRC's responsibility for the collection and management of taxes is set out in CRCA 2005, s 5. In HMRC's view (see ADML1200), this legislation offers some 'limited discretion'. However, HMRC considers that the legislation only permits collection of taxes which are properly due to be foregone if HMRC would obtain a higher net return for the exchequer by honouring the incorrect advice. For example, if it would cost HMRC £500 to collect tax of £50, then foregoing the tax in question increases the overall yield to the exchequer by reducing the cost of collection.

However, HMRC is under no explicit statutory obligation to honour incorrect advice or information. If HMRC corrected its advice or information to the taxpayer's detriment, the taxpayer could consider applying to the High Court for judicial review of HMRC's actions. For example, if HMRC has given incorrect advice, the courts might rule that to apply the strict letter of the law would be so unfair as to amount to an abuse of HMRC's power. However, the circumstances would probably need to be exceptional for a court to consider HMRC's conduct to be an abuse of power.

Legitimate expectation

There is also a legal principle of 'legitimate expectation'. This broadly states that if an individual's reliance on promises, representations or established practices of a government body such as HMRC is legitimate or reasonable, there is an obligation on the public body to fulfill rather than frustrate those legitimate expectations.
However, legitimate expectation is a difficult legal concept. In addition, court cases can be very expensive and time-consuming, and the outcome is often unpredictable.

Goalposts moving

Taxpayers are sometimes given advice based on HMRC's understanding of the law at that time, but that advice later turns out to be incorrect following a subsequent decision by the courts. HMRC's position in those circumstances is generally that its obligation to collect the 'right 'amount of tax may mean that it can no longer be bound by the advice, information or guidance previously given.
However, HMRC might decide not to apply the new understanding of the law retrospectively and only apply it going forward instead (albeit the emphasis here is on 'may'); HMRC will generally consider whether to apply a new understanding of the law retrospectively on a case-by-case basis, or perhaps for specific groups of taxpayers.
Of course, if HMRC's advice was correct when given, but is later rendered incorrect by new legislation introduced retrospectively, HMRC will not be bound by any advice previously given by HMRC covering the period of retrospection.

Clearance applications to HMRC

Very often, a taxpayer's request to HMRC for advice or guidance takes the form of a clearance application. Tax law provides for applications to HMRC for advance clearance on the tax treatment of certain transactions or events. Common examples of 'statutory clearance 'applications include: seeking HMRC's assurance that business disposals will not be subject to a counteraction notice under the 'transactions in securities 'income tax anti-avoidance rules (ITA 2007, s 701; CTA 2010, s 748); or for HMRC's agreement that share exchanges or business reconstructions will not be challenged on avoidance grounds for capital gains relief purposes (TCGA 1992, s 138(1)); or that capital treatment would be considered to apply to a company purchase of its own shares (CTA 2010, s 1044).
In addition to these statutory clearances, HMRC also offers a 'non-statutory clearance ' service in some other areas of uncertainty (https://tinyurl.com/53s8ydhn).
For both statutory and non-statutory applications, the taxpayer must make it clear they are seeking fully considered advice and indicate how that advice will be used. A clearance is broadly a written confirmation of HMRC's view on the application of the law to a

particular transaction or event, which the taxpayer can generally rely upon. However, this is conditional on the information supplied to HMRC being complete, accurate and correct to the best of the applicant's knowledge and belief; clearance applications need to be drafted very carefully. A principle was established in R v IRC, ex p. MFK Underwriting Agencies Ltd ([1989] STC 873) that the taxpayer "…should have put all his cards face upwards on the table". In addition to the information given to HMRC needing to be accurate and complete, the transactions must be carried out exactly as described in the clearance application. If these conditions are breached, HMRC are likely to regard a clearance previously given as being null and void.

Care needs to be taken with clearance applications where transactions involve subjective matters such as share valuations, as valuations can vary widely from one valuer to another. For example, in Boulting & Anor, R (On the Application Of) v Revenue and Customs [2020] EWHC 2207 (Admin), HMRC gave advance clearance that capital gains tax treatment would apply on a company purchase of own shares from a shareholder. However, HMRC later treated the clearance as void because the shares were each worth £66,900, not £600,000, according to the valuation used in applying for the clearance. The High Court held that given the very wide disparity between the parties, the share valuation may potentially have a bearing on whether the purchase of the shares was wholly or mainly for the purpose of benefiting the company's trade. The court also refused permission for the claimants to bring a judicial review claim as there was a suitable alternative remedy, namely an appeal to the First-tier Tribunal.

Non-HMRC government departments

An individual may occasionally be given advice by a government body other than HMRC about a transaction, which has tax implications for the individual. If the transaction involves disposing of an asset such as a property, the taxpayer should seek tax advice before undertaking the transaction, because the non-tax government body will not be particularly concerned about the tax implications of the transaction.

For example, in Salokun v Revenue and Customs [2023] UKFTT 962 (TC), HMRC issued to a taxpayer capital gains tax assessments for 2014/15 and 2015/16 for undeclared property disposals, and penalties for the filing of inaccurate tax returns based on the taxpayer's disclosures being prompted and his behaviour being deliberate. On appeal, the taxpayer did not dispute that the properties were sold; his primary contention was that the properties were sold to raise funds towards the care of his wife, who was in extremely poor health, and that he had been instructed by the government to sell his properties for this purpose. On that basis, the taxpayer believed he shouldn't have to pay the tax or penalties assessed.

Not surprisingly, and notwithstanding the government's 'advice', the First-tier Tribunal held that the taxpayer had made a conscious decision not to disclose the relevant information about the property disposals. Consequently, HMRC's assessments were valid. Furthermore, the tribunal found that the taxpayer's non-declaration of the property disposals and capital gains was deliberate.

Understand HMRC's approach

‘Know thine enemy ’is perhaps a melodramatic and overstated expression in this context; nevertheless, knowledge and understanding of HMRC’s position offers a potential advantage.
HMRC‘s guidance at ADML1000 and following is aimed (among other things) at helping its officers decide when HMRC is bound by incorrect advice. A review of HMRC’s Admin Law Manual may well be worthwhile where a claim that HMRC should be bound by incorrect advice is being considered.

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