

Choose one!

Mark McLaughlin looks at HMRC discovery assessments issued on an alternative basis

Some years ago, there was a sketch on the satirical television show *Spitting Image* about a former Prime Minister (who shall remain nameless) who was known for his indecisiveness. Members of his Cabinet tried to improve his decision-making skills by inviting him to make a simple choice between having a cup of tea or a cup of coffee. The Prime Minister agonized in his deliberations, sweating profusely. Eventually, after much coaxing, the Cabinet triumphantly celebrated when the Prime Minister finally declared: "I'll have tea", before sending them into despair by adding: "...with some coffee in it".

The indecisiveness of the Prime Minister in the *Spitting Image* sketch is sometimes replicated by HMRC when it comes to issuing discovery assessments. This can happen if a transaction is capable of being interpreted in different ways for tax purposes, with a different tax treatment applying to each.

Just in case...

For example, the sale of a property by an individual might give rise to a chargeable gain for capital gains tax purposes. However, in some cases the sale may arise from an established property trade and be taxable as trading profits for income tax purposes. Occasionally, anti-avoidance provisions concerning 'transactions in land' could be invoked, resulting in an income tax charge arising from dealing or developing land in the UK where certain conditions are satisfied (ITA 2007, Pt 9A).

If the statutory time limit to raise a discovery assessment is fast approaching, but HMRC is still undecided over the correct basis of charge, alternative assessments might be raised. HMRC's approach to alternative assessments is outlined in its Enquiry Manual (at EM3269): "HMRC cannot subject a taxpayer to two different charges to tax in respect of the same tax head but there is no objection to pursuing them both as alternatives." HMRC also states that making alternative assessments "...has long been accepted by the courts and is considered a sensible way of dealing with difficult cases. It is therefore established that there is nothing objectionable in principle of alternative assessments." However, even if the courts and tribunals accept the legitimacy of this practice, that does not necessarily mean they encourage it – more on this later.

In *Wyatt v Revenue and Customs* [2024] UKFTT 867 (TC), HMRC considered that the appellant had realised a profit from property development as a trading venture and raised various assessments, including discovery assessments for 2007/08 and 2009/10. Those assessments were made on an alternative (i.e., income tax and CGT) basis.

However, the relevant assessments did not set out separate assessments for the tax due: (a) if the disposals were considered trading transactions; and (b) if they were considered capital disposals. Instead, the relevant assessments each contained a single figure, being the sum of the amount as a trading transaction and the amount as a capital disposal. The assessments therefore purported to tax the same disposal proceeds twice – once as a trading disposal, and once as a capital disposal.

Thus, (1) For 2007/08, the assessment was for £184,586, when an assessment purely based on a trading disposal would be for £90,360; and (2) For 2009/10, the assessment was for £228,544, when an assessment purely based on a trading disposal would be for £123,595. The appellant appealed on 12 December 2019. However, it was not until 27 August 2024 – nine days before the First-tier Tribunal (FTT) hearing – that HMRC wrote to the appellant pointing out the matter and issuing a fresh assessment for each of the two years of the relevant assessments. Those fresh assessments set out only the trading figure.

A matter of 'opinion'

A preliminary issue before the FTT was whether the relevant assessments were validly issued. The FTT considered the discovery legislation (TMA 1970, s 29), and in particular that where a loss of tax has been discovered, HMRC may (subject to certain exceptions) "...make an assessment in the amount, or the further amount, which ought *in his or their opinion* to be charged in order to make good to the Crown the loss of tax" (emphasis added).

The FTT noted that the use of the phrase 'in his opinion' in section 29 allowed an HMRC officer a wide discretion. An officer may make assumptions to arrive at their view of the amount of tax to be assessed. If a taxpayer considered that the figures were too high, their normal remedy would be to bring an appeal. Interestingly, and uncommonly in disputed cases about discovery assessments, it was HMRC that raised the point with the FTT (even though it was not a point in their favour) that the assessments in this case did not

(as a matter of fact) reflect the officer's opinion. HMRC pointed out that there was no binding authority on this point, and the FTT set out its view in full to help in other cases. The appellant was represented by his father, so HMRC (to its credit) raised the issue 'fairly and properly'.

The FTT pointed out that the assessments must not exceed the amount which, in the officer's opinion, made good the loss of tax. In the HMRC officer's opinion, the tax due was at most the amount due based on a trading transaction (or, if higher, the amount due on a capital transaction, but not both). Because the relevant assessments in each case exceeded that figure, they fell outside the boundaries of the assessment power. The FTT therefore concluded that TMA 1970, s 29 should be read as constraining the power of an officer to raise an assessment to be no more than the maximum amount which in their opinion needed to be charged to make good the loss of tax.

The FTT concluded that the relevant assessments were not validly made. The FTT therefore: (i) exercised its powers to bar HMRC from taking further part in the appeal against the relevant assessments (i.e., effectively striking that part out); and (2) directed that the appeal against the remaining assessments be stayed for 60 days from the date of its decision (so that, should the appellant decide to appeal against the 'new' assessments, the stay would provide time for that appeal to be joined to the present one).

More inconvenience

HMRC's guidance states that where alternative assessments are raised: "The taxpayer's recourse would be to appeal both assessments and let the tribunal decide which is the correct position." Unfortunately, in Wyatt the FTT pointed out that by making an assessment that exceeded the amount the officer believed to be due, HMRC deprived the taxpayer of the option of simply accepting the assessed figure. The taxpayer was instead compelled to enter into an appeals process even if they agreed with the HMRC officer's view.

Of course, as with any discovery assessments it is incumbent on the professional adviser to check that the alternative assessments have been validly raised, not only in terms of their quantum, but also in their timing and in ensuring that the conditions for making a discovery have been met.

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