Kaczmarczyk: penalties for failure to file return

Failing to submit your tax return can give rise to some serious penalties, even if you have no taxable income.

The recent case of *Kaczmarczyk v HMRC* [2017] UKFTT 262 (TC) has some hair-raising implications.

Mr Kaczmarczyk was issued with a tax return by HMRC but he did not send it back because he had no taxable income or gains for the year. However, HMRC still imposed a penalty of £3,500 for failing to submit the return. Their grounds derived from TMA 1970 s 8: 'he may be required by a notice given to him by an officer of the Board to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice.'

The tribunal held that upon receipt by a person of a notice under s 8, the recipient has an obligation to file a tax return for the year – and failure to do so gives rise to a penalty under FA 2009 Sch 55.

Such penalties used to be limited to the amount of tax payable; however, that limit was abolished in 2010 and there seems to be no defence to a penalty for not submitting a nil return. (I wonder if this reasoning extends to failing to send a cheque for £0.00?)

That seems clear enough. But hold on: can this really be right?

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There are a billion people in China, another billion in India (and so on); none of them have any UK income or gains, or any UK liability. So HMRC can send them all s 8 tax return notices and fine them £3,500 for failing to send them back. The deficit would be gone in an instant.

But that would be silly, wouldn't it? Well, yes. But do they fall within the legislation? On a strict reading, they do. Under the circumstances, one might think another interpretation would be appropriate – you know, like when a literal interpretation gives rise to absurdity.

It is no good saying that because such penalties would be irrecoverable, that is a reason why the s 8 obligations should not fall on them. We know that argument does not work from *Agassi v Robinson* [2006] STC 1056, where the House of Lords held that a withholding tax obligation existed in respect of a payment outside the UK, by a foreign company with no UK presence, to another foreign company. Their lordships held that difficulties in collection were no impediment to the proper interpretation of the legislation.

Similarly, there is no requirement for the recipient to be resident in the UK. Indeed, I am aware of tax returns being issued to non-residents and penalties being imposed on the above grounds.

There are no longer any difficulties for HMRC in collecting tax debts in EU countries by reason of the EU Directive 2001/44/EEC and FA 2002 Sch 39, nor from people in other countries which have signed up to the OECD Convention on Mutual Administrative Assistance in Tax Matters (which is most of them). Accordingly, s 8 is clearly a cash machine for HMRC on which there is no restraint.

Or maybe there ought to be another interpretation. ■

Peter Vaines, Field Court Tax Chambers (pv@fieldtax.com)

Brexit and references to the CJEU

The Upper Tribunal considers the impact of article 50 on references to the CJEU.

It was inevitable that the UK courts would start to encounter 'Brexit based' arguments. We now have an example of this in a tax context, following service of article 50 and the start of the two year countdown to the UK's exit from the EU.

In *Coal Staff Superannuation Scheme Trustees Ltd v HMRC* [2017] UKUT 0137 (TCC) (reported in *Tax Journal*, 5 May 2017), the Upper Tribunal (UT) was asked to make an immediate referral to the CJEU, before the appeal on the substantive issues had been heard by the same tribunal. This request was made in order to protect the taxpayers from being deprived of their ability to seek the assistance of the CJEU in resolving their EU law based claim (here based on the free movement of capital) because of the UK's decision to leave the EU. The taxpayer argued that, on the basis of the anticipated timing of the outcome of the substantive appeal, it was unlikely that a preliminary ruling could be sought and obtained from the CJEU before the expiry of the two year period envisaged in article 50. On this basis, the taxpayer's position was that the UT should make a reference to the CJEU as, on a purposive reading of article 267 of the TFEU, it was obliged to do so as it was now 'a tribunal of a member state against whose decision there is no judicial remedy under national law'.

This application appears to have been designated as a priority by the judiciary, and understandably so, as there is the clear 'floodgates' risk of numerous other similar applications being made if the UT accepted the application. This could lead to the CJEU being overwhelmed by the sheer number of references to respond to, which in turn could have wider ramifications – the EU 27 are unlikely to be impressed with UK cases clogging up the CJEU machinery for the next two years. Possibly with this in mind, the application was dealt with by Mrs Justice Rose, president of the Upper Tribunal Tax and Chancery Chamber.

The tribunal rejected arguments that the service of notice under article 50 should change the approach taken by UK courts in making references to the CJEU

The UT noted that it should not seek to preempt transitional provisions that will be required to bring an end to the jurisdiction of the CJEU in the UK, as envisaged by the UK government. The tribunal went on to reject arguments that the service of notice under article 50 should change the approach taken by UK courts in making references to the CJEU. Based on the specific facts in question, the UT held that it would be inappropriate to make a referral at this stage. The UT commented that, whilst the application of the EU law principles in question may be difficult, it should not seek a ruling from the CJEU unless it is really necessary (i.e. the tribunal needs to be satisfied that it would not be able to resolve the relevant issues with complete confidence); and it is not a given that such a reference would be made by the UT in these circumstances.

It is perhaps unsurprising that the UT rejected this application. The UT's decision was possibly made easier by the position that there is an established body of CJEU case law on the EU law issues in question. It would be interesting to see if the same conclusion could be reached in a case which deals with an issue without the benefit of having been previously considered in detail by the CJEU; and/or on which UK tax practitioners are generally of the view that clarification from the CJEU is required. ■

David Haworth, Freshfields Bruckhaus Deringer (brexit.freshfields.com)