STEP Guidance Note: HMRC’s Reliance Statement

Purpose of this note

The Tax Law Review Committee (TLRC) has recently responded to HMRC’s call for evidence seeking views on how the tax administration framework could be updated and simplified to provide a better experience for individuals and organisations, enable opportunities to further reduce the tax gap, and help build greater resilience and responsiveness to future crises. In its response, the TLRC refers to the fact that HMRC’s ‘reliance statement’ has not been substantially updated since 4 March 2009 and that a taxpayer or professional agent cannot always rely on HMRC’s published guidance.

STEP would like to highlight this risk to members who should be aware of this issue and will need to carefully consider the guidance that they are relying upon and whether there could be adverse consequences if that guidance was found to be inaccurate. Many members will refer to HMRC’s guidance regularly as a guide to HMRC practice and the interpretation of the legislation, which it is likely to adopt. HMRC’s guidance does not carry the force of law.

HMRC’s Reliance Statement

HMRC’s statement¹ states ‘Information or advice from HMRC gives you certainty on your obligations, liabilities, entitlements and the consequences of your transactions. You aren’t required to act on the advice. There is no general right of appeal against the advice or information HMRC provides, except where rights of appeal are set out in law.’ The advice provided is based on the understanding of the law at the time it is given and HMRC further explains that it cannot be wholly relied upon due to the fact that it may update its views and approaches and that retrospective policy and law changes can also be introduced.

If HMRC informs you, your approach is wrong then you should consider whether HMRC is correct in its view or not. If you conclude that HMRC is correct in taking that view, you should advise your client to correct the matter or, if you act as the client’s agent, you will need to start again using the correct, advised approach. Even if you decide that HMRC’s view is incorrect, you should take account of the implications of HMRC taking that view in advising, or acting on behalf of, your client. The concern is that these disparate views can leave the user of the guidance in a difficult and uncertain situation.

HMRC confirms, however, that it will be bound by incorrect information or advice, which it has provided, on the basis that the taxpayer or agent can demonstrate that:

- the advice was reasonably relied upon;
- all the relevant facts are fully disclosed;
- applying the law would result in the taxpayer’s financial detriment.

¹ HMRC Reliance Statement, https://www.gov.uk/guidance/when-you-can-rely-on-information-or-advice-provided-by-hm-revenue-and-customs
The user will need to demonstrate that each of these conditions is satisfied, with the requisite evidence, and will need to prove that they will be penalised unfairly if HMRC reneges from its guidance.

In addition, if a client is relying on advice from an agent then the agent should draw the client’s attention to HMRC’s guidance and explain that the guidance was being relied upon in order to provide the relevant advice to the client. In the 2019 case of Aozora GMAC Investment Ltd v R&C Commrs the England and Wales Court of Appeal stressed that it would require a high threshold before it would intervene and prevent HMRC resiling from its previously provided guidance. The Court also concluded that professional agents were ‘not at any great disadvantage’ compared to HMRC when coming to their own view of the law, and it was that view on which the taxpayer relied. It must therefore be possible to show that ‘reliance’ in this context constituted a ‘real and substantial’ part in the advisory role as opposed to the agent simply being ‘supported or encouraged’ by HMRC’s guidance.

**TLRC Recommendations**

STEP believes there are aspects of HMRC’s reliance statement that are unclear and potentially misleading and we endorse the recommendations that the TLRC calls for in its response as follows:

- The guidance refers to the ‘taxpayer’ and individual transactions but it would be helpful if it is stated that it applies to general advice as well as more specific, individual advice for both taxpayers and professional advisors.

- It should state that there are avenues other than appeal available to those affected by reliance on the advice such as through the Adjudicators’ Office, the Parliamentary Ombudsman and judicial review.

- It should state that users may continue to disagree with HMRC as to whether its previous advice was a proper reflection of the application of law to particular facts.

- It should undertake that HMRC will provide some flexibility where it has previously issued erroneous advice, although the erroneous advice can be binding where detrimental reliance is not proved.

- It should introduce a policy whereby changes in advice are only to be applied prospectively and not retrospectively.

The Office of Tax Simplification (OTS) called for HMRC to undertake a consultation on the circumstances in which a taxpayer can rely on published guidance and the extent to which a taxpayer will be subject to interest, penalties and the tax in dispute where guidance is found to be incorrect. The OTS also proposes that HMRC publishes three separate levels of guidance for the mainstream taxpayer, the more sophisticated taxpayer and the specialist tax advisor.

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In the meantime, we recommend that members refer to the guidance as evidence of HMRC’s likely practice and of the construction of legislation that it is likely to adopt but remain alert to the fact that, except in rare circumstances and through the highly uncertain and expensive process of establishing a legitimate expectation in judicial review proceedings, they cannot rely on HMRC’s guidance in law.

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