Errors in taxpayer documents

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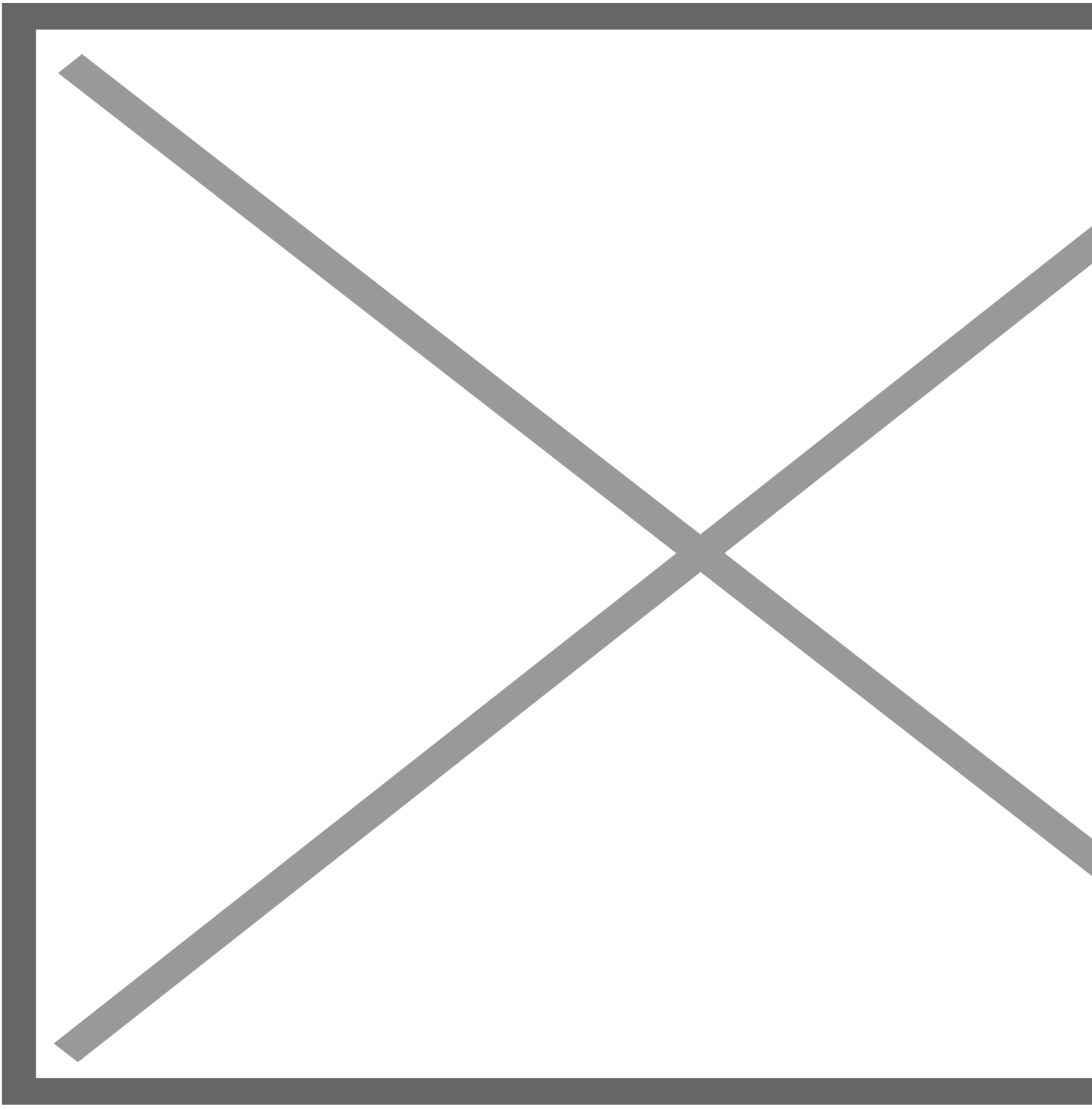

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Adrian Rudd sets out some of the implications of the provisions regarding errors in taxpayer documents

Clause 64 of the Finance Bill, which is now awaiting its second reading in the House of Lords on the 15th November and is expected to get Royal Assent before the Autumn Budget in November 2017, will increase HM Revenue & Customs' (HMRC) ability to charge penalties when a tax return (or similar document) is filed on the basis that certain avoidance arrangements had an effect which, in fact, they did not have.

In introducing this legislation, it seems that HMRC was concerned about cases such as *Anthony Bayliss v HMRC* (2016) TC 05251. In this case, Mr Bayliss was put in touch with the Montpellier organisation,by his long-standing accountant. The Montpellier organisation offered a scheme which was designed to achieve a capital loss. By the time of the hearing it was accepted by Mr Bayliss that the scheme did not work and that more tax was payable. However HMRC contended that Mr Bayliss acted fraudulently or negligently when submitting his tax returns, and sought penalties of 35% of the underpaid tax. Mr Bayliss appealed to the First Tier Tribunal on the basis that he did not act fraudulently or negligently.

The First Tier Tribunal held that no penalties were payable. It was accepted by both parties that the burden of proving that that Mr Bayliss had acted fraudulently or negligently was on HMRC. However HMRC had not proved this, and the evidence showed that Mr Bayliss believed that the returns were correct, and that he had been relying on the advice of his accountant and Montpellier.

Clause 64 makes a number of changes to the existing position, by introducing two new paragraphs into Schedule 24 to Finance Act 2007.

Reversal of burden of proof

First clause 64 reverses the burden of proof, in cases where a return or other document is submitted on the basis that the avoidance arrangements had an effect which they did not in fact have. Clause 64 provides that an inaccuracy in the document is presumed to be careless, unless either (a) it was deliberate, or (b) the taxpayer can satisfy HMRC (or, on appeal, the tribunal) that he took reasonable care to avoid inaccuracy (Schedule 24, para 3A(2)).

Disqualified advice

Second, in determining whether the taxpayer took reasonable care to avoid inaccuracy, HMRC (or the tribunal on an appeal) are required to take no account of any evidence that the taxpayer relied on advice which is disqualified advice (Schedule 24, para 3A(2)).

Advice is disqualified if any of the following situations apply.

- ***The advice was given to the taxpayer by an interested person***. Broadly this means either a person other than the taxpayer who entered into the avoidance arrangements, or a person who, for any consideration, facilitated the taxpayer entering into the avoidance arrangements. In other words, if the taxpayer receives advice from a person promoting the avoidance arrangements, he cannot rely on that advice for the purpose of showing that he took reasonable care to avoid inaccuracy.
- ***The advice was given to the taxpayer as a result of an arrangement between an interested person and the person giving the advice***. This appears to be directed at situations where the promoter of avoidance

arrangements arranges for advice to be given to the taxpayer by another adviser.
- ***The person giving the advice did not have the appropriate expertise***. It will be a defence if the taxpayer can show that he has taken steps to find out whether the adviser did in fact have the required expertise, and that the taxpayer reasonably believed that he did. It is unclear how this defence will actually be applied in practice, and many taxpayers will not be in a position to determine whether their adviser is competent or not. It is to be hoped that when taxpayers take advice from advisers who are members of a professional body, it would reasonable for the taxpayer to have concluded that the adviser had the required expertise.
- ***The advice took no account of the taxpayer's individual circumstances, or***
- ***The advice was addressed to a person other than the taxpayer***. These last two provisions are directed at cases where generic advice is relied on – for example advice given by the promoter of arrangements, which does not look at the taxpayer's own circumstances. Where taxpayers have entered into avoidance arrangements, they cannot rely on generic advice to show that they took reasonable care to avoid inaccuracy.

Avoidance arrangements

The new rules only apply when the inaccuracy in the tax return arises from avoidance arrangements, so it will be important to establish what avoidance arrangements are. The definition is in a new Schedule 24 para 3B(2), which provides that arrangements are avoidance arrangements if it would be reasonable to conclude that obtaining a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

It should be noted that this is an objective test – it does not matter what the party's own belief as to the purposes of the arrangements was; rather the test looks at what a reasonable person might conclude was the purpose of the arrangements.

It is specifically provided by para 3B(3) that arrangements which accord with established practice, which had, at the time the time the arrangements were entered into, been accepted by HMRC, are not avoidance arrangements.

The legislation outlines five circumstances where arrangements are taken to be avoidance arrangements:

1. arrangements which are disclosable under the Disclosure of Tax Avoidance Schemes (DOTAS) rules;
2. arrangements which are disclosable VAT arrangements;
3. arrangements countered under the General Anti-Abuse Rule (GAAR);
4. arrangements which are subject to a Follower Notice; and
5. arrangements countered under a targeted anti-avoidance rules (TAAR).

However the meaning of avoidance arrangements is not limited to these situations.

What will the rules mean in practice?

Taxpayers will be entitled to rely on advice which follows the principles in Professional Conduct in Relation to Taxation (PCRT), which members of the CIOT, ICAEW and several other professional bodies are required to follow.

This means that taxpayers should not face a penalty if they rely on advice in filing their tax return, where that advice:

- properly addresses the facts and circumstances of the individual taxpayer;
- provides reasoned analysis as to the impact of different courses of action open to the taxpayer; and

- does not promote highly contrived or abnormal arrangements, or arrangements which seek to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation.

In other cases it might be advisable for taxpayers to seek a second opinion before filing their tax returns.