

Enquiry adjustment

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On the basis that a private use adjustment in respect of motoring expenses was omitted from the final tax computation, HMRC are seeking to reopen previous years and increase the adjustments used

I am dealing with a tax enquiry where the only adjustment is the add-back for private motoring.

For some reason we omitted to make an add-back adjustment in the last set of accounts submitted (which happen to be cessation accounts).

For previous years the add-back was approximately £750 per year on a 'round sum' basis.

The Inspector is not content with adjusting for the existing year and is seeking to adjust the previous four years with net adjustments of between £1,500 and £3,500 per annum.

I have made the point to the Inspector that I have never come across a case where HMRC have sought to amend previous years for private use add-backs, as the enquiry window has closed.

I have referred the Inspector to ESC A19, but the Inspector will not budge.

Can *Taxation* readers please advise whether the Inspector is entitled to adjust earlier years in this instance?

Query 17,384 - Hamster

Reply by Hold Fast

In principle there is nothing special about motoring expenses or private adjustments. As HMRC say in their *Enquiry Manual* at EM2021: 'the principles underlying any decision to re-open for private adjustments are the same as for any other understatement'.

If Hamster's client has over-claimed motor expenses and capital allowances in these earlier years it is hard to see why the inspector could not make a discovery either on general grounds (TMA 1970, s 29(5)) or because the client or someone acting on his behalf had been negligent (TMA 1970, s 29(4)).

It is just possible that enough detail was provided in the earlier returns to prevent re-opening. The recent Special Commissioners case of *Corbally-Staunton v HMRC* SpC 692, has a helpful explanation of the current understanding of discovery.

The Commissioner said:

'...in my view it is not required that the officer be aware that there was in truth an insufficiency or that he be aware that it was beyond all reasonable doubt that there was an insufficiency, but merely that that information should enable him to conclude on balance that there was an insufficiency. Again, a mere suspicion would not be enough, but a conclusion in relation to which he had some residual doubt may well be sufficient. If he could reasonably have been expected to have come to such a conclusion before the later of the times mentioned he is precluded from making a discovery assessment.'

HMRC recognise this: 'if private use adjustments change because of a reconsideration of the same facts it will not be appropriate to re-open earlier years' (see EM2021).

It sometimes happens that inspectors dig their heels in on private motoring and agents have to advise clients that further debate is not worth the fees.

If this is what has happened here it is possible to argue that the inspector has not made a discovery.

HMRC have guidelines for when current year adjustments should be scaled back although they are not published because of Freedom of Information Act exemptions. But EM2022 gives a clue.

Under the heading *Reviewing earlier years: Private use adjustments*, there is an example of when it would be appropriate to scale back:

'There has been no discussion of a private use proportion but on examination it is found to be grossly understated, say 75% when only 10% had been applied.'

The figures for Hamster's client seem less than this. If they are, then HMRC should be challenged on the grounds that the example was published to instruct inspectors that this is typical of the case where scaling back is appropriate.

The corollary is that cases less pronounced than this are not suitable for re-opening.

As the inspector seems not to have mentioned penalties yet there may be a defence against imposition on the grounds that HMRC's instructions (at EM1362) on the Human Rights Acts have been breached.