How far can HMRC go?

Now the loan charge deadline has passed, it's time for us to take a step back and look at how the relationship between HMRC and the profession has evolved, writes Mala Kapacee

On the whole, the tax advisory profession exists to help taxpayers understand and fulfil their obligations while assisting individuals to legally mitigate their liabilities. In my experience as a tax investigations practitioner you meet the full range of individuals – those that were advised badly, those that simply made a mistake and those who deliberately set out not to pay their taxes for whatever reason, the latter being a minority. In the majority of cases, however, HMRC's stance appears to now be "guilty until proven innocent", contrary to the general rule of law in this country.

This appears to be in part, as a result of media focus on tax avoidance and tax evasion, largely instigated by the scandals of the past five years – HSBC 'Swiss Leaks' data in 2015, the 'Panama papers' in 2016, the 'Paradise papers' in 2017 – and partly because since the 2008 financial crisis, governments around the world have been looking to increase tax revenues without alienating the voting public.

The easiest targets for such reforms are wealthy individuals who do not appear to be contributing enough to the UK economy. At first this included the non-UK domiciled individuals, who had previously benefited from the remittance basis of taxation without charge and held properties in wrappers, benefiting from reduced IHT. Then, Parliament implemented the Accelerated Payment Notices and Follower Notice legislation, allowing HMRC to collect taxes before having to demonstrate it was due.

Rather than looking to amend our judicial system and perhaps improve processes therein, it was determined that requiring individuals to pay upfront for taxes that may or may not be due was permissible. The legislation was retrospective as at the time the tax arrangements were put in place, the understanding was that if the arrangements were challenged HMRC would have to prove that they did not work before claiming any tax. This applied for all tax structures, not just for marketed avoidance schemes. At the time the APN/FN legislation was introduced, there was an outcry from the tax profession who feared that this move towards retrospective taxation with a significant impact on a huge amount of taxpayers (in absolute terms) could lead to further retrospection in other areas, ultimately affecting the certainty with which individuals are able to manage their tax affairs.

More recently, we have had the loan charge, which has stirred up the debate again. The loan charge is insidious because HMRC have marketed the legislation as simply bringing into charge loans outstanding at April 2019. They neglect to mention that had HMRC used normal assessments timelines, they would be out of time to claim taxes considered due. The 'safeguards' in place in relation to the loan charge – for example, that if a taxpayer had sufficiently disclosed their participation in a tax avoidance scheme and HMRC had not taken any action, then loans in those years did not need to be declared – are, quite frankly, laughable. According to HMRC, putting the DOTAS number on the tax return as required by law was not enough. HMRC had to have been given full detail of the amounts affected for the disclosure to be 'sufficient'.

So we must ask ourselves, how reasonable is it to expect HMRC to take a reasonable view, that would be taken by a reasonable person in a similar situation. As professional advisers, if we were give a reference number on a form that related to something with further implications, surely we would investigate it. I suggest that HMRC officers should be considered to have sufficient expertise in tax to know when there is something that needs to be looked at more closely. The loan charge legislation appears to be a case of passing the buck and requiring taxpayers to have gone over and above what the legislation required. Would HMRC suggest it is fair' for them to do the same?

Part of the issue are media headlines vilifying tax avoidance, and HMRC's rhetoric that consistently aligns tax avoidance and evasion. Even now, it surprises and worries me how many people confuse the terms and assume that those who set out to avoid tax set out to commit fraud. But when you ask them about the use of pensions and ISAs, they say this is perfectly legitimate – and this is without taking into consideration 'aggressive' avoidance (schemes).

HMRC powers

Since 2008, the general public have been looking to blame the rich and the bankers for the state of the economy. The fact that public opinion ran so high against the wealthy allowed HMRC to put in place policies specifically targeting these individuals. HMRC have also continued to cite the tax gap as a reason for 'cracking down' on 'tax avoidance and evasion'. I fully agree, tax evasion is illegal and needs to be monitored, investigated and castigated. However, HMRC's methods are interesting, to say the least.

In a 2018 consultation, HMRC suggest they should be permitted to issue Schedule 36 notices to banks without approval of either the taxpayer or the

Tribunal. This is an attempt to override the safeguards currently in place, protecting taxpayers from a gratuitous invasion of privacy. HMRC have sufficient powers in place to obtain this information, should they have a 'reasonable suspicion' of an under-declaration of tax and the safeguards are there to prevent fishing expeditions. The consultation has closed and HMRC have drafted the legislation (to be in s4A, Sch 36, Finance Act 2008). The good news is that the legislation does require HMRC to advise the taxpayer if a Financial Information Notice has been issued by HMRC to the taxpayer's bank.

The biggest issue with a lot of this and the aggression with which HMRC treat their 'customers' is the erosion of trust in HMRC. Tax advisers as a group tend to be surprised when they receive good service from HMRC or when an inspector has a sense of commerciality. Letters sent to clients suggest that clients have done something wrong and can be very aggressive in tone. One client wanted me to represent him and the HMRC inspector appeared offended that the client did not feel comfortable speaking to HMRC directly. Having spoken to the officer, it was clear that HMRC's information was on the whole incorrect, that the client had made errors and that HMRC were pushing for responses within a week when the query had been issued less than a month before. Sound familiar?

In another example, an individual was issued with assessments by HMRC in relation to a contractor loan scheme pre 2011. The assessments were issued in time but there is still some confusion over whether the notices were sent to the last known address. The individual was not living in the UK at the time the assessments were issued and though HMRC say they attempted to deliver the notices to the person's overseas address, the notices were not received and for this reason, no appeal was filed. HMRC handed the file over to Trustees in Bankruptcy. The individual returned to the UK to find that they had been locked out of their home. They filed a Subject Access Request and then found out what had happened.

On reviewing the amounts contained in the assessments, it appears that HMRC have taxed the individual at 50% (additional rate) even though they should have been a basic rate taxpayer. Had the tax calculations been correct, the individual would have been able to pay and there would have been no need to instigate bankruptcy.

Any creditor to a bankrupt's estate must provide proof of debt to Trustees in Bankrupcty (provided certain conditions are met). It appears that for HMRC to make someone bankrupt they do not need to show the debt is correctly calculated, only that HMRC consider it is due. The system has failed the

taxpayer in this and possibly other cases in the sense that no one challenged HMRC's calculations. This person is on the brink of losing their home because they were incorrectly served with incorrect assessments and no one in the process thought to check or challenge HMRC.

Ironically, it appears that where information is given by HMRC, taxpayers and courts think it is correct, yet when it comes to relying on their guidance HMRC say it is simply guidance and should not be relied upon. Particularly for taxpayers who cannot afford advice, what are the options?

HMRC's inconsistency between how they treat taxpayers, the perception that they are 'above the law' and insufficient training for their staff means that trust is rapidly being eroded between the state and the taxpayer. It seems to me the tide is slowly turning – previously, the public were in favour of HMRC going 'all out' and aggressively taxing all and sundry. Now, as more of the less wealthy are affected by HMRC's draconian measures, advisers are seeing brutal dissection of HMRC's practices and the associated unfortunate results of them (referencing the seven suicides in relation to the loan charge – see https://tinyurl.com/y4957s6u) by less wealthy individuals. The question is, is this enough to stop HMRC or encourage them to change their practices?

HMRC and retrospection

In Finance Act 2020, we have seen additional retrospective legislation put in regarding Business Assets Disposal Relief, in the form of 'anti-forestalling provisions', which "counter arrangements that sought to 'lock in' entitlement to the higher limit". Actually, what s3(2) says is that regardless of what the law was in relation to CGT when contracts become unconditional, for the purposes of this legislation, the completion date in the date of the transaction if the two dates straddle 11 March 2020. So persons who entered a transaction pre 11 March 2020 expecting the rules in force at that time to apply are sorely mistaken. Tax law once again changed at whim will have left a number of taxpayers with an increased liability and no way to restructure their affairs as the contracts had already become unconditional.

A number of cases have gone to the FTT querying whether HMRC's issue of enquiry and penalty notices were valid if they have been issued by a computer rather than "an authorised officer". Khan Properties Ltd won their case in relation to an automatic £100 late filing penalty where Judge Thomas confirmed that "the requirement… is for a flesh and blood human being" to issue the notice. Eventually, in the Commissioners from HM Revenue and Customs v. Nigel Rogers and Craig Shaw [2019] UKUT 0406 (TC), the Upper

Tribunal confirmed HMRC's position – that notices issued by computer are valid.

To confirm this, further legislation has been introduced in s103, FA 2020 allowing notices issued by computer to be valid. Given that a number of cases have been litigated on this point, it is clear the reason the legislation was introduced. My issue with the legislation is at s103(5) – "this legislation is treated as always having been in force". Any open appeals on this basis are effectively scuppered. Anyone waiting for a lead case to be litigated is disappointed and anyone in the process of litigating has wasted significant resources on debating the point. I am not arguing on whether or not computer issued notices should valid, my concern about the lack of certainty of the laws in place. If Parliament can change laws at will to suit their purposes with effect from prior to when the legislation is enacted, how far can they go?

Another concern with this is that changing laws at will is not restricted only to HMRC, with the breaching of the international withdrawal agreement as part of the Brexit preparations being a prime example. If this continues to be the way our government functions, where will this country end up? Bob Neill MP said that "the Conservative Party is about the rule of law or it is nothing" (https://tinyurl.com/yyqdsg3h). I consider that one of the UK's greatest assets was its relatively stable political environment and the certainty with which people could plan their affairs. Acting with impunity regarding the law will be a classic situation of short-term gain, long-term pain.

The relationship between HMRC and advisers

In terms of certainty, legislation plays a significant role. In relation to Failure to Correct for example, the standard penalty is 200% of the liability with a reduction to 100% for an unprompted disclosure with full mitigation for 'telling', 'helping' and 'giving'. HMRC's 'policy' is to reduce the penalty only to 150% if the disclosure is prompted. This is not in legislation, nor is there any basis for the arbitrary limit to reduction. Nonetheless, as far as HMRC are concerned, internal policy is as good as law. If any readers have tried to negotiate with HMRC as far as 'policy' goes, they will understand it is an uphill struggle. More difficult in some ways is having to explain to the client that the penalty percentage will largely be governed by HMRC's internal decisions rather than the law.

Over the past few years, it seems that HMRC are attempting to drive a wedge between advisers and taxpayers – we had the promoters legislation, now individuals can only get full mitigation for certain penalties if they provide

details of their adviser, and with the lack of uncertainty regarding legislation (vis a vis retrospection), taxpayers never know if advice they are paying for will ultimately be worth it or not. At the same time, HMRC have not moved to fill the gap and provide advice, which advisers or the public can rely upon. Instead, HMRC bosses continue to write articles suggesting further regulation of the profession, while admitting that this is in respect of tax avoidance schemes, the majority of which are marketed by non-regulated individuals and many advisers have commented on how HMRC are approaching their clients directly, effectively cutting them out and leaving the client vulnerable.

HMRC appear to have forgotten that tax advisers are helping Joe Public get their tax affairs right, which ultimately helps the public purse. Rather than undermining us, a little cooperation and dare I say, appreciation, wouldn't go amiss.

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