

How HMRC can improve in 2022

'Could do better' is what Graham Webber would write on the taxman's end-of-year report. Here he offers a few suggestions about where HMRC can improve.

The past two years have certainly tested the Government machine and most of those working in the tax profession would acknowledge very positively HMRC efforts in implementing and attempting to police novel, extensive and wide ranging policies with some urgency.

The Covid relief schemes were rolled out and while these attracted attention from criminal elements, the majority reached the intended target. Quite a feat.

It was unfortunate however that that most of those individuals operating in the contracting sector were excluded. A failing that has to be partly at the feet of HMRC. We did see a (slightly) more generous approach to time to pay arrangements attached to tax settlements but we are now seeing a tightening of guidelines. The effects of the pandemic are still being felt and will be for some time and we would therefore urge some discretion.

Poor policy or inconsistent application?

The above situation may be argued as representing the ying and yang of a policy designed to balance the books.

Considering however the increasing debt burden arising in the UK via the policies, it might also be evidence of inconsistency and muddled policy from within HMRC. I'll take a look below at some possible 2022 actions that threaten the same outcome and suggest how HMRC might benefit without damaging their policy (or revenue).

Film schemes

Many of us will know about the Eclipse film partnerships and the litigation that ended in the Court of Appeal in 2015 (Eclipse Film Partners (No 35) LLP v H M Revenue and Customs [2015] EWCA Civ 95). Long story short, interest relief claims floundered because the LLP was considered to be not trading (but to be a non trade business). HMRC also wanted dry tax on income the LLP received but was not distributed to members. In film schemes, this is not unusual. In the face of opposition, HMRC did not press for collection.

Fast forward to September 2021, some six years later and HMRC announce a settlement 'opportunity' that allows individuals to not pay the dry tax. A sensible and proportionate solution to a problem that otherwise would have ended in litigation.

Only to be spoilt by HMRC claiming that the settlement cannot be used outside Eclipse!

Given that the principles in Eclipse are not so very far from most other film schemes, why can the settlement not be extended. How many outstanding section 9A enquiries could be efficiently and swiftly closed, many of them a decade old now, if a little common sense were to be included?

Property schemes

Successive Governments have introduced tax led schemes to encourage development of unused land.

We have seen Enterprise Zone and Business Property Renovation.

Allowance schemes detailed in statutory legislation. As is unfortunately the case with much legislation, the rules were unable to prevent advantage being sought in a manner 'unintended'. The latter, in particular, was exploited and despite an HMRC attempt to apply a retrospective analysis of 'intent', subsequent litigation has failed to produce a single definitive case in their favour.

A favourite argument of HMRC is that the leverage element of funding for a BPRA scheme is in some manner unallowable and that this taints the remainder of the equity funding, resulting in no tax relief being available. This is despite the fact that many schemes have had APNs issued which essentially limit tax relief to the equity element.

The schemes in this space range from bona fide arrangements operating within the intent, spirit and words of the legislation to some that were (to put it bluntly) very much the opposite.

Regardless, many of the users were either not aware of the less than pristine underpinnings of the latter and the subsequent HMRC campaign to deny relief was very much a shock.

Many have unresolved enquiries. A settlement plan alongside a set of closure notices and resolution would remove many obstacles here. HMRC could issue closure notices on these schemes, disallowing the leverage element of the claimed expenditure and allowing the equity funded part. This, combined with a settlement opportunity matching the above split, would undoubtedly result in hundreds, perhaps thousands, of very old section 9A TMA 1970 enquiries being closed for little or no further money flowing to or from HMRC.

Contractor schemes

I work extensively but not exclusively in the contractor arena. There are many issues here but a key one is the fact that probably 60% of what HMRC chooses to call 'tax avoidance arrangements' stem from perhaps five 'families' of schemes. That is five identifiable individuals

and/or their organisations who have produced a series of schemes since the early 2000 (some still active).

HMRC knows who they are. HMRC has made attempts to stem the flow of schemes and has largely failed. There is evidence in some cases that instead of preventing these families from putting new product into the market, they have instead targeted users of the schemes. This is unfair.

There is certainly a case to be made for those 'families' to be responsible for the tax that have been 'avoided'. There is perhaps a better case for the agencies and end clients through whom or for whom the individuals worked to be liable for the tax/NIC. There are cases in the system which will hopefully in 2022 decide this matter once and for all.

One of the main frustrations for my clients involved in such schemes is that despite HMRC knowing who was responsible for the scheme and therefore was the most likely beneficiary in terms of untaxed profits, they have been permitted to carry on for decades. This was an error by the agency and recognition of that would go a long way to re-establishing some of the trust that has been lost.

Settling contractor schemes

It would not be difficult for HMRC to devise a number of settlement opportunities that would recognise the culpability on all sides of this equation.

Where campaigns against certain schemes have failed or produced no value, just say so. HMRC should cut its loses and admit that a strategy going through Tribunal will take another decade to be resolved. Instead, make a sensible offer.

For example, HMRC claims that the law was clear after December 2010. Given that the law is still be discussed and debated more than 10 years later suggests that is not true. Nonetheless, we estimate that there are several tens of thousands of section 9A enquiries yet to be resolved in respect of schemes from before December 2010. HMRC should issue closure notices and/or a settlement opportunity, reflecting their own errors and delays, so as to bring the matter to a close.

Many recipients of section 9A notices for such schemes have heard nothing substantive from HMRC for many, many years. Many will settle on the right terms.

Here's a suggestion:

- Drop the loan charge. It's retrospective, unfair and frankly unworkable. It will lead to litigation for the next decade.
- Issue closure notices on ALL enquiries from before 5 April 2011. This will either push schemes to litigation or settlement.

- Consider a settlement that includes a basic rate tax credit on all alleged 'loan' amounts for certainly all pre-April 2011 amounts and probably post that date as well.
- Remove interest charges, which most of my clients regard as HMRC's fault for not progressing enquiries.
- Allow a generous time to pay without further interest charges on instalments.
- Lobby Parliament for a new law preventing 'lenders' from demanding repayment of loans that have been taxed as income.

I suspect that many of my clients would take the above.

This is an opportunity for HMRC to reset their position on the above issues (and more), but please do so fairly and don't give with one hand to take away with the other.

Summary

HMRC has done well but could do better. The volume of outstanding section 9A enquiries in the above areas is huge, probably tens of thousands.

Without a sensible action, many will go to litigation. That can be avoided with recognition of where the tax liability properly lays and a fair distribution of culpability in a settlement. We all hope 2022 will be better than 2020 and 2021 and starting with the above ideas would get that year off to the best possible beginning.

- **Graham Webber is Director of Tax at WTT Consulting**