

## Action – or inaction?

*Amit Puri reviews HMRC action against third parties including agents and advisers – or the lack of it...*

We recently asked HMRC for statistics and information on penalties and other sanctions they could and should have levied on deserving third parties for bad behaviour. We wanted to gauge both HMRC's powers and appetite in the pursuit of advisers.

We acknowledged that HMRC can and do raise tax assessments on people even where they have taken 'reasonable care' with their own tax affairs. However, this was in cases where the errors/irregularities were due to the 'careless' or 'deliberate' actions of someone other than them. We asked how many such instances there were in the past five years, annually?

We also acknowledged that HMRC can and do issue penalties on persons other than the taxpayer, where those persons had 'deliberately' caused inaccuracies or withheld information. We asked how many such instances there were in the past five years, annually, and the value of the penalties? These penalties will have been charged under Paragraph 1A of Schedule 24 to the Finance Act 2007.

### HMRC's response

"We can confirm we hold the information you seek in relation to our compliance activities, including the outcomes of those investigations, any tax assessments raised, and penalties issued. However, providing the information you seek relating to your first two questions (where a tax assessment was raised to a taxpayer due to the carelessness of someone other than themselves, and penalties charged under Sch 24 FA07 Para 1A) will exceed the FOIA cost limit. We have therefore refused your request under section 12(1) of the FOIA...

"Every year we open thousands of compliance checks into individuals and businesses' tax affairs to confirm that tax has been correctly declared and paid at the right time. In the last tax year where we have data, 2022/23, we opened 299,000 tax interventions."

We'll spare the reader the rest of that text regarding s12(1) FOIA and Reg 4(3) of the Fees Regulations. It's a crying shame we weren't able to witness these deterrence measures, as we believe advisers and other third parties should be held accountable in such situations. The publication of such efforts would have sunk into the profession and beyond. But HMRC have decided not to share the details.

We should be well aware that HMRC have successfully assessed taxpayers due to the careless behaviour of their advisers in the past, through tax case judgments. We know little about them having levied Para 1A Sch 24 FA2007 penalties; have limited experience of this, but we do have anecdotal evidence. Perhaps, HMRC are

embarrassed to share their data! That said, they were transparent about the data given below, even though it makes for a poor read for them.

We found it strange there was no central record of cases in which a third party was involved, such that a tax and/or penalty assessing consequence might flow from that. Why go through the trouble of introducing such sanctions if they cannot be measured or used? HMRC said this would be onerous for the caseworkers and others, and that we could not refine our information request on this occasion, on the basis there was no scope for results.

### **‘Dishonest’ agent sanctions**

We noted that ‘dishonest’ tax agent sanctions existed too, for those who had engaged in dishonest behaviour. These sanctions include issuing a Notice and penalty ranging from £5,000 to £50,000, under Schedule 38 of the Finance Act 2012. We asked:

- How many dishonest conduct notices were issued in the past five years, annually, and the value of the penalties?
- How many instances were there of the agents disclosing dishonest conduct themselves?
- How many agents’ details, found to have acted dishonestly, were published?

We also understood that in extreme cases (e.g. following a criminal tax investigation and/or prosecution), HMRC might refuse to deal with an agent. We asked how many such instances there have been in the past five years? Also, whether those details were made public, if so, where?

And we understood that if an agent was a member of a professional body and the agent’s behaviour was believed to breach that body’s misconduct rules, HMRC could make a ‘public interest disclosure’ for the professional body to consider conducting disciplinary procedures against that agent. We asked how many such cases there had been made in the past five years?

### **HMRC’s response**

Helpfully, they were able to provide answers to our remaining questions, on a discretionary basis...

- Dishonest Conduct Notices (DCNs): HMRC confirmed that they had issued only seven DCNs in the past five years, totalling about £55,000. They were unable to split this information on an annual basis for fear of identifying people, but it’s clear to us that this sanction is under-used.

HMRC confirmed that of the tax agents identified as having acted dishonestly, none of them had voluntarily declared dishonesty prior to HMRC’s interventions in the DCN cases. This is of no surprise.

Again, another sign that this sanction is under used; none of the DCN recipients in the past five years have had their details published!

- Refusing to interact with agents: HMRC confirmed that in the past five years there have been no such instances. That was surprising as we often learn about the sometimes extreme behaviour of such advisers from published case law.

HMRC did, however, remind us that despite their strict confidentiality rules, they would notify individual taxpayers where their chosen tax agent was subject to any refusal (in the future!). We're not convinced this is useful and how it has applied in practice.

- 'Public Interest Disclosures' (PIDs) made by HMRC to professional bodies: In a comparatively better outcome, HMRC confirmed that there had been 139 PIDs made to tax agents' professional bodies since June 2019. So this is comparatively encouraging to read, although not the number we had imagined, given HMRC confirmed that they had opened some 229,000 interventions during 2022/23 alone. Without looking into this interventions number more, it's obvious HMRC have much more contact with advisers/agents, not just in interventions. So it would appear that PIDs are under-used too.

We are mindful that HMRC had identified policy problems, consulted internally and decided to make announcements at fiscal events. After which, they typically published consultation documents to gauge the profession's views on things like this; then created the policy responses (above) which they believed were necessary... only then to grossly struggle to measure their deterrence policies' usage and effectiveness and worse, not used them much or at all.

### **Formal/litigation proceedings**

We believe HMRC will be irritated with the recent outcome in Baxendale-Walker vs R&C Commissioners. By way of background, Paul Baxendale-Walker was heavily involved in promoting remuneration trusts. The structure was meant to receive gross pay from employers, rather than their employees receiving pay net of taxes, and for the trusts to then make loans to the employees. The marketing proposition was that a loan was not taxable in the hands of the employees nor the trust, to result in substantial tax savings; with no realistic requirement for the loan having to be repaid.

HMRC were trying to be pragmatic and fair by extending the deadline for complying with their Schedule 36 Finance Act 2008 Information Notice in connection with a penalty assessment. But, unbeknown to them, procedural errors were made while dealing with this individual, who was notorious for promoting dubious tax schemes. If the reader is not familiar with Baxendale-Walker, a quick read-up is recommended; a barrister who was struck-off by the SRA, made bankrupt and convicted of forgery (fraud)!

Unfortunately for most people using this planning or similar arrangements in the past, and being victims of mis-selling, this is not high up on HMRC's agenda. They are, though, reportedly pursuing more and more tax avoidance scheme promoters, and doing so more vigorously.

## **Hard-fought case**

In another hard-fought case by HMRC, albeit another old case, the accountant/tax adviser to thousands in the media industry was sent to prison for five years for evading more than £6m in tax. HMRC's investigation into Mr D C C Lunn (of Christopher Lunn & Co) uncovered evidence of a range of serious offences, including inflating accountancy fees and the fraudulent use of trading losses. He also helped his clients to evade taxes.

Lunn was finally convicted, where the jury found him guilty of four counts of cheating the public revenue. HMRC started confiscation proceedings thereafter to strip him of financial gains he made as a result of his criminal activity, which was estimated to have exceeded £20m.

Simultaneously, HMRC pursued Lunn's former clients to settle their own tax liabilities. In connected action, Lunn's son, who also worked at the firm, was convicted on six counts under the Fraud Act after he had sent false invoices to HMRC to try to cover up the wider scam.

At Pure Tax, we strongly believe that newer laws designed to quickly identify and disrupt scheme promoters should be used to exhaustion. If not, why both creating them? Clearly, litigation is not favoured by HMRC and their track record on pursuing promoters is not great.

Importantly, this ought to be coupled with HMRC's front line staff being trained more robustly in using the array of penalties and sanctions at their disposal, being demonstrably more competent...

Having more powers but not using them well or at all is not only lazy, it's a false economy and ought to be unforgiveable. The new Labour government would do well to address this.

- Amit Puri is the founder of Pure Tax. Email [amit@pure-tax.com](mailto:amit@pure-tax.com)