RESPONSE TO HMRC "TAX AVOIDANCE" PUBLICATIONS OF 24TH JANUARY 2014

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1. Background to this Response

On 24th January 2014, HMRC published:

Promoters of Tax Avoidance Schemes and DOTAS

Raising the stakes on tax avoidance: Summary of Responses and Draft Legislation

Tackling marketed tax avoidance.

I shall refer to these collectively as "the Publications".

2. The proposals contained in the Publications fall into three main categories

Proposals to make life more difficult for promoters of tax avoidance schemes who, in HMRC's view, "misbehave".

Proposals to introduce a financial penalty on taxpayers in dispute with HMRC who insist on exercising their right to have the dispute adjudicated by independent tribunals with rights of appeal, subject to requisite consents, all the way to the Supreme Court.

Proposals for a principle of "Guilty until Found Innocent" whereby taxpayers in dispute with HMRC will, if HMRC so require, be compelled to pay tax demanded by HMRC without any right of appeal to the Courts

3. This is my response to those publications.

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My Response

General

4. In essence, the proposals stand triply condemned as fundamentally flawed, root and branch, in that:

> they ignore the Rule of Law, and in particular the doctrine of separation of powers and the vital role of an independent judiciary which, at the request of any citizen, is entitled to rule on the legality of acts of the Administration;
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> they ignore one of the two elements of the rules of natural justice: no one should be judge in his own cause; and
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> they ignore the presumption of innocence until proved guilty or, in civil matters, of non-liability until found liable.

5. Had we never had the Glorious Revolution of 1688 which firmly established that the Administration is not a law onto itself but that its actions can always be called into account in the Courts, had we not defeated the absolutist Napoleon Bonaparte, had Hitler won the Second World War and we were now a fascist society and if we did not have a Human Rights Act, HMRC's proposals would, perhaps, make some sense. As it is, they are utterly repugnant to the values of the people of the United Kingdom society in 2014. That these proposals could now even be mooted, shows that there is something very rotten in the state of HMRC.

6. Modern politicians are often condemned for being useless at governing the country and possessing only the skills of getting themselves elected and keeping themselves elected. In fairness to David Gauke M.P., Exchequer Secretary to the Treasury, that is not a criticism which can be levelled at him as respects these proposals. They are calculated to alienate natural core supporters of his party, and, if implemented, to help ensure that the Conservative party loses the next general election.

7. Further, by creating potential significant cash-flow problems for small and medium-sized businesses at a time when, despite all the Government's efforts, banks are still reining in lending to them, they threaten to undermine the still fragile recovery from the painful recession which was the major achievement of the last Labour Government.

Promoters of Tax Avoidance Schemes

8. The proposals to heighten pressure on misbehaving promoters of tax

avoidance schemes are well-motivated. And all of us honest tax-advisers will heartily agree that consumers need protection against the "cowboys ".[1] Yet, as so often happens, the current HMRC proposals involve giving to HMRC a power so dangerously wide as to threaten our historic rights and liberties. In a free society such as ours, it is fundamental that all should have access to legal advice, all the more so when they are in dispute, or possible dispute, with a powerful organ of the state, such as HMRC. Yet these proposals would enable HMRC to prevent, say, a barrister, expressing his candid opinion to a client if he had committed some venial infraction, which had nothing to do with this honesty, integrity of fitness to advise., such as failing to comply with at technical requirement to undertake so many hours per year of "continuing professional development".

9. Moreover, to a large extent, the present proposals would enable HMRC to be prosecutor, judge and jury, which offends one of the two core principles of natural justice as recognised in English law for hundreds of years, the rule against bias.

10. My counter-proposal is that

(a) HMRC should be empowered to impose restrictions on persons only for the protection of the consumer

(b) the restrictions must be no more than a proportionate response to relevant misconduct on the part of the person restricted and

(b) the person proposed to be restricted should at all stages have, in the normal way, full rights of appeal to the Courts against HMRC's determinations.

Financial Penalties for Exercising Rights of Appeal

11. The second proposal is that provided HMRC had won some case before the lowly First Tier Tribunal,[2] and the decision had for some reason not

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1 None would agree more than I. Evidently promoters of tax avoidance products consider that my name carries some weight with the public. The result is that I am sometimes misrepresented, particularly on internet sites, as having endorsed a tax product on which I have not advised at all. Cleverer promoters have stated that my advice had been taken in relation to a product, which is literally true, but have omitted to mention that I had not in fact advised that it was fit for purpose.

2 which could have judges who were not full-time professionals, who might know very little indeed about tax and would not include a judge of High Court status, no matter how difficult the case or how great the sums involved.

been appealed.,[3] then HMRC would be able to decide whether this decision was conclusive of the appeal of some other taxpayer (T) (to which they would be the respondent) and require him to cave in to their demands without exercising his rights to have his case properly adjudicated on its merits. If T failed to agree, litigated and ultimately lost, he would be subjected to a financial penalty for exercising his rights of appeal.

12. This proposal strikes at the heart of our constitution. The Rule of Law requires that everyone should have access to the Courts without let, hindrance or intimidation, particularly in the case of a dispute with the Administration. Every lawyer knows that the outcome of litigation is rarely certain.[4] And T may ultimately lose for some reason quite independent of the decision in the earlier case. To impose a financial penalty for exercising one's rights to resort to the Courts is a clear restriction on those rights.[5] It would be legalised blackmail.

13. Motivating this proposal is a fear that some taxpayers may spin-out litigation simply to secure a cash-flow advantage, even though, if they lose, they will ultimately have to pay interest on unpaid tax. As the third proposal is motivated by the same consideration, I set out my counter-proposal in that context.

"Guilty until Found Innocent"

14. It is a fundamental principle of the Rule of Law that he who asserts must prove and until he has proved the defendant is presumed innocent. That is as much a principle of civil law as it is of criminal law. In particular, there is no presumption that the assertion of the Administration is right.

15. The proposal that in certain cases, including ones where HMRC have invoked the second proposal but the taxpayer has called their bluff, HMRC should be able to collect tax in dispute, runs completely against this

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3 And that could be for a variety of reasons. HMRC might have chosen to take first a case against some impecunious taxpayer who would not afford proper representation or to appeal further. Or HMRC could have entered into a confidential settlement agreement with the taxpayer whereby the decision was not appealed but the taxpayer was given virtually everything he wanted, as an inducement not to appeal.

4 More than once in my career, I have lost before the Court of Appeal for reasons which did not bear scrutiny. Fortunately, the House of Lords put matters right on appeal. Yet for most litigants, the Court of Appeal is the final court of appeal, where there is no guarantee that justice will be done.

5 I am reminded of the ancient Greek city state, the citizens of which were sceptical about new laws. While anyone was free to propose one, if his proposal failed, he was hanged.

principle. And it is scarcely mitigation that if and when HMRC eventually gets round to litigating - which, of course, they would have little incentive to do - and years down the line the Courts hold that the taxpayer was right, that he will be entitled to repayment with a derisory repayment supplement. In the meantime, the taxpayer may have been put out of business or bankrupted or died.

16. Motivating this proposal is even more obviously a fear that some taxpayers may spin-out litigation simply to secure a cash-flow advantage.

17. My counter-proposal is that exactly the same principles should apply to tax appeals as to civil litigation in general. Where a claimant alleges that there is no arguable defence to his claim he can, after launching proceedings, apply for judgment against the defendant on that ground. The matter is determined by a regular court - not by the claimant himself! - and, if the claim is upheld, the defendant has his right of appeal, in the usual way. Of course, the claimant has to show that his case is strong and that the defendant is simply playing for time.

18. The court hearing the application does not have to decide entirely to prevent the defendant from defending the claim. If it considers that the defence is very weak, but not totally unrealistic, it can give conditional leave to defend. The condition is usually that the defendant pays into court the sum in dispute or some lesser sum which the court thinks will almost certainly be held to be due.

19. If HMRC assert that a taxpayer is prolonging a tax appeal which has no realistic chance of success, then they indeed ought to be able to apply to a court for an order that the taxpayer pays now an amount which he has no realistic chance of being held liable not to pay once the matter if fully litigated. Given the special status of HMRC as an organ of the Crown. I see no reason why the money should simply be paid into court but could be ordered to be paid to HMRC, who will, of course, be good for repayment, if necessary.

20. What is crucial is that the matter should be determined not by HMRC, one of the parties to the litigation, but an independent court, and that the taxpayer should have full rights of appeal in the normal way. There is no reason why the "court" of first instance on the application should be the First Tier Tribunal, provided the taxpayer has the same appeal rights as in the case of the final determination of his appeal.

21. If this were adopted, then I apprehend that taxpayers who had no arguable

case and who were simply playing for time were required to pay the tax on account, they would have no further interest in pursuing their appeals.

22. Oddly enough, this situation is in my view already covered by Taxes Management Act 1970 section 55, as substituted in 1975! The prima facie position is that tax assessed by an assessment which is the subject of appeal is due but that the taxpayer can apply to postpone payment of tax if there are reasonable grounds for believing that the tax in dispute should not have been charged: section 55(6). In the first instance, the taxpayer makes an application to HMRC to postpone payment. If HMRC disagrees, then there is a right of appeal to the independent First Tier Tribunal.[6]

23. If I have overlooked something and HMRC has any reason to suppose that section 55 does not give them the same protection against unarguable defences as a claimant in civil litigation, then they should propose that the section be appropriately amended.

6 In my experience of thirty-four years in practice, twenty-four as a Silk, I have never once known HMRC fail to agree postponement requested.