

Practical TAX Newsletter

Living with naming and shaming

Iain Macleod assesses the challenges facing tax agents now that the naming and shaming provision has 'gone live'

HMRC is becoming better armed in its never-ending struggle with tax evasion.

The enhanced information powers in FA 2008 Sch 36 are now in use. The new penalty regime in FA 2007 Sch 24, FA 2008 Schs 40 and 41, and FA 2009 Schs 55 and 56, makes it possible for HMRC officers to charge much higher penalties while also, HMRC hopes, encouraging tax evaders to come forward with disclosures.

And on 1 April 2010 the "naming and shaming" provision in FA 2009 s 94 went live. It only applies to periods starting from 1 April 2010, so HMRC does not expect to publish details before mid-2011.

Confidentiality

FA 2009 s 94 is a significant departure. HMRC really does take confidentiality seriously and there are criminal sanctions against staff that breach it. The main exception is when people's names are in the public domain because of court action or decisions.

If people are convicted of tax offences HMRC often rushes out lurid press releases. A recent example concerned a couple in Northern Ireland. "The [defendants] were stealing taxpayers' money over many years and clearly had no issue with enjoying the benefits of our public services whilst not contributing towards them." But this sort of thing used to be restricted to a few very bad cases. Now we can expect many more people to receive unwelcome publicity.

What happens in Ireland?

Each quarter the Irish Revenue publishes a tax defaulters list under Taxes Consolidation Act, 1997 s 1086 at www.revenue.ie/en/press/defaulters. The second part of the list is more interesting for the purposes of UK comparisons. It lists cases where, instead of taking court proceedings for the recovery of any fine or penalty, the Revenue Commissioners accepted an offer in settlement of all "back-duty" liabilities. The legislation applies not only to fraud but also to neglect and to failures to file returns.

Details are not published where the total amount is below €12,700 (if it includes pre 2005 tax) or €30,000, where the penalty does not exceed 15 per cent of the tax or where the taxpayer has, in advance of any Revenue investigation, voluntarily furnished complete information relating to undisclosed tax liabilities. So in Ireland it seems that, where the thresholds are exceeded, only unprompted disclosures avoid publication.

For the calendar year to December 2009 details were published for 356 taxpayers involving €97 million. The full name, address and occupation appear along with the tax, interest and penalties and the nature of the offence. The amounts involved range from just over the limit for publicity up to many millions and involve farmers, publicans, doctors, solicitors and other such businesses.

Continued on next page... ➤

CONTENTS

HMRC POWERS
Iain Macleod discusses
'naming and shaming'
Page 57

FINANCE BILL
Tax bodies repeat warnings
of inadequate scrutiny
Page 60

NEWSFILE
Shorter hours for enquiry
centres; Credit for foreign
tax; Spotlight on Gift Aid;
Working Together update;
Regulations published
Page 61

POINTS OF LAW
Bankruptcy; Double
taxation; Employment-
related securities; Capital
allowances; Residence in the
UK; Dividends from non-
resident companies
Page 63

►...Continued from previous page

The offences are understatements of income tax, corporation tax, VAT and PAYE including sums arising from "offshore assets" investigations and 'bogus non-resident accounts cases'.

The BBC news website reported on 3 March that in Ireland, "publication of the identities of tax cheats attracts widespread publicity." It certainly would be easy for local journalists to identify people in their area who have been named on the website.

UK numbers

The population of the Republic of Ireland is 4.4m while that of the UK is about 62 million. The total tax collected by the Irish Revenue in 2009 was €33 billion. In 2008/09 HMRC collected £439 billion. Extrapolating from these numbers (and ignoring the fact that the Irish thresholds for publication are below the UK's) then once the UK system is up and running we might expect some 5,000 UK individuals and companies to have their names and addresses published annually. Perhaps £1.4 billion of tax, interest and penalties could be involved.

What's the point?

Stephen Timms, Financial Secretary to the Treasury, said on 3 March: "It is only right that people pay their fair share of tax, which supports vital public services. We know that law-abiding taxpayers will want to see the results of HMRC's investigations into tax cheats. This new approach should make people think again about trying to get away with tax fraud. As well as having to pay the tax, interest on the tax, plus penalties of up to 100 per cent of the tax lost, they also now risk being identified publicly."

Mr Timms suggests that an objective is to provide reassurance to the public that HMRC is doing its job. HMRC explained earlier this year: "The policy objectives are to send a clear signal that cheating on tax is wrong; to deter people from doing it; to reassure those who pay the right tax and to encourage those who

do not to come forward and make a full disclosure."

Will naming and shaming work?

People evade tax even though they know they might go to prison. It is unlikely that sort of person will be deterred by the possibility of publicity. Indeed it has been suggested that in some parts of Ireland appearance on the list is almost a badge of honour. But there must be some who would find publicity like that which

appeared in the Irish Times on 12 March 2010 unsettling: "Racehorse trainer John Mulhern, a son-in-law of the late Taoiseach Charlie Haughey, made a settlement for €1.4 million for underdeclaration of income tax and capital gains tax, following a Revenue investigation."

HMRC does not suggest that FA 2009 s 94 will change attitudes overnight.

But senior officials have said they want to make tax evasion as socially unacceptable as drink driving. Enhanced information powers, the new penalty regime with its improved discount for disclosures, the various disclosure opportunities and the publication of the names of tax defaulters are all part of the carrot and stick strategy.

Have Irish tax evaders been deterred by the risk of publicity? For 2002 the Irish Revenue published 272 "list 2" cases and €35.3 million was involved. So, by 2009 the number of defaulters had increased by 84 (31%) and the duties by €61.7 million (175%).

On the face of it these increases suggest naming and shaming in Ireland has not been an unequivocal success – although of course many may have been deterred from evading, allowing the Irish Revenue to go after bigger and more difficult cases. And we don't know how many came forward with full disclosures to avoid being named. Maybe the Irish Revenue has just got better at tackling fraud and neglect.

It seems reasonable to assume HMRC spoke to its Irish counterparts before persuading UK ministers that this was

a good idea. It also seems probable that the Irish Revenue would have said publishing defaulters' details was a useful weapon in their armoury and that it wouldn't be without it.

HMRC has not slavishly adopted the Irish model, though. The main differences are that in the UK only deliberate errors are within FA 2009 s 94. Disclosures, even if prompted by HMRC, will not lead to publication so long as they attract the maximum penalty discount.

It will be hard to prove the impact of naming and shaming although HMRC will say that it believes it has worked.

FA 2009 s 94

The provisions are pretty straightforward. If, for tax periods after 1 April 2010, £25,000 or more of tax is discovered not to have been paid because of:

- deliberate inaccuracy in a taxpayer's document
- deliberate supply of false information or withholding of information
- deliberate failure to notify liability to tax or
- deliberate action in relation to certain VAT and Excise offences

and a penalty is due, then the section applies.

In such cases names, addresses, business details, the tax and penalties, periods involved and any other information to make clear the person's identity will be published on the HMRC website within one year of the penalty becoming final.

So publication will not, unlike Ireland, apply where the offence is just a failure to take reasonable care.

There are safeguards. People will be told in advance if publication is intended and HMRC will consider representations. HMRC has said it might not publish where that could prejudice an ongoing criminal investigation or involve risk to a person's security. The decision will be made by a senior HMRC officer, independent of the investigation.

Unlike in Ireland, details will be left on the HMRC website for one year only. And of course people have full appeal rights against the imposition of any penalty by HMRC.

People evade tax even though they know they might go to prison. It is unlikely that sort of person will be deterred by the possibility of publicity.

Nothing will be published where people make a full disclosure. HMRC said: "Everyone will be able to escape publication if they make a full disclosure to HMRC, either unprompted or prompted."

However, this will only apply if the person qualifies for the maximum penalty reduction. So in making the disclosure the taxpayer will have to ensure HMRC is helped with quantification and has access to all records, and that the disclosure is of the highest quality by reference to its timing, nature and extent.

Publishing names of tax agents

In April 2009 HMRC published the consultative document *Modernising Powers, Deterrents and Safeguards: Working with Tax Agents*. Since then there have been meetings with interested parties, representations have been submitted to HMRC and an extended period of consultation on draft legislation will end on 28 April. Although most people accept that incompetent or dishonest agents should be either educated or punished, there has been a good deal of concern about some of HMRC's proposals.

The second consultation published at PBR 2009, *Working with Tax Agents: the Next Stage*, proposed that a penalty would be charged on a tax agent involved in deliberate wrongdoing. The penalty would be geared to the amount of tax lost, or likely to be lost, subject to a maximum and a minimum.

Reduced penalties would apply where a tax agent had made a full unprompted or prompted disclosure.

Where a penalty was charged, HMRC proposed that the name of the tax agent would be published on the HMRC website for twelve months. A tax agent who made a full prompted or unprompted disclosure would be exempt from disclosure.

As TPT reported (issue 31.7, 26 March 2010) the Chartered Institute of Taxation said in its response to the consultation that, given the name and shame power

in FA 2009 s 94, it was "hard to resist a similar power for agents". The ICAEW Tax Faculty was not so sure and suggested a naming and shaming power could discourage membership of professional bodies.

Some tax jurisdictions such as Australia and the USA require all tax agents to be registered with them, and if behaviour does not meet certain standards penalties can be imposed. In Australia registration can be suspended or withdrawn, which of course damages or even ruins the agent's business.

HMRC has rejected registration of advisers so it is hard to see why it would not take the chance to go for naming agents involved in deliberate inaccuracies.

Living with 'naming and shaming'

Few advisers will contact clients to say that if they are evading tax they should come forward with a full disclosure as they now run a risk of unwelcome publicity. But many agents will have some clients who, unbeknownst to the advisers, have been evading tax. So it would be sensible to draw this issue to clients' attention – in a subtle way of course – and without implying that any particular client is dishonest.

This issue will most commonly arise where an HMRC investigation has begun and a disclosure is required. Clients need to know that if they don't make a full disclosure of the quality needed to get the maximum discount for penalty purposes they run the risk of being publicly identified. This could be unpleasant for many reasons. In for example matrimonial disputes the public detail could be of interest to an estranged party.

It is probable that, a consequence of FA 2009 s 94 and the much higher penalties for deliberate inaccuracy, there will be many more arguments with

HMRC about the nature of the offence. Under the old penalty legislation it rarely mattered whether the taxpayer's behaviour was fraudulent or negligent as

the maximum penalty was the same. But as the penalty for deliberate inaccuracy is now much higher than that for carelessness, both in financial and reputational terms, agents will argue more strenuously that the client's behaviour was merely careless – if that.

Also, even if a client's behaviour was clearly deliberate it will be important for advisers

to persuade clients to do everything to secure the maximum discount for disclosure and to identify all arguments to justify that discount.

Naming and shaming will raise the stakes in future penalty negotiations. For example, if the disclosure was prompted by HMRC then the maximum penalty would be 70 per cent and the minimum 35 per cent. The HMRC officer may suggest that although the disclosure was complete its quality, by reference to its timing, nature and extent, only justified a discount to 40 per cent. If the HMRC officer was successful in that argument, publicity would follow.

The BBC news website item quoted an HMRC spokesperson as saying that "if taxpayers have been cheating and they do not tell us, no amount of good representation will help them avoid being named."

I'm sure we'll do our best.

**IAIN MACLEOD
MA CTA**

The penalty for deliberate inaccuracy is now much higher than that for carelessness. Agents will argue more strenuously that the client's behaviour was merely careless.

Enhanced information powers, the new penalty regime, the various disclosure opportunities and publication of the names of tax defaulters are all part of the carrot and stick strategy.

Iain Macleod heads the Tax Investigations department at EDF Tax LLP (see www.edftax.co.uk) and provides support to professional firms and clients on all types of HMRC checks, enquiries and investigations. He can be contacted on 0115 983 5580 or 07920 146800 or imacleod@edftax.co.uk.

Pre-election Finance Bill worries experts

Tax Faculty warns of poorly drafted and complex provisions passed into law 'at a stroke'

The Chartered Institute of Taxation criticised the publication of a 167-page Finance Bill just five days before Gordon Brown asked the Queen to dissolve Parliament to make way for a general election, and called for legislation on pensions tax relief to be delayed.

The tax body's President, Andrew Hubbard, had urged Alistair Darling before the 24 March Budget not to rush substantial tax changes through Parliament (see TPT 31.7, 26 March 2010).

The ICAEW Tax Faculty had warned that "only the rates and allowances and entirely uncontroversial measures" should be included in the Bill. "We are concerned to ensure that large swathes of potentially complicated and poorly targeted and drafted legislation could be passed into law 'at a stroke'," the Faculty said in its initial response to the Budget. It identified five measures – relating to capital allowances, transactions in securities, the DOTAS regime, tackling offshore evasion and security for payment of PAYE – that it did not wish to see passed into law before the dissolution of Parliament.

Finance Bill 2010 as introduced had 73 clauses and 22 schedules see www.lexisurl.com/OsdqN. Explanatory notes, lobby notes and impact assessments were published at www.hm-treasury.gov.uk.

Stephen Timms, the Financial Secretary to the Treasury, presented the Bill in the House of Commons just before

midnight on 30 March, after MPs had passed 50 resolutions on the final day of the Commons Budget debate. The Bill's remaining stages were set for 7 April.

Announcing publication of the Bill on 1 April, Timms said it would help to secure the recovery by introducing "further targeted support" for businesses and households. "Following its passage,

around half the tax measures we have announced to halve the deficit will have been passed into law," he said.

CIOT Tax Policy Director John Whiting said: "We are worried that many of these clauses – including three new taxes – will be rushed into law with no meaningful debate. This is not a recipe for good tax law. I hope the Government will hold back

a majority of their proposals for a post-election Finance Bill."

The Bill includes provision for the bank payroll tax (22 pages), the restriction of pensions tax relief (12 pages headed "Pensions: high income excess relief charge") and the new landline duty.

Whiting said there were many complex, technical measures in the Bill. Many had benefited from consultation but "even sensible ideas" benefit from going through proper parliamentary scrutiny, he argued, to identify loopholes and unintended consequences.

Pensions tax relief

"We are particularly disappointed that the restrictions on pensions tax relief for

higher earners are going forward in such an over-complex way," Whiting added. "The Bill's proposals show no signs of there having been any listening to the views of most respondents which were that there were much simpler ways of achieving the aim of curtailing tax relief for the wealthy. The proposals as framed will lead to substantial increases in costs for employers and the pensions industry generally.

"The pensions restriction does not come into effect until April 2011 so there is no reason why it cannot be delayed until a post-election Finance Bill, where it can be properly scrutinised, and alternative proposals for achieving the Government's objectives in this area considered."

The proposed changes will reduce from 50 per cent to 20 per cent the income tax relief available for pension contributions paid by people with incomes of £150,000 to £180,000, the CIOT explained.

"Those on £180,000 or more will have relief restricted to 20%. Relief on pension contributions made by an individual's employer will also be restricted – by way of a special tax recovery charge imposed on the individual.

"It will be mandatory for the scheme to meet this tax charge at the individual's request, subject to certain conditions, including a de minimis amount, by reducing the member's accrued benefits or money purchase pot."

HMRC published technical guidance, running to 74 pages, on the pensions tax relief measure. Mark Lee, chairman of the Tax Advice Network, observed that the proposed "high income excess relief charge" was "so needlessly complicated it could easily have been designed by the March Hare from Alice in Wonderland".

"This pre-election Finance Bill simply provides the purest evidence of something many of us have long suspected when it comes to tax law. It rarely receives adequate Parliamentary scrutiny," Lee wrote on his TaxBuzz blog. "In future let no one attempt to argue that Parliament decides our tax laws."

ANDREW GOODALL

andrew.goodall@lexisnexis.co.uk

The Tax Faculty identified five measures that it did not wish to see passed into law before the dissolution of Parliament.

newsfile

Shorter hours for more enquiry centres

HMRC has shortened the opening hours of a further 58 enquiry centres in the light of feedback received following completion of a pilot scheme. "We tested shorter opening hours in ten enquiry centres in 2008 and feedback from the pilot was that customers were broadly happy with the change," HMRC said. Visits to enquiry centres have fallen by 40 per cent since 2006/07. A list of the opening hours for each office is available via www.hmrc.gov.uk/enq.

Services provided to the elderly and people with disabilities are based on individual needs and will not alter, HMRC added. Access to emergency payments of tax credits will be provided by telephone in the 58 locations in order to ensure that "customers are not disadvantaged".

HMRC indicated that it would work with groups such as Citizens Advice Bureaux and the Low Incomes Tax Reform Group to explore new ways of reaching customer groups who do not currently seek support from the department.

Credit for foreign tax

HMRC discontinued, with effect from 19 March, its practice of restricting foreign tax credits where a chargeable gain is calculated by reference to a longer period of ownership for foreign tax purposes than for UK tax (eg, where the UK gain is fixed by reference to March 1982 value) or the UK gain is less than the foreign gain. Revenue & Customs Brief 17/10 said: "We have reconsidered our view and are revising our practice so that the whole of the foreign tax is allowable ... up to the amount of the UK tax on the gain."

A return submitted on the basis of a restricted credit may be amended if it is still open or within the self-assessment window for amendment. In other cases where the credit has been restricted, additional relief may be claimed within the normal time limits. Recent changes to those limits meant that very little time was provided for some claims arising from this change of practice. "We will, exceptionally, accept late claims for

the tax years 2004/05 and 2005/06 or accounting periods ending on dates between 19 March 2004 and 29 June 2006, provided that those claims are for additional tax credit relief resulting from this change of practice and are made no later than 30 June 2010," HMRC said.

Spotlight on gift aid schemes

HMRC announced its intention to challenge tax reliefs claimed in connection with an avoidance scheme exploiting the Gift Aid rules, and to "litigate where appropriate". Spotlight number 9 at www.hmrc.gov.uk/avoidance said the scheme seeks to exploit the rules enabling a charity to claim a repayment of tax at the basic rate on a qualifying donation by an individual.

"The scheme depends upon a circular series of payments. It starts with the charity purchasing, say, gilts of £100,000 which pass through a third party to an individual taxpayer for perhaps £10. The taxpayer is expected to make a sale for £100,000 and pass the money to the charity. There is an option that ensures the gilts will be returned to the charity if it does not receive a cash gift of £100,000 within one or two days," HMRC said.

"We do not accept that the charity is entitled to a repayment of tax or that Gift Aid relief is due to the individual. In our view a gift has not been made to the charity as it is no better off than before entering the arrangements. Therefore Gift Aid is not due."

HMRC powers and penalties: guidance

HMRC flagged its latest guidance on a range of new powers and penalties taking effect this month. The aim of the legislation is to create "a common approach to how we carry out compliance checks, and the penalties we charge, across the taxes HMRC collects". See www.hmrc.gov.uk/news/new-powers.htm. The changes include:

- a penalty for people who fail to register for a tax, declare taxable income or notify a new activity on which tax is due;
- a new VAT and excise wrongdoing penalty;
- a new four-year time limit for claims

and assessments for income tax, corporation tax, capital gains tax, PAYE and VAT;

- extension of the compliance checks legislation to more taxes;
- extension of the inaccuracy penalty to more taxes; and
- provision for HMRC to publish the names of deliberate defaulters.

Dave Hartnett, HMRC Permanent Secretary for Tax, said: "These changes underpin our drive to improve tax compliance in the UK. They are carefully constructed to support and encourage those who make a genuine effort to get their tax right, while coming down hard on those who don't."

A new late registration penalty regime applies from April 2010 for money service businesses, high value dealers, trust or company service providers and accountancy service providers that fail to apply for registration with HMRC under the Money Laundering Regulations. The penalties apply only to businesses that must be registered with HMRC. Further information is provided at www.hmrc.gov.uk/mlr.

Double taxation

A first-time comprehensive double taxation agreement between the UK and Bahrain was signed on 10 March, and new double taxation convention between the UK and Germany was signed on 30 March. The treaties will enter into force once the parties have completed their legislative procedures.

Rewrite project closes

The Tax Law Rewrite project closed on 31 March, HMRC announced. The three most recent Acts – CTA 2009, CTA 2010 and Taxation (International and Other Provisions) Act 2010 (TIOPA 2010) – complete the rewrite of the main direct tax legislation.

"Each of these Acts contains time limited powers to make corrections. To ensure that these powers are exercised in accordance with arrangements agreed during the lifetime of the project, the external committees which have overseen the work of the project will as before review all proposals made by HMRC to use the powers," HMRC said.

Revenue & Customs Brief 04/10 sets

newsfile

►...Continued from previous page

out the structure of CTA 2010 and TIOPA 2010, and confirms that these Acts came into force:

- for corporation tax purposes, for accounting periods ending on or after 1st April 2010, and
- for income tax and capital gains tax purposes for 2010/11 onwards.

Tax information exchange agreements

The UK signed new TIEAs with Belize, Dominica and Grenada in March.

HMRC manual updates

HMRC announced updates to the following manuals dealing with direct taxes and tax credits (see TPT 31.6, 12 March 2010 for the previous update):

March 2010: Relief Instructions; PAYE Online; General Insurance; Compliance Handbook; Shared Workspace Business; National Insurance; Information Disclosure Guidance; Self Assessment; Tax Credits Technical; Debt Management and Banking; Corporate Intangibles and Research and Development; International; Business Income; PAYE Settlement Agreements.

April 2010: Inheritance Tax; Tax Compliance Risk Management Process; Compliance Handbook.

Local Working Together: an update

Issue 39 of Working Together includes a report on progress of a new local Working Together model. There are 49 local WT groups who meet regularly, and seven locations where "groups have either been dormant for a short time or where there appears to be a demand for a new group," HMRC said. But 38 local groups have met at least once since the launch of the new model.

"We realise that local groups can only accommodate a limited number of agents. The six professional bodies have direct routes into HMRC's national WT team, but their members who are not directly involved with local WT will be encouraged to refer issues and concerns through their respective bodies. Additionally, agents now have the

option of using the two new 'virtual' WT groups launched by AccountingWEB and Taxation on 23 February."

Working Together is a partnership between HMRC and CIOT, ICAEW, ACCA, ICAS, ATT and AAT. See www.hmrc.gov.uk/workingtogether.

HMRC added: "One of the main benefits of the new local WT model is that agents can identify operational problems, discuss them with colleagues to assess their scale and potential impact and then immediately refer them to the HMRC co-ordinator for further action. The co-ordinator will then determine if the problem is already known to HMRC. If it is then any steps being taken to rectify the issue will be reported back to the local agents."

The latest bulletin also includes articles on:

- form R40, repayment claims and capital gains;
- new legislation to develop a standard compliance system;
- Shares and Assets Valuation changes; and
- correction and amendment of self assessment returns and company tax returns.

Regulations published

Record keeping

The Finance Act 2009, Schedule 50 (Record-keeping) (Appointed Day) Order SI 2010/815 appoints 1 April 2010 as the day on which amendments made by FA 2009 Sch 50, concerning record-keeping obligations for SDLT, insurance premium tax, aggregates levy, climate change levy and landfill tax, come into force.

Time limits

The Finance Act 2009, Schedule 51 (Time Limits for Assessments, Claims, etc.) (Appointed Days and Transitional Provisions) Order SI 2010/867 appoints the days on which amendments made by FA 2009 Sch 51 come into force and contains transitional provisions. The appointed day for changes to time limits for insurance premium tax, aggregates levy, climate change levy and landfill tax is 1 April 2010, and the appointed day for changes to inheritance tax, SDLT and petroleum revenue tax is 1 April 2011.

Tax credits

The Working Tax Credit (Entitlement and Maximum Rate) (Amendment) Regulations SI 2010/918 amend the WTC childcare provisions in relation to circumstances where childcare costs decrease. The change will enable awards for fixed period childcare costs (eg. claims for a few weeks during school holidays) to be averaged and paid over that fixed period.

The Tax Credits Up-rating Regulations SI 2010/981 increase from 6 April 2010 various child tax credit and working tax credits elements and thresholds, as set out at PBR 2009.

Savings Gateway

The Saving Gateway Accounts Act 2009 (Commencement No. 2) Order SI 2010/921 brings into force on 1 July 2010 the majority of the provisions of the Act, which creates a new Saving Gateway scheme to encourage persons on lower incomes and of working age to save.

Pensions

The Registered Pension Schemes (Standard Lifetime and Annual Allowances) Order SI 2010/922 sets the standard lifetime allowance at £1.8 million, and the annual allowance at £255,000, for each of the tax years 2011/12 to 2015/16.

CGT annual exemption

The Capital Gains Tax (Annual Exempt Amount) Order SI 2010/923 specifies £10,100 as the exempt amount for 2010/11 by virtue TCGA 1992 s 3 unless Parliament otherwise determines.

Manufactured overseas dividends

The Income Tax (Manufactured Overseas Dividends) (Amendment) Regulations SI 2010/925 make amendments to counter the avoidance of tax by sidestepping restrictions designed to prevent recipients of manufactured overseas dividends from obtaining relief for overseas tax more than once.

Social security contributions

The Recovery of Social Security Contributions Due in Other Member States Regulations SI 2010/926 relate to the recovery in the UK of social security contributions due in other member states.

Ross and anor v Comrs for HM Revenue and Customs [2010] EWHC 13 (Ch), [2010] STC 657

Bankruptcy

HMRC had served statutory demands on the debtor firm in respect of unpaid partnership and self-assessment tax liabilities. The debtors offered HMRC a number of legal charges over various properties as security for payment. HMRC rejected the offer. The principal issue was whether the offer of security had been reasonably refused within the meaning of Insolvency Act 1986 s 271. The High Court dismissed the debtor's appeal. HMRC could reasonably refuse the offer. HMRC's primary function was to collect tax rather than to act as an institutional lender.

R (on the application of Huitson) v Revenue and Customs Comrs [2010] EWHC 97 (Admin), [2010] STC 715

Double taxation: avoidance scheme

The UK-resident taxpayer sought to avoid income tax by supplying his services to UK clients through an Isle of Man intermediary. He claimed double taxation relief under the UK/Isle of Man Double Taxation Agreement, although his income from the Isle of Man intermediary was not charged to tax in the Isle of Man. HMRC rejected his claims. While the appeals were pending FA 2008 s 58 was enacted with retrospective effect. The taxpayer applied for judicial review, contending that FA 2008 s 58 contravened the European Convention on Human Rights. Dismissing the application, the High Court held that the arrangements which the taxpayer had entered into "had no genuine commercial purpose" and were "artificial".

Grays Timber Products Ltd v Revenue and Customs Comrs [2010] UKSC 4

Employment-related securities

G, the managing director of the taxpayer company, had been allotted shares in the group's parent company under an agreement where, if that company were sold, G would be entitled to substantially more consideration per share than the other

shareholders. HMRC determined that G's shares had been sold for more than their market value giving rise to a charge to income tax under ITEPA 2003 ss 446X–446Z. The company contended that the shares were sold for market value, taking account of G's enhanced rights, and that the consideration was taxable as a chargeable gain. The issue was whether G's enhanced payment was taxable as employment income or as a chargeable gain.

Dismissing G's appeal, the Supreme Court held that G's shares had been disposed of for more than market value. The enhanced payment had a value to G personally, but that right had not transmitted to the purchaser.

Chilcott and others v Revenue and Customs Comrs [2009] EWHC 3287 (Ch), [2010] STC 453

Payments by employer on account of tax

In 2001 two company directors exercised share options and realised substantial gains. One of the directors (C) declared the gain on his 2001/02 tax return, but the other (G) did not. In October 2003 the company paid the class 1 NICs arising from the exercise of the options. In 2006 HMRC issued an amendment to C's return, charging tax on the exercise of the options under TA 1988 s 144A (now ITEPA 2003 s 222) and issued a discovery assessment on G. Dismissing the taxpayers' appeals, the High Court held that the taxpayers were liable to tax under TA 1988 s 144A, the meaning of which was clear. The company had failed to account for PAYE on the gains and the directors had failed to reimburse the company within the statutory time limit.

Goldman Sachs International v Revenue and Customs Comrs, Goldman Sachs Services Ltd v Revenue and Customs Comrs [2009] UKUT 290 (TCC)

PAYE and NICs: identity of "employer"

HMRC issued rulings to two associated companies that the exercise of certain options to employees gave rise to a li-

ability to NICs. The companies appealed. Allowing the first appeal, the Upper Tribunal held that there should be a preliminary hearing, as contended by the companies, to determine which company should be treated as the employer for PAYE and NICs purposes. Allowing the second appeal, the Upper Tribunal held that, as HMRC had already begun county court proceedings against one of the companies and intended to take similar proceedings against the other company, the hearing of the second appeal should be halted in order to permit the companies to raise "limitation arguments" in the county court

Tower MCashback LLP I and anor v The Comrs for Her Majesty's Revenue & Customs [2010] EWCA Civ 32

Capital allowances: expenditure on software

Two limited liability partnerships claimed capital allowances in respect of expenditure on computer software (to take advantage of the 100% allowance for the year 2003–04). Seventy-five per cent of the purchase price of the software was funded by "non-recourse loans" made available by the vendor of the software. HMRC rejected the claims under CAA 2001 s 45(4) and issued closure notices. At the hearing HMRC abandoned its s 45(4) contention, but defended the closure notices on alternative grounds. The Court of Appeal allowed HMRC's appeal in part (in relation to the closure notice issue) but found that one of the LLPs had genuinely "expended ... funds on the purchase of the software agreement and, accordingly, was entitled to a first-year allowance in respect of that expenditure".

R (on the application of Davies and anor) v HM Revenue & Customs; R (on the application of Gaines-Cooper) v HM Revenue & Customs [2010] EWCA Civ 83

Residence in the UK

Both appeals concerned the interpretation of HMRC's booklet IR20. In the first

Continued on next page... ►

►...Continued from previous page

appeal the taxpayers contended that HMRC had interpreted IR20 particularly strictly in relation to their claims to be non-resident. Dismissing that appeal, the Court of Appeal held that, on the proper application of IR20, the taxpayers fell outside the terms that would have made them non-resident. In the *Gaines-Cooper* appeal, the appellant contended that he had acquired a domicile of choice in the Seychelles and was neither resident nor ordinarily resident in the UK for the relevant tax years. Dismissing his application for judicial review, the Court of Appeal held that he had failed to establish a distinct break from his social and family ties in the UK and did not meet the IR20 criteria to establish non-residence.

Kellogg Brown & Root Holdings UK (Ltd) v Revenue and Customs Comrs [2010] EWCA Civ 118

Capital gains: connected persons

A UK-resident subsidiary (K) of a US parent company (HC) acted as a holding company for a number of UK subsidiaries. As part of a corporate reorganisation, two of K's subsidiaries were transferred to HU, another subsidiary of HC, creating substantial capital losses for K. K claimed that the losses could be set against subsequent chargeable gains. HMRC rejected the claim on the basis that HU and K were "connected persons" within TCGA 1992 s 18. Dismissing K's appeal, the Court of Appeal held that under TCGA 1992 s 28(2) the disposal was made at the time the relevant contract was satisfied and that K and HU were connected at the time of the sale of the shares.

Test Claimants in the FII Group Litigation v Revenue and Customs Comrs [2010] EWCA Civ 103

Dividends from non-resident companies

Both sides appealed against the High

Court decision following a reference to the ECJ (see [2007] STC 326). The case concerned the tax treatment of dividends paid by a non-resident subsidiary to a resident parent company. The Court of Appeal held, *inter alia*, that there would be a reference back to the ECJ to clarify its decision on whether *Sch D Case V* infringed Article 43 of the EC Treaty; advance corporation tax provisions could be interpreted in such a way as to be compatible with Community law; a restitutionary remedy would be available for claims to a credit under TA 1988 s 231, and such claims would be subject to a six-year limitation period; and HMRC would not be precluded from relying on the curtailed limitation period for mistake-based claims.

Power v Trustees of the Open Text (UK) Ltd Group Life Assurance Scheme and anor [2009] EWHC 3064 (Ch)

Life assurance scheme and earnings cap

The deceased had been a member of a group life assurance scheme which would pay out a maximum of four times salary on the death of a member, subject to the earnings cap (TA 1988 s 590C). The deceased died in July 2007. The claimant contended that since TA 1988 s 590C had been repealed with effect from 6 April 2006, and the scheme trustee had the power to amend the scheme rules, the amount paid out under the scheme should be unrestricted. Dismissing the appeal, the High Court held that the primary duty of the trustee was to administer and manage the scheme in accordance with the rules in place. The power to amend the rules was ancillary to that primary obligation.

X Holding BV v Staatssecretaris van Financiën (Case C-337/08)

Non-resident subsidiary

The Netherlands claimant company and its 100% Belgian subsidiary applied in

the Netherlands for taxation as a single tax entity, but were refused on grounds that, under local laws, both companies had to be established in the Netherlands. The question was whether the Netherlands legislation was precluded by Articles 43 and 48 of the EC Treaty.

The ECJ held that Articles 43EC and 48EC "do not preclude legislation of a member state which makes it possible for a parent company to form a single tax entity with its resident subsidiary, but which prevents the formation of such a single tax entity with a non-resident subsidiary, in that the profits of that non-resident subsidiary are not subject to the fiscal legislation of that member state".

Editor: Andrew Goodall
Production: Stefan Black
Published fortnightly by LexisNexis, Halsbury House, 35 Chancery Lane, London, WC2A 1EL.
Telephone: 020 7400 2500
Fax: 020 7400 2842
E-mail: Andrew.Goodall@lexisnexis.co.uk
© Reed Elsevier (UK) Limited 2010
ISSN 1475-2352

This publication is intended to be a general guide and cannot be a substitute for professional advice. Neither the authors nor the publisher accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this publication.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission in writing of the publishers. Printed by Windsor Print Production, Tonbridge, Kent.

