

WHY SO MANY DISCLOSURE OPPORTUNITIES?

Robert Maas considers if HMRC's campaigns will achieve the desired result

I feel a bit sorry for HMRC. It is fairly clear to me that the Chancellor's 'efficiency savings' have slashed HMRC's staffing to such an extent that it no longer has the resources to do much enquiry work.

I find it hard to conceive any other logical basis for the succession of disclosure opportunities that HMRC has launched, all seeking to tempt delinquent taxpayers not only to come clean, but to carry out their own enquiries, work out their own tax bills and send a cheque to HMRC in return for a 10% fixed penalty loading and, in most cases, a no-questions-asked basis about what they declare.

The original Offshore Disclosure Facility (ODF) in April 2007 made a degree of sense. This was billed as 'An opportunity for those with an offshore account and undisclosed tax liabilities to come forward now and settle their affairs with HMRC'. Although HMRC had at the time obtained information from the UK clearing banks it seems to have asked for a massive amount of information, much of which had no possible relevance to undisclosed tax – such as bank accounts of non-domiciled taxpayers who had made no remittances and non-interest bearing accounts opened for convenience by those with holiday homes abroad. Accordingly it was hard to see how HMRC could use it to open enquiries in any reasonable timescale. Furthermore, the probability is that most of those who seek to hide funds overseas use a local bank rather than a local branch of a UK bank, and it would have been difficult, if not impossible, for HMRC to obtain information from banks which did not carry on business in the UK. The ODF accordingly made sense. It raised £400m in revenue, most of which it is likely that HMRC would otherwise never have unearthed.

But it made sense as a one-off initiative. In my experience HMRC has always held out against amnesties largely on the grounds that if you grant one, people will expect another later. Accordingly they are likely to be counterproductive. Those that miss the amnesty bus will feel it better to wait until the next one comes along than to make a disclosure to HMRC.

Last year's New Disclosure Opportunity (NDO) seems to have produced comparatively few potential disclosures, although that may well be because most of those with a willingness to disclose did so under the ODF. What the NDO may well have done though is to create a climate in which those who are not yet ready to disclose feel that they might as well wait for the Mark 3 offshore disclosure opportunity in a couple of years' time. I doubt that the average tax evader understands that with the new minimum penalties any further 10% disclosure opportunity that extends beyond 2007/08 will need statutory authority. They probably do understand that, as both the ODF and NDO carried a 10% penalty, nothing is likely to be lost by waiting, apart perhaps from a bit of interest.

Indeed the notification period for the NDO had not even closed when along came the Liechtenstein Disclosure Facility (LDF) carrying not only the same 10% penalty loading but also immunity from prosecution, a requirement to pay only 10 years' tax instead of the normal 20, and the incredible opportunity for those whose money was hidden elsewhere to move it to Liechtenstein any time up to April 2015 and benefit from those amazing concessions. (Incidentally it is almost certainly both illegal and unethical for Tax Faculty members to arrange for tax evaders to do this.)

Next, in January 2010 came the Tax Health Plan (THP). This is the most extraordinary of all. Indeed I cannot imagine how the Board of HMRC ever approved it. The THP heralds the second in a programme of 'campaigns'. The first campaign is the offshore one (ie the ODF, NDO and LDF) and the THP is the first stage in a new campaign aimed at professionals. HMRC has told the Compliance Reform Forum that campaigns are not simply disclosure opportunities, they also aim to help people to get things right. However, it is difficult to glean this from the HMRC publicity. Furthermore, why hold out the now customary – and presumably standard – 10% penalty rate when those who need help to get things right will probably not, by definition, have been careless, so will not be liable to a penalty at all?

Why do I think that the Board of HMRC should never have approved the THP? Because the reality is that the THP deters voluntary disclosure of tax evasion. Why on earth HMRC should want to do that is beyond me. The recently published 'Your Charter' tells us that we can expect HMRC to 'treat you even-handedly'. It also says that HMRC will 'act with integrity'. These surely mean that HMRC should not make concessions to doctors and dentists who evade tax but deny those same concessions to 'subbies', market traders or anyone else in the black economy. Indeed most people would feel that to qualify as a doctor displays a level of intelligence that makes tax evasion by a doctor more heinous than evasion by, say, a poorly educated person scraping by on a minimal income. It surely cannot be the intention of Government to sting the poor and be lenient to the rich? Indeed the Human Rights Act 1998 protects us from 'discrimination on any ground'. This must surely prevent HMRC imposing a penalty of more than 10% on a tax evader on the grounds that he or she is not a doctor.

It is possible that it might not be discriminatory to treat someone who confesses his or her crime individually to HMRC more harshly than one who does so as a result of a campaign. But it must be discriminatory if a campaign aimed at doctors imposes harsher penalties than one aimed at, say, waiters. Accordingly any tax evader who would otherwise have 'come clean' ought surely to think twice before doing so. It would be safer to wait for the campaign aimed at his or her own trade or profession.

I do not know how HMRC can get itself out of the situation it seems to have created. The only thing that I can think of is that it will have to introduce an Onshore Disclosure Opportunity with a 10% maximum penalty. And it needs to do this fast. Indeed HMRC seems to me to have pre-empted the Government's rationale behind Mr Darling's Hidden Economy Advisory Group. It is hard to see what this can offer without HMRC first making clear that everyone in the hidden economy who chooses to come clean will be treated no more harshly than those doctors who have functioned partly in the hidden economy.

In addition to believing that the THP is a conceptual failure, I also think that the timing of its introduction is unreasonable. I do not act for any doctors, but I know people who do. My understanding is that the British Medical Association (BMA) is currently in discussion with HMRC as to what travelling expenses doctors can deduct. I have been told that some HMRC officers are even challenging 'on call' travel, despite the long-standing decision in *Pook v Owen* (HL 1969, 45 TC 571) that a doctor is performing his or her duties immediately that on taking the phone call at home. I think it incredible that HMRC should choose to introduce a disclosure opportunity at a time when no one – not HMRC, not the BMA, not any individual doctor – can be expected to know how to compute the profits of a doctor while the HMRC/BMA discussions are ongoing.

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