

Changing the balance of risk in tax

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I have not commented in any depth on the newly contentious issues of follower notices and accelerated payment notices that have, as a result of legislation now becoming law, become the subject of much comment in the tax profession.

Details of these related issues can be found [here](#) and [here](#). In essence, follower notices give power to HMRC to demand that a taxpayer amends their self assessment tax return in the event that HMRC think that they have won a ruling against a taxpayer in a case relating to a tax scheme similar to that which they think the taxpayer has used. The follower notice requires the taxpayer to either settle their dispute or face a large penalty if their dispute with HMRC is ultimately unsuccessful. The aim is fairly easy to identify: it is to prevent HMRC having to litigate each case of nearly identical tax avoidance separately when schemes have been mass marketed - as many have been. The contention issue is that there is effectively no appeal available against the notices when they are issued.

Accelerated payment notices allow HMRC to advise a taxpayer that they must pay tax that they have not settled as part of their self assessment tax arrangements because they have purchased an identified tax avoidance scheme. 1,200 schemes have now been identified where accelerated payment - or settlement before the status of the scheme has been resolved and therefore liability has been proven - might be required by HMRC and the first demands are to be issued very soon. Again, no appeals are to be allowed, and the motive for that is very obvious: when these arrangements are necessary because litigation delays have meant tax has been withheld from HMRC for quite a number of years by tens of thousands of taxpayers (at least 40,000 are involved, and maybe more) permitting appeals would simply add another mechanism that would delay payment yet again.

The question to be asked is whether or not this is a reasonable course of action. In the view of many tax practitioners it is not, [with claims circulating of the hardship such demands will cause](#) as people without the means to make the payment are faced with demands for settlement for which they are not prepared. I have remarkably little sympathy with such claims: all involved know they were partaking in marketed tax

avoidance schemes and all should have been aware of the risks involved when they entered the arrangements (and if not, they need to sue their advisers, which I am sure will happen in many cases). In addition, if they were not aware of the risks at the time they bought the schemes it is hard to know how they have not become aware of it over the last two or three years; surely no one has missed the crack down on tax avoidance? In that case the hardship issue can, candidly, be laid aside. These schemes were designed to unjustly enrich and if they have failed to do so I think there are many better causes where sympathy might be extended.

So what of the greater significance if these new provisions? What are these?

First, I think it fair to say that these arrangements are likely to be a temporary phenomenon. The sale of marked tax avoidance does appear to be declining. The risks are now better known and the mood has changed. The arrangements have been introduced to tackle a back log situation where tax amounting to, it is suggested, £7 billion, might be at risk. It may have been appropriate to have put a sunset clause in the legislation as a result, only permitting use for a limited period without review. The power is appropriate I think in the current situation, but the risk of extension beyond the original intended clause has always to be considered. A sunset clause could close down that risk, and an annual opportunity to extend does exist in any event: a renewal clause could be included in a future Finance Act but would then require review and debate. I think there is merit in such clauses because they force that review.

Second, more broadly, it would be worrying if an absence of a right to appeal become general in tax. There may be reasons in these cases, but more broadly it undermines any principle of justice. This is why review of these provisions will, in my opinion, be required.

More generally though there is another issue to consider. This new legislation sets out to change the balance of risk in tax. That is appropriate. Self assessment has, since the 1990s, been the basis on which UK taxpayers declare their tax liabilities i.e. it has been up to the taxpayer to declare all their income and to both calculate and settle the tax they owe and it is for HMRC to, by and large, check that process. This may not feel to be the case for those on PAYE, but nonetheless that is the essence of the system and as a matter of fact if a taxpayer submits a claim for a tax repayment on their tax return most are given the money they say they are owed without question being asked in the first instance. This is not just with regard to income tax; the same is also true for corporation tax and VAT.

Now before some shout I am well aware that there are mechanisms to delay repayment and that they can be put into operation, and are on occasion. My point is not that such mechanisms do not exist, but that there are now insufficient resources to make sure that they are used effectively. HMRC staff tell me that they think that too many repayments are being made where they think there should be intervention but there are not enough people with sufficient experience working at HMRC to make such

decisions and so repayment is made inappropriately on more occasions than they think proper. I stress, this is anecdote, but I have no reason no reason to doubt its validity.

In that case is is, I think, unsurprising that the National Audit Office has highlighted the fact that the amount of debt HMRC has to write off as a result of its own mistakes has doubled in the last year, [a matter I referred to here](#), whilst write offs of remaining irrecoverable debt remain significant at more than £5 billion a year.

The move on follower notices and accelerated payments are an attempt to recover £7 billion of debt, and that is welcome, but there is, I suspect, a bigger and ongoing issue out there of HMRC simply not having the resources to check repayments where there may be risk. If the balance of risk in tax is to change - and I think it is right that it should - then dedicating resources to checking repayment claims more thoroughly is a necessary next step. But right now HMRC is dispensing with too many of the staff engaged in the process. There is no sense in that.