HM RC Enquiries Investigations & Powers

April/May 2020

Covid-19:

Taxman suspends all compliance activity

‘I wish to make a complaint!’

Making a grievance to HMRC

Full details inside

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HMRC to accept service of legal proceedings by email

HMRC has requested that, where possible, new legal proceedings and pre-action letters should be served via email rather than post, due to Covid-19 pandemic.

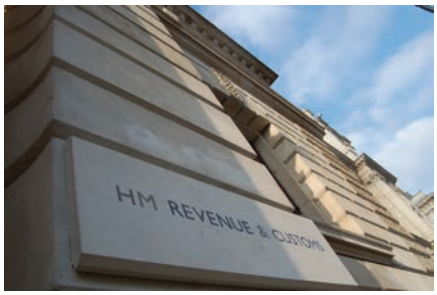
This will help HMRC protect its staff by reducing the handling of paper documents where possible.

New legal proceedings in England and Wales which are required to be served on the Solicitor for HMRC can be sent by email to newproceedings@hmrc.gov.uk.

Any correspondence which is required to be sent to the Solicitor for HMRC in compliance with any pre-action protocol to the Civil Procedure Rules, including the Pre-Action Protocol for Judicial Review, can be sent by email to preactionletters@hmrc.gov.uk.

If attachments are needed they should be sent in a common format such as PDF or MS Word, and must not exceed 10mb (in total). If they are likely to exceed this limit then the document should be split.

PAYE 'trap' for employers introducing pay cuts



UK employers introducing pay cuts across their workforce as an emergency measure to deal with the financial impact of the coronavirus pandemic could find that they are still liable to PAYE on the full amount, an expert has said.

Employment tax expert Chris Thomas, of Pinsent Masons, said: "PAYE liabilities for employers are calculated on the amounts which employees are entitled to. If the employer has not properly dealt with the formalities it could find itself still liable to HMRC for the PAYE on the full salary and not the reduced salary."

Under most employment contracts the employer cannot unilaterally impose a pay cut or reduce the employee's hours – the employee has to consent to a change in their terms and conditions of employment.

"Timing is also important – any agreement to accept a lesser salary needs to be in place before the employee is entitled to receive their salary for the month," Thomas said. "In the current exceptional circumstances, HMRC may not actually take the point, but for businesses seeking to reduce their overheads, it makes sense to get the formalities right and comply with the strict letter of the law."

Welcome

WELCOME to the latest edition of HMRC Enquiries, Investigations and Powers e-magazine.

The world really has been turned upside down since our last issue came out in February. It seems no one saw what was coming, and at the time of writing there is no end of the lockdown in sight, and no one knows the extent of the damage Covid-19 will inflict on the economy (although clearly catastrophic).

In this issue we've a lead feature from Jesmin Rahman on HMRC's suspension of virtually all its investigations. The rest of the issue brings you bang up-to-date with what was happening out there before the big meltdown.

Happy reading,
The Armstrong Media team

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HMRC hits the pause button

Jesmin Rahman explains what is happening in HMRC in regard to tax investigations and the Covid-19 pandemic

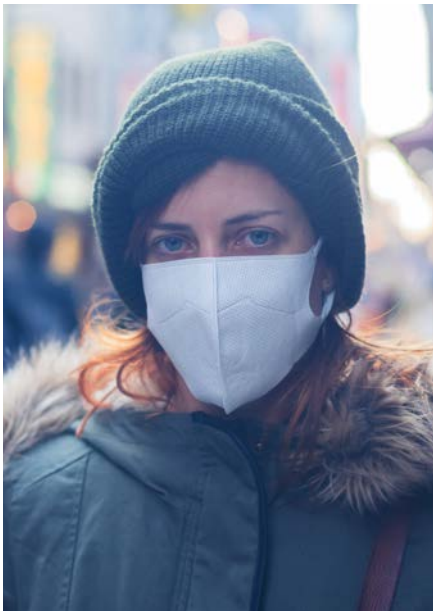
HMRC have suspended all compliance activities indefinitely apart from cases where the customer is actively engaged and communicating. HMRC at this time will not contact the agent or customer unless the customer/agent contacts them. HMRC are informing customers in various way via email, phone calls or letters such as below:

Taxpayers who are being subjected to compliance checks have mainly stated that they want to proceed with the compliance checks or tax investigations in order to come to a resolution as it would be difficult to pick up on the progress of the case smoothly after an indefinite period of postponement. The cases can at least be worked to the point of agreeing quantified figures for the tax assessments and penalties.

HMRC caseworkers have been internally advised in general not to issue any schedule 36 information notice or tax assessments and penalties at this time as HMRC understand that this is distressing time for all and there are reduced resources on all fronts. There will be no new cases opened by HMRC until the Covid-19 virus situation is alleviated.

There are exceptions to the postponement of compliance activity where there are issues of VAT repayments as this would ease the cashflow for trades and where HMRC will have to meet statutory deadlines for example:

- Offshore tax cases.
- Discovery assessments.
- COP 9 cases where it is not possible to postpone the progress of the case.



The postponement in HMRC compliance activities is also partly due to the new job retention scheme which will be processed by the end of April 2020 and the self-employed income support scheme that will be processed in June 2020 as economic measures implemented in response to the economic impact of the Covid-19 virus pandemic. These two schemes will be processed by HMRC staff that have been suffered from severe cuts over the last 10 years. There will be HMRC resources redeployed to process the new schemes until September 2020. HMRC offices that were slotted for closure and HMRC staff that were headed for redundancies in the summer of 2020 have now had their tenure extended to September 2020 in order to cope with the additional resources required to process the schemes.

HMRC's ADR process

The Alternative Dispute Resolution (ADR) process has been affected as they cannot conduct face to face meetings as it would not be adhering to the social isolation government policy.

ADR are accepting applications but are sending the following email acknowledgements: "Your application will be processed as normal, however, please be aware that with the current COVID-19 outbreak, there will be restrictions on what the ADR team may be able to offer you at this time.

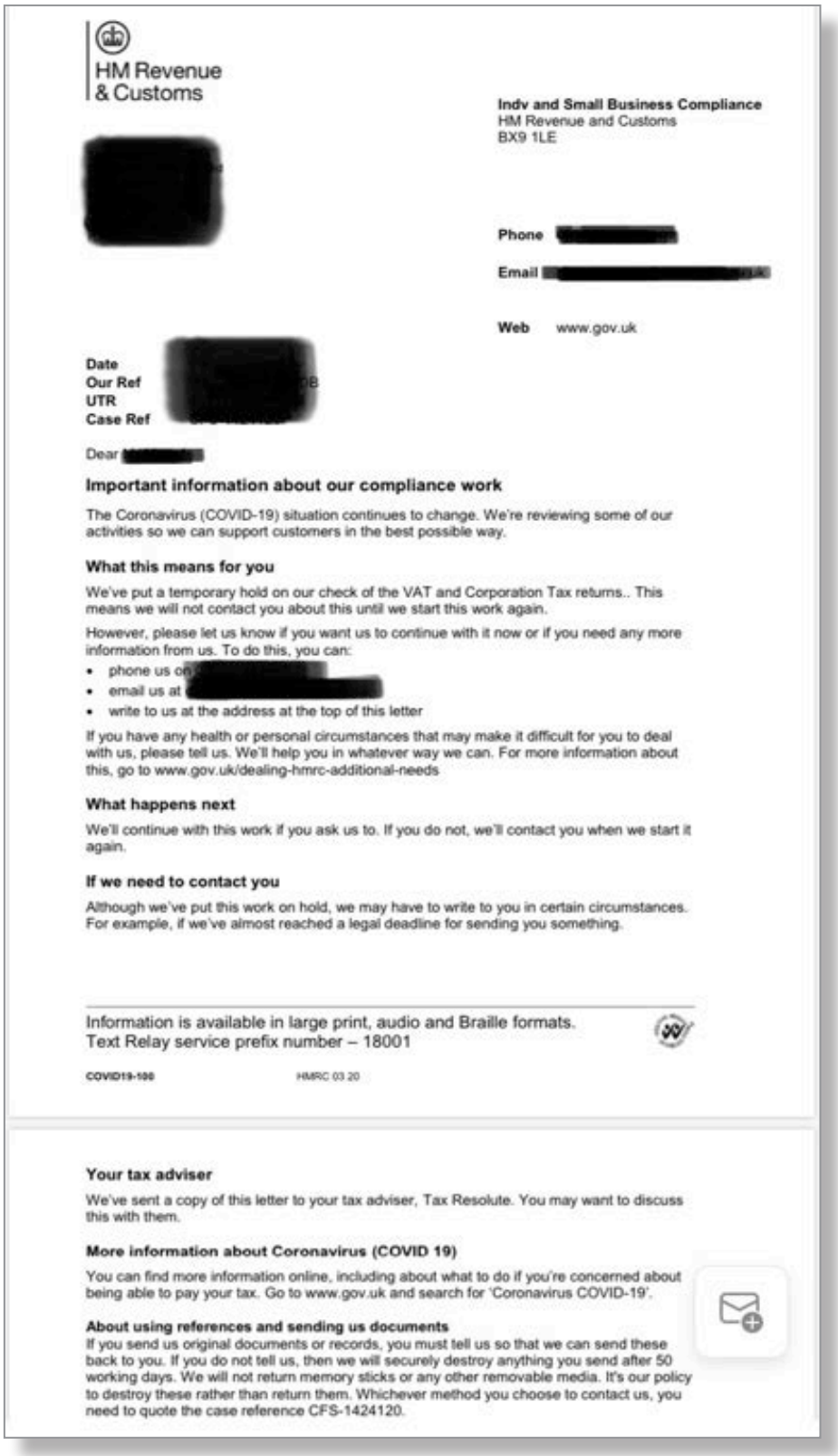
"All applications will be reviewed and, where the dispute is deemed suitable for ADR, accepted. Every effort will then be made to try and resolve the dispute during our normal 120 day turnaround time by either email and/or telephone mediation. However, where this is not possible, the case will be put on hold until after the current restrictions have been lifted and a face to face meeting can be arranged."

There are a few options that can be considered in going forward with the ADR process:

1. to consider teleconference or email correspondence instead of a face-to-face-meeting. This option may not be suitable to resolve the more difficult disputes.
2. that ADR activity is suspended until the isolation policy is lifted, but the ADR application is accepted and held in the process.
3. or withdraw the ADR application and resubmit when things go back to normal.

Tribunal appeals

The tribunal services have also suspended hearings on until further notice and deadlines where directions have to be met was suspended for 28 days from 24 March 2020. Therefore, there is scope within this suspension in the tribunal timescale to delay the ADR process.



HM Revenue & Customs

Indv and Small Business Compliance
HM Revenue and Customs
BX9 1LE

[redacted]

Phone [redacted]

Email [redacted]

Web www.gov.uk

Date
Our Ref
UTR
Case Ref

Dear [redacted]

Important information about our compliance work

The Coronavirus (COVID-19) situation continues to change. We're reviewing some of our activities so we can support customers in the best possible way.

What this means for you

We've put a temporary hold on our check of the VAT and Corporation Tax returns.. This means we will not contact you about this until we start this work again.

However, please let us know if you want us to continue with it now or if you need any more information from us. To do this, you can:

- phone us on [redacted]
- email us at [redacted]
- write to us at the address at the top of this letter

If you have any health or personal circumstances that may make it difficult for you to deal with us, please tell us. We'll help you in whatever way we can. For more information about this, go to www.gov.uk/dealing-hmrc-additional-needs

What happens next

We'll continue with this work if you ask us to. If you do not, we'll contact you when we start it again.

If we need to contact you

Although we've put this work on hold, we may have to write to you in certain circumstances. For example, if we've almost reached a legal deadline for sending you something.

Information is available in large print, audio and Braille formats.
Text Relay service prefix number – 18001

COVID19-100 HMRC 03 20

Your tax adviser

We've sent a copy of this letter to your tax adviser, Tax Resolute. You may want to discuss this with them.

More information about Coronavirus (COVID 19)

You can find more information online, including about what to do if you're concerned about being able to pay your tax. Go to www.gov.uk and search for 'Coronavirus COVID-19'.

About using references and sending us documents

If you send us original documents or records, you must tell us so that we can send these back to you. If you do not tell us, then we will securely destroy anything you send after 50 working days. We will not return memory sticks or any other removable media. It's our policy to destroy these rather than return them. Whichever method you choose to contact us, you need to quote the case reference CFS-1424120.

The tribunal are looking into conducting tribunal hearings by teleconferences or video conferencing and are processing the case where this may be possible. They are requesting feedback from respondents and appellant to understand which options are feasible and if the facilities are available for tele or video conferencing.

Debt management

There is a brief suspension on HMRC Debt management pursuance of debts. For those who are unable to pay due to coronavirus situation, HMRC will discuss specific circumstances on a case by case basis to explore:

1. agreeing an instalment arrangement.
2. cancelling penalties and interest where you have administrative difficulties contacting or paying HMRC immediately.

The government have put in place financial measures for employed and self-employed, for people who cannot work due to the coronavirus situation. Notably, company directors who receive the main part of their income as dividends have been left out as the government has stated they cannot cover everybody.

The government has indicated that it is difficult to distinguish dividends as income or from investments therefore it is not easy to process and include in the self-employment schemes. The government has automatically deferred VAT payments for three months for VAT registered businesses to help with the cashflow and postponed the self-assessment instalment to be paid on 31 July 2020. The government have also provided 80% backing of the Coronavirus Interruptions Business Loan scheme, which have not had a high acceptance rate.

These are difficult times for our clients, trades and businesses and we can only work together to meet the challenges. HMRC are extending all efforts to give us the breathing space to deal with the consequences of the coronavirus and to allocate their own resources to deal with the economic backlash of the Covid 19 virus pandemic. At the same time, we are adapting to new ways of working that we may have not considered before the pandemic.

• Jesminara Rahman is a tax investigation specialist and Director of Tax Resolute Ltd. She can be contacted on 0203 031 6755 or jesmin@taxresolute.com

I wish to register a complaint!

Mark McLaughlin looks at what can be done if a taxpayer has a genuine grievance about HMRC's actions and behaviours in a tax enquiry or investigation

For those readers old enough to remember, the title of this article is the opening line of Monty Python's famous 'dead parrot' sketch, in which a pet shop owner sold a customer a dead parrot, and the customer subsequently returned to the shop to complain after finally realising that the parrot he had bought was already dead.

Of course, most stores (the larger ones, anyway) have customer service departments, to which complaints can be made. However, what about HMRC's 'customers'? How can a taxpayer make a complaint (for example) about HMRC's handling of an enquiry into their tax return?

HMRC standards

HMRC's interaction with taxpayers, including during enquiries, is subject to 'Your Charter' (www.gov.uk/government/publications/your-charter/your-charter).

There is a legal requirement for the Charter to "...include standards of behaviour and values to which [HMRC] will aspire when dealing with people in the exercise of their functions" (CRCA 2005, s 16A(2)). The Charter features seven taxpayer 'rights'. The most relevant in the context of an enquiry are probably: 'respect and treat you as honest' and 'be professional and act with integrity'.

HMRC published a consultation document 'HMRC Charter' on 24 February 2020, seeking public feedback on a revised charter "to set out more clearly the experience that we want to deliver to our customers." The draft revised Charter features seven aspirations for HMRC's 'customer' service. One of these is 'Treating you fairly', which includes the following statement: "We trust you are telling the truth, unless we have good reason to think you're not." The consultation period closes at 11.45pm on 15 May 2020, and the revised Charter is due to commence in summer 2020.

Making a compliant

A further taxpayer right in the current Charter is 'Deal with complaints quickly and fairly'. Traditionally, complaints were often made to the HMRC complaints manager of the office or area which dealt with the enquiry in

the first instance, followed by the head of that HMRC office or area.

These days, a recognised and structured complaints process is in place. The gov.uk website contains guidance on complaining about HMRC's service, including telephone numbers and postal addresses for complaints, and online forms for those with a government gateway user ID (www.gov.uk/complain-about-hmrc).

A different procedure applies in the (unlikely) event of serious misconduct by HMRC staff (tinyurl.com/HMRC-Complain-SM).

Independent review

The Adjudicator's Office (www.adjudicatorsoffice.gov.uk/) is an independent body that investigates complaints about HMRC maladministration. It has the power to recommend restitution in the form of apologies and (modest) financial payments. There is specific guidance on the Gov.uk website on how to complain to the adjudicator's office about HMRC (tinyurl.com/HMRC-Complain-AO).

However, it should be noted that the Adjudicator's Office will only investigate complaints after an enquiry or investigation has ended; and it will not look at decisions made as part of the alternative dispute resolution process

An alternative to the Adjudicator's Office is the Parliamentary and Health Service Ombudsman (PHSO) (https://ombudsman.org.uk). Access is via the taxpayer's Member of Parliament. It should be noted that a case referred to the PHSO cannot later be referred back to the Adjudicator (although the reverse is possible).

The PHSO's guidance on its website points out that there are statutory time limits for making your complaint to the Ombudsman

The PHSO's guidance on its website points out that there are statutory time limits for making your complaint to the Ombudsman; for complaints about a UK government department or another UK public organisation, a complaint should be made to an MP within a year. As indicated, the MP then needs to pass the taxpayer's complaint to the PHSO. The guidance states: "Normally, if we receive a complaint outside these time limits, we cannot investigate it. However, the law does give some flexibility on this. In some circumstances, we may still be able to investigate even if you complain outside of these time limits."

Having your day in court

It may sometimes be appropriate for HMRC's unfair actions to be drawn to the attention of the tax tribunals or the courts. An appeal to the First-tier Tribunal can be a relatively straightforward and inexpensive option in certain circumstances, such as in cases involving administrative or procedural errors, including in appeals and appeal hearings.

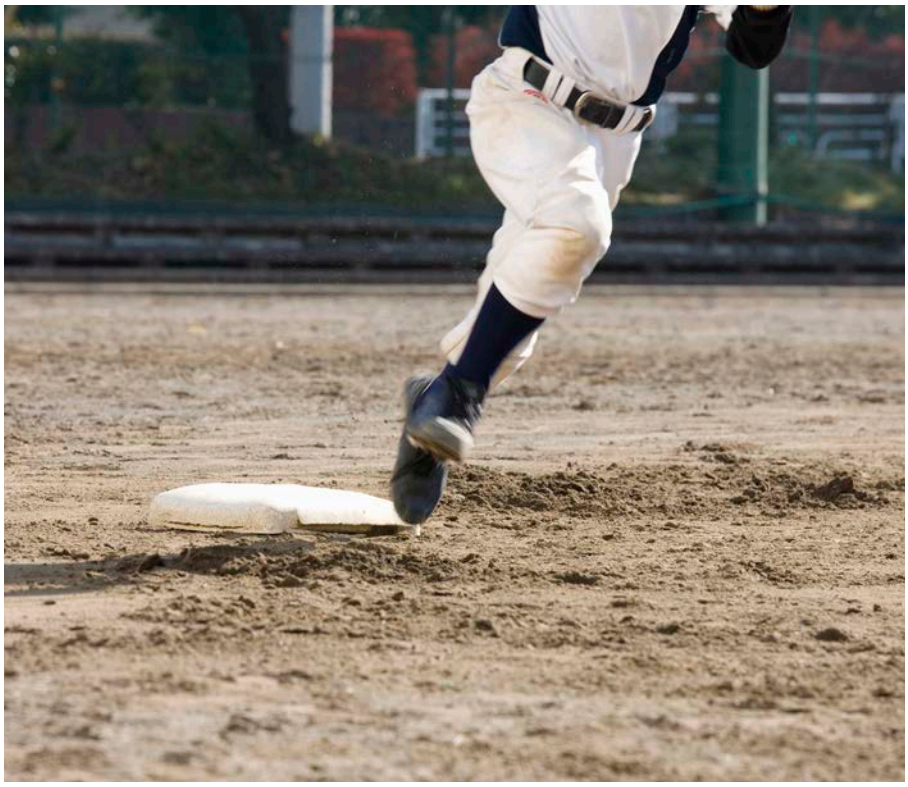
For example, in Revenue and Customs v Ritchie [2019] UKUT 71 (TCC), the Upper Tribunal (UT) considered whether evidence advanced by HMRC shortly before the end of an earlier First-tier Tribunal hearing gave the taxpayers adequate notice that HMRC intended to argue that their accountant's carelessness (rather than the taxpayers') resulted in a loss of tax for discovery assessment purposes. The UT held that HMRC had not raised this point (i.e. the taxpayers' representative understood HMRC's case was that the taxpayers themselves were careless); it was not fair for the point to be taken into consideration.

In some cases, a tribunal will not have the jurisdiction to consider an appeal. For example, in White & Anor v Revenue and Customs [2019] UKFTT 659 (TC), the First-tier Tribunal concluded that it did not have jurisdiction to consider the application of extra-statutory concession D49 following HMRC's refusal to apply it and allow the appellants' period of absence to be treated as a period of occupation for private residence relief purposes. An application to the High Court for judicial review is normally the solution in such circumstances. However, the process is generally expensive and the outcome is unpredictable.

HMRC's approach

Some insight into how complaints are dealt with can be found in the HMRC manuals, particularly the Complaint Handling Guidance manual and the Complaints and Remedy Guidance manual.

- ***Mark McLaughlin*** *CTA (Fellow) ATT (Fellow) TEP is a consultant with The TACS Partnership LLP (www.tacs.co.uk). He is also editor and a co-author of HMRC Investigations Handbook (Bloomsbury Professional)*



Cover all the bases

Alice Kemp explains why in a case of a corporate failure to prevent tax evasion then just having a policy is not enough

It is no secret that the government is focused on corporate accountability, and recent figures show that HMRC are serious in their drive to hold companies responsible for tax evasion. Now is the time for corporates to ensure that their regimes are robust and withstand close scrutiny.

In 2017, two new offences criminalising companies and limited liability partnerships for failure to prevent the facilitation of criminal tax evasion were introduced by the Criminal Finances Act 2017 ('CFA'), to address the difficulties in prosecution encountered by the concept of the 'controlling mind'.

As at 31 December 2019, there were nine live investigations for corporate criminal offences of failure to prevent facilitation of tax evasion and a further 21 'opportunities' under review, up from five in the first half of 2019. No corporate is safe with investigations under way in a broad range of business sectors and from small business to "some of the UK's largest organisations". HMRC's appetite for investigation, and potentially prosecution, of the new corporate criminal offences is much greater than other agencies have shown in relation to similar corporate criminal 'failure to prevent' offences.

The two offences in the CFA criminalise corporate failure to prevent criminal tax evasion; domestic or foreign. Both offences are strict liability. This means that if criminal tax evasion (whether or not there is a successful prosecution) and facilitation by a person or entity associated (i.e performing services for or on behalf of) the company are proven, the defendant corporation's guilt for failing to prevent will follow. Crucially, there does not need to have been any assent, co-operation or even awareness of the facilitation of tax evasion by the board.

Is there a defence?

Corporates may have a defence if the corporation either:

- had in place reasonable preventative procedures as was reasonable in all the circumstances; or
- it was not reasonable in all the circumstances to expect the company to have any preventative procedures in place.

'Reasonable procedures' are formulated using the following six guiding principles:

- Risk assessment: The nature and extent of the exposure to risk of criminal tax evasion of those who act in the capacity of an associated person.
- Proportionality of risk-based prevention procedures: Given the nature, scale and complexity of activities and the level of identified risk, what is appropriate given the level of control and supervision that can be exercised over associated persons?
- Top level commitment: The 'tone from the top' and fostering of a culture of intolerance of tax evasion.
- Due diligence: Taking an appropriate and risk-based approach to the due diligence of associated persons and those performing services on for or on behalf of the corporation.
- Communication (including training): Communication, embedding and understanding of the policies and procedures proportionate to the identified risk.
- Monitoring and review: Documented monitoring and review, including modifications and improvements where necessary.

The 'reasonable procedures to prevent' defence is worded in identical terms to the defence provided in the Bribery Act 2010 and, given the age of that legislation, you would perhaps expect there to be clear guidance and judicial understanding of what is required in practice to establish that defence. Unfortunately, that is not the case. We are aware of only one case in which this issue has been considered. In R v Skansen Interiors Ltd (unreported) the defendant company was found guilty of failing to prevent bribery under section 7 of the Bribery Act 2010. It would appear that the jury in that case did not find acceptable that:

- while having policies and procedures for a number of different matters, there was no specific policy for failure to prevent bribery (despite there being clauses in the contracts in question prohibiting the exact conduct that occurred);
- there was no dedicated compliance officer, despite Skansen being described as a small company; and
- there was no evidence that staff had been trained, reminded or advised of the policies that Skansen did have in place, or that anyone had agreed to abide by them.

The latest Deferred Prosecution Agreement (SFO v Airbus SE, 31 January 2020, Southwark Crown Court, U20200108) also makes states that despite Airbus having commissioned an award-winning compliance programme and having 'a number of written policies', including detailed due diligence processes in place, there was no effective oversight to ensure that they were implemented.

It is clear from the above two cases that simply having a policy is not sufficient; it needs to be bedded in, brought to the attention of associated persons, and adhered to, with clear sanctions for non-compliance.

With unlimited potential financial penalties and strict liability, it is important that corporates do not fall foul of the new offences. Now is the time for corporates to ensure that they are well equipped to avail themselves of the 'reasonable procedures to prevent' defence, should HMRC come calling. No business wants to become the 'Skansen' of the CFA.

- *Alice Kemp is an employed barrister in RPC's Tax Disputes Resolution team. She specialises in criminal fraud investigations and litigation conducted by regulatory bodies, including HMRC and the SFO. She can be contacted on 020 3060 6527 or Alice.kemp@rpc.co.uk.*

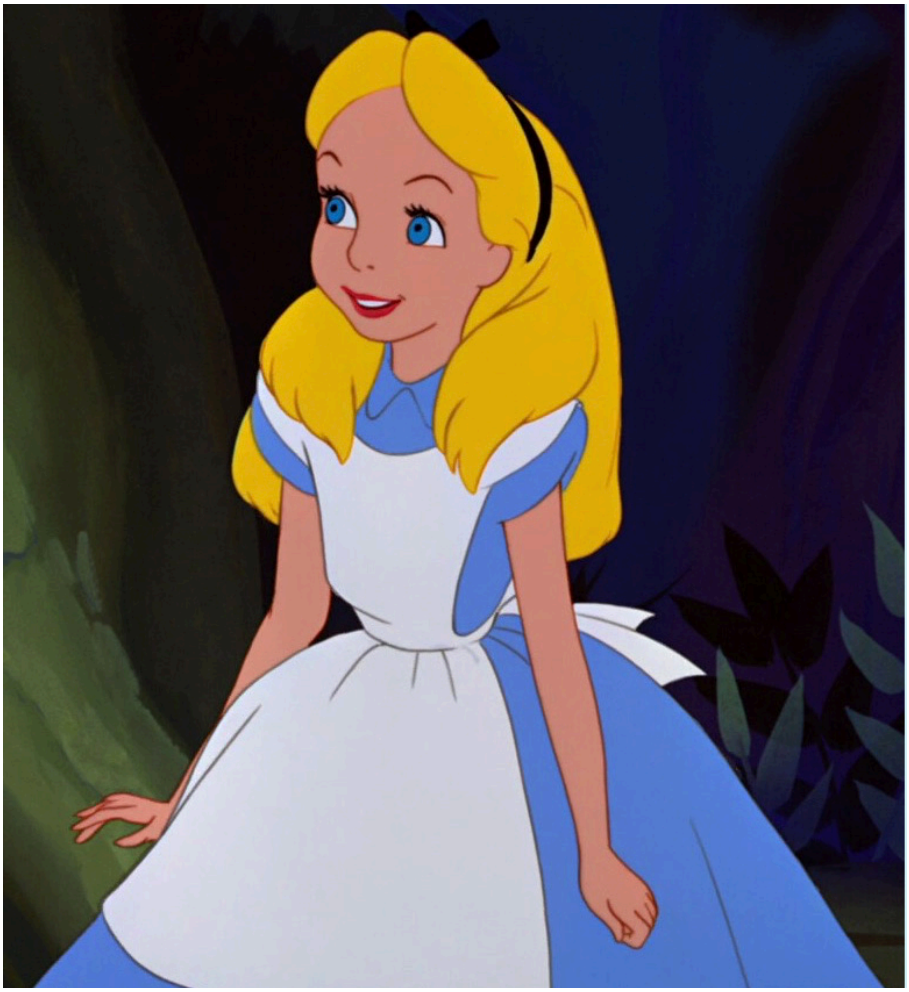
Curiouser and curiouser...

Russell Cockburn is puzzled by a redacted section in a recent HMRC press release. What are they trying to hide?

As a tax consultant I have to do my best to keep up with the latest developments in tax so that I can advise my clients properly. One of the sources of information I use regularly is, of course, any official press releases issued by HMRC and there is a page on their website devoted to these of which there is a regular flow. I tend to check these on a more or less daily basis to see if there is anything new they have put out that I ought to be aware of and which might need passing on to my clients.

So, in the current awful 'outbreak' situation my attention was inevitably drawn quickly to a press release entitled 'COVID-19 Guidance' issued on 30 March, apparently as an update to HMRC's own Internal Compliance Manual. These internal manuals have been made available to the public and the practising professions freely for many years via the HMRC website and apart from being an authoritative source of guidance on UK tax law can give a useful insight into the department's own interpretation of tax laws and regulations. So, I clicked on the link and followed it, only to find to my surprise that it lead me to a page containing nothing but the following rather puzzling comment: "This content has been withheld because of exemptions in the Freedom of Information Act 2000". (See https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch930000)

Now it is not that unusual to see some content in HMRC Internal Manuals being 'redacted' and usually there is some similar comment referring to the 'national interest' or the 'Freedom of Information Act' provisions. HMRC's view since it started publishing its



internal guidance manuals has always been there are some parts of its instructions and guidance to officials, particularly tax inspectors, that have to be kept secret as they cover sensitive aspects of their use of statutory powers and their intelligence gathering techniques and, of course, their own interpretation of particularly sensitive pieces of legislation that it would be against the national interest to make public.

As a former tax inspector myself I have always had some sympathy with this viewpoint, although in recent years HMRC has become more and more transparent about its own internal practices and procedures and the way it interprets some particular controversial or complex areas of tax legislation. I have wholeheartedly approved of this approach. Indeed, HMRC has generally been widely applauded for the increasingly open and transparent and cooperative way it manages its approach to tax compliance. Hence it puzzles me greatly that there should be some change to its Internal Compliance Manual so early on in the progress of the epidemic, and which is clearly dealing specifically with the virus outbreak that they currently feel unable to publish. What might this be

commenting on or advising HMRC officials about and why is it so sensitive?

Could it be that some cases have already come to light where individuals or businesses have been using the virus outbreak to evade tax in some ways that HMRC wants to keep secret, and where wants to keep its approach to dealing with these case to itself for the moment? This seems unlikely to me. There have indeed apparently already been some cases of unscrupulous businesses in the 'murkier' end of the tax advisory world, targeting former NHS employees returning to the NHS to laudably help with the current crisis. These firms have been approaching such individuals posing as tax avoidance specialists, offering them specifically designed schemes to ostensibly reduce their tax bills very significantly.

HMRC has already published a statement on its website about these schemes, intimating that in their opinion (and mine by the way) these particular schemes are unlikely to work. They are in all probability fraudulent or at least very close to being capable of deserving that description and almost certainly come within the scoop of the extant 'disguised remuneration' legislation. But I can see no reason on earth why anything connected with dealing with compliance cases arising from the activities of these sort of 'specialists' needs to be redacted from public availability.

Similarly, there are provisions in the UK's statutory residence test rules, introduced from April 2013, which provide that an allowance can be made when someone is prevented from leaving the UK due to 'unforeseen and exceptional circumstances' and thereby perhaps accidentally breaches one of the day counting rules for the purposes of the statutory residence test. For example, someone with 75 days presence in the UK in tax year 2019/20 who got stuck here at the beginning of March this year could conceivably exceed the 90-day threshold. In some cases this might technically serve to render them inadvertently tax resident in the UK for that tax year. This would clearly be unfair and in the past when there have been international transport problems (for example when the unpronounceable Icelandic volcano prevented international air travel for a period of days a few years ago), HRMC was very quick to confirm that the exceptional circumstances provision would indeed apply there to mitigate the effects of this problem. Could this be something similar? If so, why keep it a secret? I can't see that it can be anything to do with that. Indeed, I am fully expecting HMRC to release some official commentary on precisely this issue very shortly now.

I can also conceive of the possibility that where there is an ongoing tax investigation or 'compliance check', to use the modern HMRC term, on an individual or business who contracts corona virus, or whose business or personal financial situation is severely adversely affected by the outbreak (as will be the case for many individuals and businesses this year), then HMRC might take the internal decision to hold-off on continuing with the investigating for a period of time. It might even accept that the investigation could actually be brought to an early end in view of such problems; but again I cannot for the life of me see why HMRC would keep such a revised policy approach secret.

Actually, I just don't think they would and I believe they would in all probability start publicising it quite quickly as part of the overall government's approach to being seen to help businesses of all sorts as much as they can through these difficult times. I can well understand why they might adopt such a 'softer' approach for a while and I would applaud it.

So where does this leave us? In the dark I'm afraid, and this is something that for a number of years now HMRC as avowed it will not do as regards it internal procedures and instructions to its officials in the interests of openness and transparency, especially where its approach to dealing with Compliance Checks is concerned.

We are all supposed to know and understand how things work and what HMRC's approach is to applying the law and carrying out its compliance functions. Generally this works well, and in my experience it has led to a much-improved climate when one is dealing with HMRC officials carrying out compliance checks. So it is really rather worrying, to me at least, that something connected with this serious national emergency has been redacted in this manner. One can only assume that it deals with something so sensitive or potentially controversial that HMRC feels it would cause a lot of difficulty for its officials if it was made public.

Personally I have a lot of confidence in the way HMRC generally carries out its compliance activities nowadays. It just strikes me as very odd that within a week or so of the stringent lockdown conditions being imposed on the population of this country there is someone working away inside HMRC who has come up with a revision to its internal manual on compliance that directly relates to COVID-19 and which they feel must not be made available to the public, presumably because it is against the national interest for it to be so made available?

Perhaps I am just being a conspiracy theorist here, and that would be unusual for me as I am normally opposed to that sort of thing, but this press release has teased my brain and I look forward to hearing if anyone else has any ideas or can shed light on what is going on here.

- ***Russell Cockburn*** *is a tax consultant, lecturer and author, and a former HMRC inspector. He can be contacted on 01909 824542 or by email at russ@bluebellhouse.plus.com*

IR35 not so elementary for (Eamonn) Holmes

Andy Vessey gives his appraisal of HMRC's recent victory in the case of Red, White & Green Ltd

Just under a year from the FTT judgment laid down in the Albatel Ltd (Lorraine Kelly) case, came that of Red, White & Green Ltd (RWG), Eamonn Holmes' PSC. Both broadcasters worked for ITV but suffered different IR35 fates. One of the reasons Ms Kelly escaped IR35 was because the Tribunal considered that ITV was not employing a 'servant', but rather purchasing a product. Could not the same be said for Eamonn Holmes though? After all, this broadcaster and journalist has been plying his trade for many decades and is pretty much a household name.

Background

RWG was incorporated in April 2001 and Holmes is its sole director and majority shareholder.

Holmes started presenting on ITV's 'This Morning' programme from at least 2006 but the direct contracts, between RWG and ITV, that were at stake covered the following periods:

- 24.07.11 – 20.07.12
- 01.09.12 – 19.07.13
- 02.09.13 – 18.07.14
- 01.09.14 – 17.07.15

During the gaps between the contracts, Holmes continued working on the programme but through a different PSC, Holmes & Away Ltd.

The vast majority of evidence upon which Judge Harriet Morgan based her verdict was taken from the contract wording and notes of a meeting between ITV representatives and HMRC held in March 2015. It appears that all parties accepted ITV's comments, as set out in the notes, as being a true reflection of ITV's view of its relationship with Holmes.

Non-exclusive

Holmes said that he was not "beholden or exclusive" to any one broadcaster and had undertaken a variety of work for television, radio, and online, as well as contributing to magazines and newspapers, hosting corporate events and was also involved in media training.

Between 2011 - 2015 Holmes also worked as a presenter on Sky's 'Sunrise' morning show from 06:00 – 09:00. However, prior to October 2013 it appears that he was working for Sky as a sole trader.

The percentage of income from RWG's various sources for the period under appeal was as follows:

Y/E 30th April	This Morning	Sunrise	Other income
2012	71.8	¬-	28.2
2013	72.8	-	27.2
2014	31.8	54.1	14.7
2015	18.6	80.0	1.6

Although RWG had other revenue streams, ITV would need to know about commercial activities in case of conflict or reputational damage. That ITV did not strictly enforce these provisions did not, according to Judge Morgan, affect the binding legal affect.

Benefits

ITV provided a car for Holmes to travel to and from the studio, clothing for appearances on the programme worth around £5,000– £6,000 a year, reimbursed reasonable travel and 'other' expenses, and all necessary insurances.

Personal service

Holmes accepted that ITV wanted only him and that he was not permitted to send a substitute. If he fell ill, then ITV would find someone else and RWG would receive no fee.

Mutuality of obligation (MOO)

Holmes knew from the outset of a contract that there were a minimum number of days he would be required by ITV to work, mainly Friday's. However, if required to work on other weekdays, this was at ITV's sole discretion

The contract stated that in the event ITV cancelled any dates and were unable to reschedule for reasons other than Holmes's unavailability or termination, then RWG would still be entitled to its fee for any cancelled dates.

Even Holmes's counsel, Robert Maas, accepted that the MOO test was satisfied but disputed that other tests pointed towards an employment relationship.

Control

Maas argued that ITV did not have the sufficient degree of control over

his client. Whilst ITV decided what to include in its programme, the order in which items are broadcast, guests to invite on the show and when to take advertising breaks, Holmes role is to take ITV's ingredients and create an entertainment from them.

Holmes considered his role to be that of "anchor man" bringing his own unique stamp and interpretation to the programme. In his view he controlled the show.

Although a researcher/producer writes a brief which is given to Holmes the night before the show, the presenter can choose to ignore the research as he brings his own expertise to bear.

The ITV editor confirmed that Holmes would "lead the show" and that Holmes "runs his own ship within the timeframes". More than any presenter on the show, Holmes will "do his own thing". Autocue is used sparingly, allowing Holmes to largely ad-lib. Holmes structures the show as he likes and whilst the editor intervenes where there are legal pitfalls or a guest is uncomfortable, Holmes often ignores this advice.

Whilst Holmes said he could refuse to interview someone put forward by the editor, the editor said that would be unreasonable and that he would push Holmes to do it as ultimately the editor had the final say. However, Holmes has influenced what is broadcast and the editor has dropped guests/topics where Holmes has voiced concerns but if the editor really wanted something included then it would be. The editor couldn't recall any time this has happened though.

Despite this the judge was more persuaded by the fact that Holmes was contractually obliged to act in accordance with ITV's editorial remit. She did not believe that the practical difficulties as regards ITV's lack of ability to interfere with Holmes' actions during a live broadcast rendered the relevant obligations and ITV's right to overrule Holmes any less contractually binding.

Whilst the judge did accept that the time and place of broadcast was dictated by the nature of the work, she stated that, under the assumed contracts, ITV could decide on what particular days Holmes was required to present the show and could require him to attend other locations.

Caught by IR35

The cornerstones of employment status, ie personal service but in particular MOO and control were all present which pointed towards an employment relationship.

Judge Morgan found nothing of substance in favour of self-employment which I find surprising.

Eamonn Holmes had 56 days to appeal this decision and unless he does so, then RWG will have to pay over a reported £250K PAYE tax and NIC to HMRC for the years 2011/12 – 2014/15. Given his character, I'd be surprised if he didn't. With the considerable autonomy he has presenting 'This Morning', a different judge may well conclude that ITV does not have the sufficient degree of control over Holmes to make him their 'servant'.

This hearing took place over three days in June 2018, yet it took just over 20 months to release a 72-page judgment. Why?

- ***Andy Vessey*** *is Head of Tax at Larsen Howie*

Witness evidence: getting it right

Les Howard explains what makes a good witness at a Tribunal hearing – and what makes a bad one

An awful lot of Tribunal cases are lost because the witness(es) for the Appellant taxpayer does not actually say what happened. This applies equally to a litigant in person, who is his/her own witness, or to a witness giving evidence in response to questions put by a representative.

In the majority of Tribunal cases it is the responsibility of the taxpayer to present his case so as to defeat the HMRC decision. And, in most cases, this relies on presentation of witness evidence. This means that there is a responsibility on the witness to clearly communicate certain information.

First, a good example in my own experience.

I was presenting a case in 2019, which concerned whether an annex to a Church building should be properly zero-rate. I called two witness, the church minister and the project manager. I was clear with them both – "this case turns on how well you present the facts". The church minister explained the vision for the project and why the annex was required. The project manager explained the detail; where the doors where, how you would access toilets, etc.

As it happens, both spoke clearly and accurately. They left the legal arguments to me. And we won!

Next, a not-so-good example. These are comments in the FTT decision of RPS Health in Business Ltd [2020] UKFTT 150. This was a case about the VAT liability of supplies of occupational health services. (It actually raises a number of issues about how not to conduct a Tribunal appeal!)

26. Mr Latter was extremely careful to give evidence he thought would assist RPS, in particular by seeking to avoid confirming that the services provided protected employee's health…

27. At times this tendency led Mr Latter to make assertions which were not borne out by the documentary evidence…

27. We found Mr Latter to be a partisan witness who was not entirely reliable.

Although the case was ultimately lost on its facts, such poor evidence from a witness will never support any legal argument.

Some observations about witness evidence.

If you are intending to produce witnesses, it is important to properly prepare them for the hearing. This is not asking them to memorise answers to specific questions. But being a witness can be quite daunting, so each witness must be well prepared.

Ideally, you will have sent a formal Witness Statement to the Tribunal ahead of the hearing. But this is not always necessary. (If the Tribunal has issued Directions in relation to Witness Statements, make sure you comply.)

Make sure they know the key facts they must explain. Make sure they give actual dates (or as near as possible). If necessary, provide some notes, as long as does not add to the evidence bundle.

Explain that they will be cross-examined by HMRC. This is not normally aggressive. But a witness will be unsettled by what sounds like an accusation of wrong-doing or of dishonesty.

Remind them not to enter into legal argument. Although the Tribunal will tend to be quite relaxed with a litigant in person, in most cases the presentation of evidence is distinct from the presentation of legal argument. A witness contributes to the first, not to the second.

A witness is a witness of fact. If your witness is unsure about something or does not know something, then simply be honest. It is much better to admit "I don't know" than to guess or waffle.

Witnesses of truth make mistakes. None of us recalls precisely what happened on a specific day, nor why we did one thing in preference to another. Although HMRC presenting officers tend to attack such apparent inconsistency, the Tribunal will take a more reasonable view. Minor inconsistency is actually evidence of a genuine witness. and that will carry a lot of weight with the Tribunal.

In closing, a brief word about HMRC witnesses. My observation is that officers' witness statements tend to follow a rigid template. This can seem pretty unassailable. In fact such statements are open to challenge, and an officer may well struggle under good cross-examination. Without being overly aggressive, do look for weaknesses and inconsistencies that will help to undermine their argument. Do remember that you will need to win your own argument as well as defeat the HMRC argument.

And good luck!

- ***Les Howard*** *is a partner in vatadvice.org, a specialist VAT practice based in Cambridgeshire. He has over 30 years' experience in VAT, including a short spell with HMCE (as it then was). As well as assisting businesses and charities with VAT issues, he lectures on VAT and sits on the Tax Tribunal*

Here's an update on recent HMRC successful investigations and prosecutions

No escape for tobacco smuggling trio

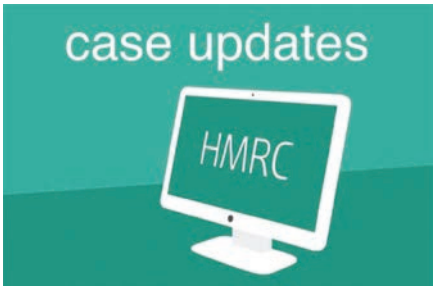
Three Lithuanian men involved in a sophisticated plot to smuggle millions of illegal cigarettes into the UK have been jailed for a total of four years and nine months.

The trio were brought to justice following an HMRC investigation into a criminal scheme that saw 8.5 million illegal cigarettes seized from a Lincoln farm in June 2017.

Andrej Jerofejev, 53, Vilmantas Simaitis, 48, and Martynas Nazaras, 38, are behind bars after they were arrested by Lithuanian authorities and extradited back to the UK by HMRC.

The tobacco haul, which was concealed in window frames and laundry bags, was worth £2.8 million in evaded duty. It was discovered by HMRC investigators in a farm outbuilding in Lincoln on 15 June 2017.

Richard Paris, Assistant Director, Fraud Investigation Service, HMRC, said: "These men thought they could evade justice by returning to Lithuania, but they were wrong. HMRC works with law enforcement agencies across the world to ensure that fugitives are returned to face justice in UK courts.



"We have returned to the UK and prosecuted more than 30 fugitive tax cheats in the last two years alone.

"The trade in illegal tobacco undermines legitimate traders, takes funding away from our vital public services and helps to fund serious organised criminals who bring misery to local communities."

Jerofejev and Nazaras were arrested as they removed the illegal cigarettes, which were hidden within several units of window frames. Simaitis was arrested at the same time at a nearby petrol station.

The three had left the UK ahead of appearing in court on charges of fraudulently evading excise duty.

Following the issue of European Arrest Warrants (EAWs), Jerofejev was arrested in Lithuania in August 2019, Nazaras in December 2019 and Simaitis in January 2020. All three were extradited and all three pleaded guilty.

At Leicester Crown Court, in 18 February, Simaitis was jailed for 21 months and Nazaras was jailed for 18 months. Jerofejev was sentenced to 18 months at Nottingham Crown Court.

EAWs have been issued for two other men who are wanted in connection with the smuggling plot.

Restaurateur banned over £570k tax fraud

An Aberdeen restaurateur has been banned for 11 years after the discovery of almost £800,000 of payments that were not declared to HMRC.

An Insolvency Service investigation uncovered a hidden customer account set up by Syed Ahmed, the sole director of Blue Mango Tree Ltd, which went into liquidation in September 2018.

Incorporated in May 2009, the company traded as the Jewel in the Crown restaurant in Aberdeen and for five years made full tax returns to the tax authorities.

For more than three years between February 2014 and November 2017, Blue Mango operated a second bank account that had not been declared to the tax authorities.

Investigators from the Insolvency Service discovered that when customers used the restaurant's credit card machine to settle their bill, payments were diverted to the undeclared account.

The investigation identified £797,587 worth of payments made by customers sent to the second account. The proceeds of that account, amounting to £123,000, were then transferred by Ahmed to himself and he withdrew a further £535,000 as cash.

This resulted in HMRC being owed just

under £570,000 when the company went into liquidation.

Robert Clarke, chief investigator for the Insolvency Service, said: "Syed Ahmed knew exactly what he was doing when he diverted funds for his own purposes, in an attempt to avoid paying the tax authorities what they were rightfully owed.

"This ban should serve as a warning to other directors tempted to help themselves first, you have a duty to your creditors and if you neglect this duty you could be investigated by the Insolvency Service, with the possibility of losing the privilege of limited liability trading."

Jail for trio behind £9.5 million tobacco fraud

Three London men have been jailed after 23 million illegal cigarettes were discovered at four rented industrial units across the south of England.

The gang was responsible for the importation, storage and distribution of illegal cigarettes worth £9.5 million in unpaid duty, an HMRC investigation found.

Oleg Bolun, 39, and Ion Pantelei, 26, both of Sydenham, south London, and Maxim Glodeanu, 31, of Canning Town, east London, were caught unloading pallets of cigarettes from a lorry into a farm unit in Essex.

Officers also found more than £840,000 cash at a residential garage owned by Bolun in Sydenham.

In March, Bolun was sentenced to five years in jail at Chelmsford Crown Court. Pantelei and Glodeanu were jailed for a total of six years at the same court in February.

A fourth man, Evghenii Andrusca, 30, was given a suspended 12-month prison sentence for helping unload a delivery of cigarettes.

Alison Chipperton, Assistant Director, Fraud Investigation Service, HMRC, said: "This was a well-organised operation and a deliberate attempt to put millions of illegal cigarettes on the streets of the UK.

"The illegal tobacco trade undermines legitimate businesses, including small, independent shops and takes funding away from our vital public services. It also funds serious organised criminals who bring misery to local communities."

Between November 2018 and July 2019, HMRC investigators found and seized 23,464,440 cigarettes from four rented units in London, Essex, North Hertfordshire and Cambridgeshire.

Bolun was the lead organiser and documents found on his phone detailed the sale and purchase of commercial quantities of cigarettes worth £9.5 million in unpaid duty.

Pantelei recruited workers, paid their wages and organised unloading, deliveries and re-packaging of the cigarettes. Glodeanu and Andrusca helped unload deliveries.

Officers found 8,965,780 cigarettes inside a unit at a warehouse in Royston, on 12 November 2018.

Ten days later, officers discovered a further 3,490,900 cigarettes inside a self-storage unit in Forest Hill. Some of the cigarettes were packed inside cardboard boxes labelled as laminate flooring.

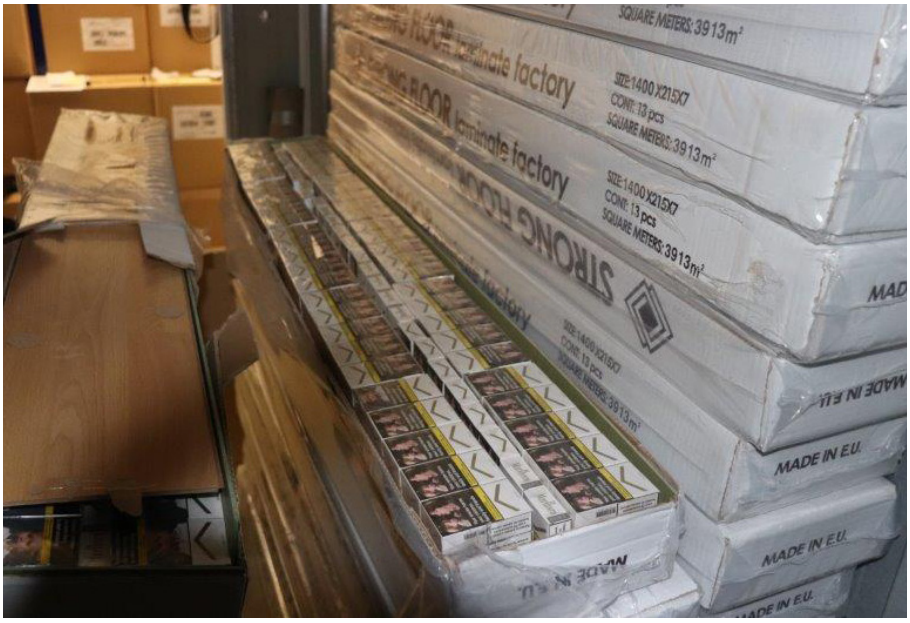
Another 6,114,360 cigarettes were found in a unit on an industrial estate in Huntingdon.

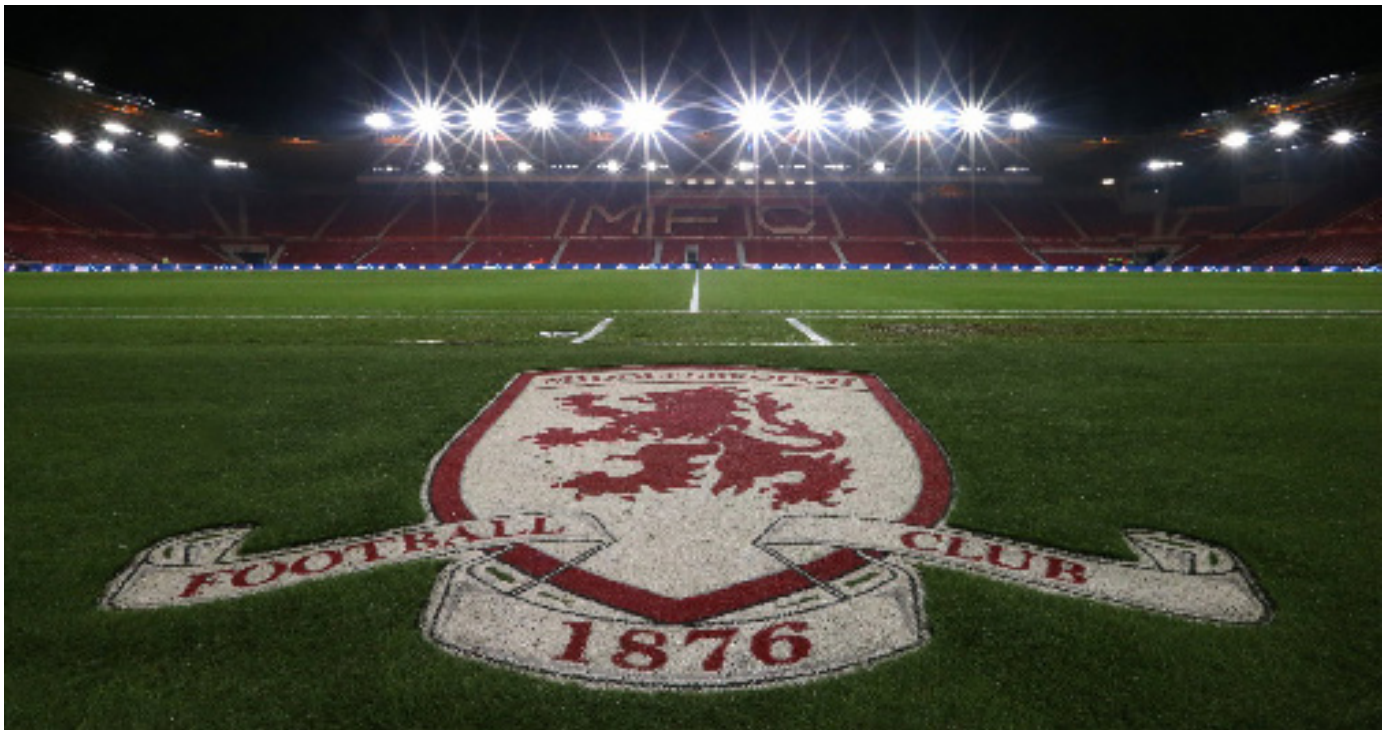
Bolun, Pantelei, Glodeanu and Andrusca were arrested in July 2019, after officers caught them unloading a delivery of 4,863,600 cigarettes into a farm unit in Essex. Bolun and Pantelei ran when officers approached but were subsequently apprehended. Glodeanu was found hiding inside the unit.

Officers also found £843,580 cash inside a padlocked box, and more cigarettes, at a garage on Peter's Path in Sydenham. The garage was owned by Bolun.

Pantelei and Glodeanu both admitted excise fraud at separate hearings and were sentenced in February 2020. Pantelei was jailed for four years and Glodeanu was jailed for two years. Bolun admitted excise fraud and possessing criminal cash at Chelmsford Crown Court in January 2020. Andrusca admitted excise fraud and was sentenced to 12 months in prison, suspended for two years, at Chelmsford Crown Court on 13 March 2020).

Proceedings are under way to recover the unpaid duty.





HMRC score winner over Middlesbrough FC

Gary Brothers and Paul Rippon question the wisdom of the recent overturning of a National Minimum Wage ruling by the Tribunal

On 20 March 2020, the Employment Appeal Tribunal decided that the voluntary payroll deductions Middlesbrough FC had been making to allow their staff to purchase season tickets by instalments had the effect of reducing their pay for National Minimum Wage purposes.

Background

A number of Middlesbrough FC employees approached the club to request if they could pay for their season ticket by instalments, and have the cost deducted from their wage over a number of weeks. These employees were employed in clerical and hospitality roles and their wages were paid in accordance with, and in some cases above, the rate then in force for National Minimum Wage.

Following these deductions being made, the employees' 'take home' wages fell below the rate then in force for National Minimum Wage.

Regulation 12 of the National Minimum Wage Regulations 2015 (deductions or payments for the employer's own use and benefit) allows for certain deductions, which can be made from an employee's wage without it being affected for National Minimum Wages purposes. This includes:

- deductions (or payments) relating to an employee's conduct, or any other event;
- deductions (or payments) following an advance or loan to the employee;
- deductions (or payments) following an accidental overpayment to the employee;
- deductions (or payments) for the purchase of shares or securities by the employee;
- payments by the worker for goods or services from the employer, unless the purchase is made to comply with a requirement imposed by the employer.

Middlesbrough FC took the view that these deductions were acceptable and within the bounds of the National Minimum Wage Regulations. The employees were not contractually obliged to purchase the season tickets, and indeed agreed to the deductions of their own free will.

Original decision

Following the hearing in February 2019, the Employment Tribunal ruled in Middlesbrough FC's favour, reasoning that the wording at Regulation 12 had an overarching effect, meaning that deductions or payments for goods or services paid to the employer were allowable for National Minimum Wage Purposes.

The judge also took care to note that the employees were not required to purchase the season tickets in connection with their employment, but chose to do so; and simply exercised their freedom of choice.

New decision

HMRC appealed this decision, which the Employment Appeal Tribunal allowed. The view taken by Tribunal in this instance was more prescriptive of the legislation, and that the original decision was flawed by taking such a purposive view.

Wider implications

As tax practitioners, this decision can be considered as a backward step. The original decision came as a beacon of hope, that moving forward the legislation was going to be applied in the way we believe it was intended.

We understand the reasoning behind the NMW legislation as we believe it was intended when introduced. There are undoubtedly employers operating in the UK, who, almost like a throwback to the old Victorian workhouses, would deduct a large proportion of a worker's salary for room and board in their own premises, leaving very little disposable income.

There are, however, many employers who do wish to implement this service to their staff with no ulterior motive, and do so out of ease, efficiency and care for their workforce. The latest decision looks to suppress the worker's autonomy and free choice to even request deductions to be made at their own discretion – but only if they are a low earner.

This may be an area that HMRC's policy team wishes to investigate, and consider updating their guidance accordingly. Clearly at the moment it is not being implemented in the spirit of the legislation, and employers are being issued with punitive 200% penalties on top of the wages HMRC have determined they underpaid.

Referring to Middlesbrough FC once more, their representing Counsel argued that Notices of Underpayment issued by HMRC would effectively mean that the underpaid employees received season tickets free of charge. By extension, the employer is also effectively giving away goods that they could have sold elsewhere.

In our view, as long as the employee is not coerced, and is making their choice of their own free will, then such deductions should be allowable and not be taken into account for National Minimum Wage purposes. Such measures would be simple for the employer to record and maintain, and would allow for the existence of such schemes that have clear benefit to both employer and employee.

We feel that an appeal against the Notices of Underpayment on the above basis would certainly be worthwhile. There is evidently confusion and disagreement concerning how the legislation should be interpreted and applied in these circumstances. It would also demonstrate that tax practitioners consider the legislation is not a 'one size fits all' set of instructions, and there are other factors and nuances concerning those employees affected by the National Minimum Wage.

- *Gary Brothers, Partner, and Paul Rippon, Assistant Manager, The Independent Tax & Forensic Services LLP*

UK court rejects attempt to stop adjudication on pandemic grounds

A contractor's attempt to halt an adjudication due to difficulties caused by the coronavirus lockdown has been rejected by the High Court in England.

Mrs Justice Jefford ruled that contractor Millchris Developments Ltd had not been able to show that, by going ahead, the adjudication would be conducted in breach of natural justice with the inevitable consequence that it would be unenforceable.

Construction disputes expert James Ladner of Pinsent Masons said that, on the facts of this case, Millchris had not been able to meet the high threshold required for an injunction to be granted.

"The case involved a relatively modest

housebuilding dispute," he said. "In other cases, such as a final account adjudication for many millions of pounds on a large commercial development, or one involving complex extension of time arguments, the court may find differently if access to evidence is severely hampered, particularly if the adjudicator and referring party are not prepared to significantly extend the 28 day statutory timetable."

In other cases, such as a final account adjudication for many millions of pounds on a large commercial development, or one involving complex extension of time arguments, the court may find differently if access to evidence is severely hampered.

Before the court, Millchris argued that it had been given insufficient time to prepare for the adjudication given the lockdown measures and the fact that it had ceased trading. It said that its solicitor was in self-isolation at home, making it difficult to obtain evidence from those with knowledge of the dispute. In addition, it would not be able to attend the site visit because of the lockdown measures while Waters would be able to, as the site was her home.

Mrs Justice Jefford disagreed that there would be a breach of natural justice here, denying the injunction sought.

VAT invigilations: when best judgement isn't even good

Tony Monger looks at two recent Tribunal and wonders how just why proceedings were allowed to go as far as they did

Anyone who has only been involved with tax since 2005 might not be aware that prior to that point, rather than there being one HM Revenue and Customs, there had been two departments – the Inland Revenue and HM Customs & Excise. Of the two departments, Customs & Excise always thought of itself as the senior service, in much the same way as the navy views the army. They had been set up long before income tax was even thought of, to levy Customs and Excise duties on imports coming over our shores – and fight off those who sought to evade duties by smuggling.

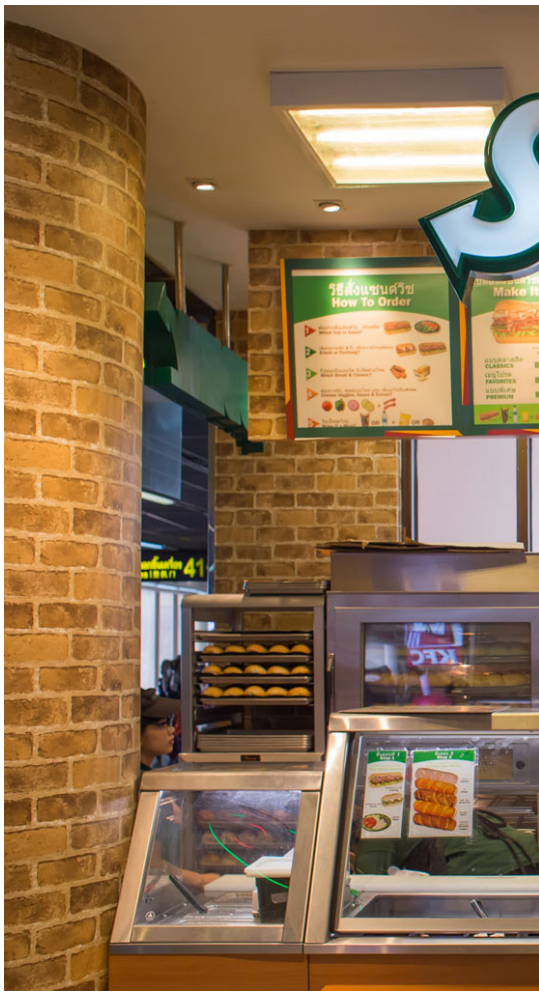
Customs and Excise was itself the merger of two even older departments: Her Majesty's Excise department was set up in 1643 and mention of HM Customs goes back to the middle ages, whereas the younger Inland Revenue department began life in 1849. No wonder then that HM C&E looked upon the Inland Revenue as a mere uncultured stripling.

However, time has its way with all of us, even government departments, and by the late 1960s the functions and usefulness of HM C&E had largely fallen away and the department was reduced to little more than checking luggage at airports and cargo at docks. But then the UK joined the EU and, as part of its harmonisation, the UK Government was obliged to introduce VAT. And this led to the question of which government department should be tasked with policing it.

Logic dictated that the job should go to the Inland Revenue. After all, it was the income tax inspectors who checked business records, visited shop premises and so on. However, because of concerns that the 'senior' department was shrinking to the point of disappearance, it was decided instead that the task of administering VAT should go to Customs & Excise. And that simple decision has resulted in something akin to a schizophrenia – a truly split personality – in the approach of Her Majesty's Revenue and Customs that exists to this very day. For the reality is that the approach that a taxpayer receives from the hands of HMRC will depend very much on whether the officer carrying out the review is coming to talk about income tax or VAT – that is whether they come from the Revenue or whether they come from Customs.

The differing approach of the two sides has long been noticeable. While no generalisation is wholly true, the Revenue side has typically been more inclined to the clinical and technical approach – carefully examining the records, considering the legal position, formulating the arguments and then presenting their conclusions, to be argued through the courts if necessary. Whereas the Customs approach has been more – how can we put it – robust. Rough and ready. Or, to use an analogy from the old Wild West, their tendency has been to shoot first and ask questions after.

Of course, whether an assessment is made by the Revenue or Customs side, the taxpayer has the same rights of appeal – but with the distinction that, with a VAT assessment, the taxpayer has to pay the tax before they can take the appeal to the Tribunal unless they can show that paying the tax would cause undue hardship. For other taxes – Income Tax, Corporation Tax,



Capital Gains Tax, etc – the taxpayer can simply ask for the payment of the tax to be postponed until the appeal is settled, and it usually is. Theoretically, the tax officer could dispute the postponement request but they rarely do – and, even then, the taxpayer could take the postponement application itself to the Tribunal.

However, on the VAT side there is a check on the officer's powers in that the officer has to show that he has made an assessment to his best judgement and, if he hasn't, the assessment is wiped out as invalid. Having seen some recent VAT Tribunal cases, one can only offer a small prayer of thanks for the inclusion of this safeguard in the legislation – because nowhere is the distinction in the differing approaches of the two parts of HMRC more apparent than in their attitudes to investigation and the making of estimated assessments.

A recent example comes in the case of FW Services v HMRC [2020] UKFTT 00143 (TC) which involved a VAT investigation into a service station selling petrol and diesel fuel. HMRC officers visited the station on five occasions between 9 June 2016 and 22 June 2017 and carried out what they referred to as 'invigilations', which essentially means that they stayed for a few hours and recorded how much fuel of each type was sold. The amount of time that they stayed ranged from just under an hour to almost five hours and they made particular note of the amount of diesel fuel sold. This ranged from a low of 270 litres in an hour to as much 528 litres an hour, and averaged out at 350 litres per hour. On this slim – and statistically invalid – sample, the HMRC officers decided that the business must have been consistently achieving diesel sales at a rate of 350 litres per hour during every hour that it was open between 1/6/2015 and 31/10/17, and made VAT assessments to charge additional VAT of £686,054.00.

Just to make it clear what that means in real terms, this would have required the service station to understate its diesel sales by £4,116,324 over the assessed quarters 08/15 to 10/17 – a period of 29 months or 792 days. This works out at just slightly short of £5,200 per day for every day of the 792 days.

Thankfully, the Tribunal was not impressed by HMRC's 'judgement' in arriving at these figures. Among the factors considered was the point made by the proprietor and his representatives that HMRC had not found any undisclosed bank account and the HMRC officer himself conceded that he had seen no evidence of a separate bank account and had not seen any evidence of the pumps being tampered with. As the proprietor pointed out, the alleged omitted sales of £5,200 per day would necessarily have had to be in cash (for them not to appear in the bank account) which would have required the collusion of a large portion of the local population. Indeed, even if you take the average fuel purchase of a full tank of diesel at, say, £70, it would have necessitated 74 members of the local population turning up to fill their tanks with diesel and pay in cash every day for 792 days.

As for the basis on which HMRC had arrived at their figures, the Tribunal pointed out: "Four of the five invigilations were carried out during the morning with only one in the afternoon. Three of the invigilations were carried out on the same day of the week – Thursday (9 and 16 June 2016 and 22 June 2017). No invigilations were carried out at the weekend. A total of 16 hours and 31 minutes was spent invigilating. The filling station was open for a total of 97 hours each week."

The decision went on to record: "While the three witnesses for HMRC all indicated their contracts of employment did not allow them to work in the evenings or at weekends, this does not mean that HMRC can simply rely on their observations made during their permitted working hours. There was no evidence before the Tribunal in relation to evening and weekend sales."

And, most damningly, the HMRC officer "…stated that he had calculated the under-declaration by assuming that there were sales of 350 litres of diesel per hour on each day from Monday to Saturday, yet the filling station is only open for twelve-and-a-half hours on Saturdays. His calculations therefore immediately gave rise to an error even if his other assumptions were correct."

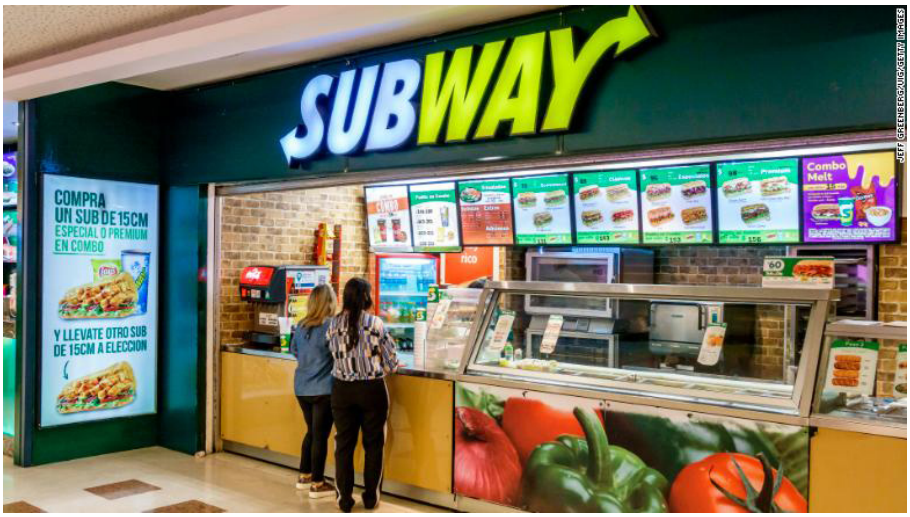
Not surprisingly, the whole bunch of assessments were thrown out as

not being made to best of judgement. What is perhaps more surprising is that HMRC's Reviews and Litigation section had previously considered the decision to issue the assessments, as part of the review process, and decided it was correct and should be upheld. One cannot help but question how they could possibly claim to have reached that decision.

Nor is F W Services an isolated case. The judgement in FW Services itself refers to two other cases from 2020, those of Wei Xian Peng and Qian Hong Peng t/a Zhu Guang Restaurant [2020] UKFTT 0177 (TC) and Sital Khimji [2020] UKFTT 22 (TC), but a similar cavalier approach is apparent in many earlier cases. Indeed, the similarity of approach in FW Services to that shown in the case of Homsub v HMRC from 2017 [TC/2017/00168] is quite remarkable.

In the Homsub case the appellant company was a franchisee of the Subway brand, which operated from five different stores in five different towns. In that case the HMRC officers visited all five stores on 25 November 2015, and recorded each sale made and annotated whether it was 'eat in' or 'take out' and whether the food was 'hot' or 'cold', because these facets were relevant to the determination of the different VAT treatment in respect of the sales.

HMRC then proceeded to add up, outlet by outlet, the number of transactions upon which VAT was due and those upon which VAT was not due. The results varied across the five stores suggesting a range of percentages of the goods sold as bearing VAT from a low of 80% to a high of 89% – but, of course, the product range sold on a cold November day is going to vary dramatically from that on a hot summer day. The VAT officers used the 'results' from this one day to extrapolate an alleged understatement of VAT but, as in F W Services, the Tribunal recorded that "…there has been no suggestion by



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the respondents (HMRC) that any of the appellant's tills were being improperly manipulated or that sales were not being recorded through the till. To put it bluntly, it has not been suggested that this is a case of 'fiddling the till'."

As with F W Services, the HMRC assessments in Homsub were held to be invalid as not made to best judgement.

A number of questions leap to mind. Firstly, how on earth are such cases coming to Tribunal without being stopped by HMRC's independent internal review process? Is it not the function of the internal review to prevent unmeritable cases being brought to Tribunal? And why are HMRC officers continuing to use such worthless techniques to arrive at 'projections' of profits when they have been so thoroughly rejected by the Tribunals? In the Homsub case the Tribunal went so far as to remark that: "When we read the papers and the parties' respective Skeleton Arguments for this appeal, we were immediately concerned that the assessment methodology adopted by the respondents was significantly flawed."

Why then are similar methodologies still being used many years later – to be greeted with similar scorn by the Tribunal?

But, perhaps most importantly, why is the Customs side of HMRC operating in a manner that would be wholly unacceptable on the Revenue side? The officers of the former Inland Revenue are all too aware that in presenting a case to Tribunal they need to be able to demonstrate (a) that the records of the business are less than perfect (b) that there is a reasonable basis to their projections of understatements and (c) that there is some correlation between the suggested understatements of profits and the capital position or lifestyle of the taxpayer. In common parlance, it's no good alleging a Ferrari size omission if the taxpayer is living a Ford Prefect lifestyle.

As I said at the start of this article, there's a schizophrenia within the HMRC mindset – and, unfortunately, it is causing some taxpayers to suffer unnecessarily. The time has long gone when the ailment should have been diagnosed and the proper treatment prescribed. Until that happens, more taxpayers will likely find themselves in front of the Tribunal arguing that HMRC's best judgement simply isn't good enough.

- ***Tony Monger** is a former Tax Inspector and Investigation Team Leader and worked for HMRC for 25 years. Since then he has worked for two Big 4 firms and a leading UK law firm and has been a Director in Mazars Tax Investigation team since 2013. Call 0161 232 9528 or email tony.monger@mazars.co.uk*