Comment
Views on topical issues

UK's most wanted tax fugitives

Jonathan Fisher QC
Barrister, Devereux Chambers

The recently published list of the UK's most wanted tax fugitives gives a highly misleading impression of the nature and extent of tax fraud. Broadly speaking, tax fraud in the UK can be classified into three categories, but only one of these categories is reflected in the published list.

A recent HMRC press release describes the 20 wanted people as 'tax fugitives' and 'the UK's biggest tax fraudsters' before proceeding to give details of the 'tax dodgers' crimes'. A review of these crimes reveals that the allegedly criminal activity involves a form of VAT carousel fraud or excise duty in 19 of the cases which have been identified. A false tax repayment fraud thought to involve a gang in Russia or Lithuania constitutes the 20th case.

The list, therefore, reflects the continuing trend for organised criminal gangs to engage in dishonest activity often described as 'tax fraud' because it involves the penetration and corruption of HMRC's systems by the establishment of bogus companies and representations of false trading for large financial gain. Essentially, these are 'extractive' frauds, in the sense that taxpayers' money is obtained from the revenue under false pretence.

When presenting the wanted list to the media, David Gauke MP, the Exchequer Secretary, made the point that tax evasion and fraud cost the taxpayer around £10bn a year, repeating the government's commitment to 'crack down on those who try to dodge their responsibility to pay tax'.

However, one wonders whether the Minister had found an opportunity to look closely at the list before making this statement, since by no stretch of the imagination can these people be properly described as 'tax dodgers' in any traditional meaning of the phrase. This form of tax fraud invariably involves the dishonest retention of monies which have originated from legitimate trading and ought to have been paid to the revenue.

Certainly HMRC is right to pursue these (alleged) organised criminals with the utmost vigour, since according to the National Fraud Authority the nefarious activities of organised criminal gangs involving extractive frauds is thought to be costing the public exchequer around £6bn a year. Yet interestingly, this figure is smaller than the £8bn a year figure attributable to the malign activities of the tax dodgers who fail to declare their true income.

Using figures put forward by the National Fraud Authority, it is thought that the public exchequer suffers an annual loss of £4bn through the making of false declarations by individual and corporate taxpayers, and a further £4bn loss through the hidden economy where income from trading activity has been deliberately concealed.

So, to borrow from the language of '1066 and All That', HMRC's publication of its list of most wanted tax fugitives is unquestionably 'a good thing'. But it is 'a bad thing' to mis-describe the activities of these people as tax dodging. The effect has been to allow the public to believe that the most serious forms of tax fraud involve attacks by organised criminal gangs on the VAT and excise duty systems, whereas in fact it is individual and corporate tax dodgers who have as much to answer.

Legal professional privilege

James Bullock
Head of Litigation & Compliance, Pinsent Masons

The case for the status quo.

At the beginning of November, the Supreme Court will hear the landmark appeal by Prudential in relation to the question of legal professional privilege (LPP) – and whether it attaches to 'legal advice' in relation to tax law, when the advice in question is given by a person other than a solicitor or barrister.

The actual case concerns whether HMRC is entitled to the production (under their information powers) of tax advice given to Prudential by an accountancy firm. Prudential has sought to assert LPP over the advice in question – the effect of which under settled law would be that the advice is immune from disclosure.

It is common knowledge that in reality this is a 'test case' funded by the leading accountancy firms in an attempt to extend the bounds of LPP to accountants and tax advisers.

To my mind there is an analogy here with the debate that periodically emerges in certain Commonwealth countries that currently retain HM The Queen as Head of State. A majority seem to agree on the principle that they should have their 'own' Head of State. But the implications of making such a fundamental change are often so unattractive in practice that they decide to retain the status quo – until the question re-emerges a decade or so later.

In relation to LPP there are two distinct questions. The first is whether there should be a change to the long-standing principle that LPP should only apply to advice given by practising lawyers? Second, if so, is the Supreme Court (through application of common law) the appropriate forum to effect that change?

Taking the second question first. In my opinion the judgment of the Court of Appeal in this case is excellent (*Prudential v Pandolfo* [2010] EWCA Civ 1094). In summary, the Court concluded that:

- As it stands, LPP provides absolute clarity (whatever its other demerits). It is most important to remember that LPP is fundamentally an exclusion to the overriding rule of evidence that states that as a matter of principle all relevant material should be disclosed before the Court.
- The restriction of LPP to advice given by a practising solicitor or barrister (and note that it does not cover advice given by a person holding themselves out as a 'legal adviser') ensures that the advice in question is given by a person who is both professionally qualified and regulated rigorously.
- LPP does not 'belong' to the solicitor or barrister – or to either of those respective professions – but to the client. It is there to protect the litigant and absolutely should not be used as a 'marketing tool' by any profession. If this is abused then it should be made a matter of professional

discipline, not a raison d'etre for extending LPP.

- Any attempt by the Supreme Court to 'extend' LPP would require a degree of prescription (as acknowledged by Prudential's Counsel in the Court of Appeal). An example offered was restricting LPP to advice given by members of a professional body which maintains proper standards and regulates its members (eg, the ICAEW or CIOT in relation to tax advice). This is simply asking too much of the courts – even of the Supreme Court. Any form of 'court-made' prescription would lead to uncertainty and inevitably further legal challenge – and could cause serious damage in the tax context to HMRC's powers.

Turning now to the first question. Even a die-hard lawyer like me accepts that the whole question of LPP should be looked at afresh in the light of modern professional practice in a world that has changed beyond all recognition since the concept was created. Fundamentally the question is how best to protect the litigant who has taken proper advice in good faith, without providing an opportunity to damage the interests of justice by removing key evidence from the purview of the court. It is easy for those of us in the tax world to view LPP merely within the tax context. It is, of course, of far wider and of much more fundamental importance.

So, for me, the answer to the first question is that there should be a 'working committee' appointed by the Ministry of Justice (rather like that on the GAAR). The committee should be chaired by a Judge of at least High Court rank – reflecting the fact that LPP is both a fundamental right and one that impacts on the rules of evidence. But the committee should include representation from the tax and accountancy professions – and others whose members provide advice on 'the law' as a matter of normal practice. A wider consultation should follow – and as a result a new statutory form of privilege should emerge fit for a modern – and increasingly international – world.

For an alternative view, see 'Why legal professional privilege should be extended to clients of chartered accountants' (Ian Young) Tax Journal dated 16 March 2012, p 8.

The latest on the joint initiative on service delivery

Paul Aplin
Chairman, ICAEW Tax Faculty Technical Committee

The joint initiative is making visible progress in improving HMRC's customer service delivery.

The latest statement from HMRC and the professional bodies and tax charities involved in the joint initiative on service delivery was published on Friday 10 August (see www.lexisurl.com/OS6z0). The initiative was started in response to the House of Commons Treasury Committee's July 2011 report on HMRC's service standards.

Significant news this time was the commitment to publish call waiting times, starting in the autumn. Working with stakeholders to agree and publish performance statistics was a key recommendation of the Treasury Committee report. There is, however, only any purpose in reporting statistics if doing so leads to improvements in service levels. Friday's linked announcement from HMRC that it would be providing an extra 1,000 call centre staff at a cost of £34m in order to improve the department's telephone service and bring forward a key target by two years, was therefore very welcome news. The focus on measuring and improving telephone service levels addresses a key concern of ICAEW Tax Faculty members and the need for improvement was the subject of a recent Tax Faculty representation to HMRC (*TaxRep 26/12*, see www.lexisurl.com/BJlz5).

In addition to looking at telephone call handling the joint initiative has been looking at post handling, repayments and PAYE coding accuracy. A great deal of work has been done and the challenge now is to demonstrate that it can lead to improvements across all these areas.

The joint initiative delivered an improved P35 end of year return process for employers, with increased emphasis on reminders and helping employers to comply. Those who had potentially missed the filing deadline were told in June this year (last year it was August) allowing them an opportunity to cap any penalties after one month rather than the four. HMRC say that as a result of the changed process they received over 70,000 extra P35 'no return to make' notifications and over 85,000 extra returns. That has to be as much of a result for employers and their agents as it is for HMRC: fewer penalty notices, less wasted time.

The initiative has also addressed a major concern of the tax charities involved: a better process for bereavement cases. The result is a new single point of contact, re-written guidance, improved training and a priority telephone service.

Another important step has been the launch of an email pilot, addressing something that has been high on the wish-list for a decade. This has now been extended to more practices and to some large firms. Feedback from those participating has been very positive.

This initiative cannot – and was never going to – solve HMRC's service issues overnight, but since it was launched last October it has made visible progress. Lin Homer has given it her full backing and will take over chairing the meetings when Mike Clasper – who has driven it with real enthusiasm from the start – steps down. Even if there is no new money available, the initiative can help focus some of what there is on the areas that really matter to those who deal with HMRC.