Is it me?

KEVIN SLEVIN thinks it must be, as he wonders how an HMRC enquiry was started and then allowed to continue.

This article seeks to capture in print the stance taken by one HMRC officer pursuing tax, interest and penalties from an unsuspecting taxpayer and poses the following question: are the standards of HMRC caseworkers falling or am I just becoming even grumpier?

Hopefully, none of the views expressed in the communications received from one particular tax office are those of real decision makers within HMRC. Nevertheless, those in management roles must, and I am sure do, realise that numerous decisions are made each day by overworked and often demoralised employees and, somehow, well-meaning staff need to be supervised. The starting point is to bring all case workers to the point where they appreciate that matters which may seem small in their eyes may well be of major concern to an individual taxpayer receiving their communications.

> ***"The officer concerned was clearly not getting the training, support and on-going supervision to do the job being carried out."***

This article is based upon a recent case involving a dispute with HMRC – a dispute which left me wondering about the actual approach adopted within this huge organisation as regards the everyday corporate governance issues. By 'corporate governance', I mean the way an entity such as a large company or major institution like HMRC governs itself so as to (a) achieve and (b) maintain the highest standards of integrity as regards the conduct of their workload.

To put the question in another way, should it really need an independent tax consultant to open the eyes of HMRC officers to enable them to see the wood (i.e. the correct actions to be taken by the department) for the trees (i.e. the facts of any particular case). The case of Mr X described below demonstrates the problem facing HMRC in 'getting it right first time', to quote from one of the department's own strap lines.

What follows is not an attack on the officer concerned. Rather this article it is intended to highlight how a simple and straightforward matter can be pursued in a sub-optimal manner and, by implication, to suggest that the officer concerned was clearly not getting the training, support and ongoing supervision to do the job being carried out.

KEY POINTS

- Are HMRC officers getting sufficient training when enquiring into tax returns?
- Misleading wording on the tax return results in information shown in the wrong area.
- HMRC suggest that the 'additional information' box is not part of the tax return.
- The two tests in TMA 1970, s 29 are ignored.
- What would be expected from a reasonable HMRC officer?

Setting the scene

Mr X had, for many years, completed his own tax returns. The only 'complication' as regards his tax affairs was that he was, and indeed still is, a partner in a trading partnership. Each year, the firm of accountants instructed by the partnership would both prepare and file the partnership's return and would also send a statement to each of the partners detailing the entries to be reflected on the partnership pages of their individual personal tax returns. Each year, Mr X would correctly enter the details of his income and gains on his personal return including his share of the partnership. Any doubts Mr X had about how to proceed in completing his returns were quickly answered by HMRC's excellent guidance notes.

However, a few years earlier, a small change to HMRC's practice as regards their dealings with Mr X occurred. Somewhere within HMRC it was decided that this

unrepresented taxpayer should no longer receive guidance notes along with his tax return. This change of practice was a seemingly small decision, but it was one which may well have shaped what was to happen three years later.

It must be said that Mr X took great care in preparing his tax return. Before he sat down to complete the form he made sure he had all necessary information readily available. Only when all documents were collated and checked would he begin the completion process. Each year, he fully and correctly disclosed his investment income, his share of the partnership's taxable profit, and his other items of taxable income. Ranking high on his list of matters to address was disclosure of details of his pension from a former employer and the amount of tax deducted therefrom. So far, so good.

The 2008/09 return

When completing his 2008/09, Mr X knew he had to enter details of his pension income and, as usual, he had the relevant P60 certificate to hand. For some reason, the question which worried Mr X was just where should the pension details, taken from the relevant P60, be entered on the return form? Of course, Mr X should have looked at his copy of the previous year's return for guidance but, alas, he decided to read the return form in front of him. He thought he did so carefully but, as we shall see below, arguably he read the form too carefully!

Mr X turned to the section (see ***Tax Return***) found in the 'other income' section of his 2008/09 tax return and to the question headed 'UK pensions, annuities and other state benefits received' and, in particular, to question 10. Mr X read the following:

> 'Pensions (other than State pension), retirement annuities and taxable triviality payment – give details of the payers, amounts paid and the tax deducted in Box 19 on page TR 6.'

'That's clear enough', thought Mr X, his query had been answered. He immediately turned to Box 19. As instructed (see wording above), he entered details of the payer of the pension, the amount of the 2008/09 pension received and the tax deducted therefrom in Box 19 – all details correctly taken from the 2008/09 form P60. As far as Mr X was concerned, he had proceeded as per the instructions on the return form. The thought that he might be required to disclose his pension income twice on the same return never entered his mind. He happily left blank the box for an entry in response to Question 10.

"Mr X submitted his tax return well before 30 September 2009, content in the knowledge that HMRC would carry out the tax calculation."

Mr X submitted his tax return well before 30 September 2009, content in the knowledge that HMRC would carry out the tax calculation and in due course he received this from HMRC. The calculation showed that a tax repayment was due to Mr X and the seemingly appropriate refund was made. It never crossed Mr X's mind that the officer calculating his tax had failed to take into account his pension income or the tax deducted therefrom – information which he had shown clearly on the return form. Had HMRC officers properly captured the full data provided on the return, Mr X would have been shown to owe a small amount of tax and he would not have received a refund. Mr X had never understood how the taxable income of the partnership was arrived at and he just assumed that the refund had something to do with the partnership results which he had declared as instructed by the partnership accountant.

The problems

Nothing more happened until August 2011 when HMRC wrote to Mr X asserting that his tax return was seemingly incorrect. The officer explained that a letter had been sent to Mr X's agent requesting that they agree to the increased tax exposure for 2008/09. The said letter from HMRC to the firm of accountants (obviously written on the assumption that the firm was Mr X's personal agent as well as acting for the partnership) made clear that the officer wished to collect the additional tax and interest and that the question of penalties had to be addressed too. The letter asserted that Mr X had failed to disclose his pension details on the return form and the officer quoted TMA 1970, s 29 – the so-called 'discovery provision' – as the department's authority to pursue the 'arrears of tax' relating to this.

Experienced practitioners will not be surprised to learn that HMRC's approach was initially rebutted. This was on the grounds that the pension income and the tax deducted had been shown in Box 19 of the tax return. However,

TAX RETURN

UK pensions, annuities and other State benefits received

7 State Pension – *the amount due for the year (not the weekly amount)* £ . 0 0

8 State Pension lump sum £ . 0 0

9 Tax taken off box 8 £ . 0 0

10 Pensions (other than State Pension), retirement annuities and taxable triviality payments – *give details of the payers, amounts paid and tax deducted in box 19 on page TR 6* £ . 0 0

11 Tax taken off box 10 £ . 0 0

12 Taxable Incapacity Benefit – *the total amount before tax was taken off* £ . 0 0

13 Tax taken off box 12 £ . 0 0

14 Total of any other taxable State Pensions and benefits £ . 0 0

HMRC's response was that the officer who made the decision to pursue arrears and to demand penalties had not taken the trouble to examine the actual return submitted; only the data captured by the 'data capturer' had been examined by the officer.

Readers might be forgiven for thinking that matters were in a position to be concluded there and then, i.e. with the case officer examining the actual return submitted and finding the pension details shown clearly thereon. The return form was found to contain all the necessary information and it was clearly an employee of HMRC – the data capturer – who had made the mistake. Alas, there was more to come.

Not part of the return

The case officer wrote accepting that the pension income detail was indeed shown on the form in Box 19. However, to the surprise of all, it was asserted that Box 19 did not form part of the self-assessment return. This line of thinking by the HMRC officer was resisted on behalf of Mr X by the partnership accountant when they responded to HMRC, but the department's response was to maintain the same stance saying that, although full details of Mr X's pension and tax deducted were shown in the 'any other information box' on the form issued by HMRC, this meant that the pension figures disclosed would not have been taken into account for self-assessment purposes. Accordingly, the officer asserted that there had been a failure on the part of Mr X. What is more, the officer also advanced the view that 'it would not have been reasonable for [Mr X] to believe his tax affairs were in order'. As a result, the officer stated that certain questions must be answered so that Mr X's case could be submitted 'to an inspector to review the penalty situation'.

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Here, it is important to stress that at no point in the correspondence was any indication given by HMRC to the taxpayer that TMA 1970, s 29 contained 'tests' – at least one of which must be shown to be satisfied before the provision can be activated by an officer. The officer seemed to lose sight of the fact that one of the two tests contained in s 29 must be seen to apply if the discovery provisions are to be implemented (allowing the tax otherwise lost to the Exchequer to be pursued). As a reminder, either:

(1) the tax loss arising to the Exchequer was brought about *carelessly* or *deliberately* by the taxpayer in question; or
(2) at the time when an officer of the Board ceased to be entitled to give notice of his intention to enquire into the taxpayer's return, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the tax loss.

The solution

It was pointed out to HMRC that, however the current officer chose to view matters, the pension information was clearly shown on the return. Furthermore, it was suggested to HMRC that their officials would be unable to successfully argue that the officer initially reviewing the return in 2009 could not have been reasonably expected, on the basis of the information made available to him, to have realised that, if the pension income and tax details shown in Box 19 were ignored, tax would escape assessment! As regards test 1 above, it seemed that the question to be addressed was whether a taxpayer who gets confused when completing a tax return can properly be regarded as acting 'carelessly' in not recognising what the officer was suggesting, namely, that the tax return box 19 and headed 'any other information' is not to be considered to be part of any taxpayer's return?! Clearly, it would have been absurd to suggest this was so (or indeed to try to make such an argument before a tax tribunal) but, nevertheless, correspondence left one of HMRC's offices suggesting that this was HMRC's view of matters in the circumstances of the case.

Action stations

It was argued that Mr X had, by any reasonable measure, made sufficient disclosure on his return to meet fully his obligations under TMA 1970. There was a clear opportunity available to the case officer initially examining the return to address the position or, failing that, to open an enquiry within the period laid down in the TMA 1970. The enquiry window had already ended, i.e. before the dispute arose, and, therefore, was not the officer pursuing the arrears of tax unlawfully?

It was further pointed out that the data capturer had a duty to examine the contents of Box 19 and to ensure that such adjustments as necessary were made in carrying out HMRC's tax calculation. The case officer was referred to HMRC's *Self Assessment Manual* at SAM121371. The so-called 'capture operators guidance' contains (my italics) the following extracts:

> 'The majority of return entries can be captured from the return without you having to consider the effect of each entry on the case as a whole. *There are occasions, however, when you must stop and think about, and possibly calculate, amounts that have to be entered during capture…*
>
> *'In all cases you should read all the information given in the additional information boxes on the return and read and act upon as necessary any warning messages that are displayed.'*

In summary, the arguments advanced in support of Mr X were that: (a) the period to open an enquiry had clearly ended; and (b) a hearing before a tax tribunal would show that an assessment under s 29 was not legally possible – neither of the tests therein having been shown by HMRC to apply. Accordingly, in the particular circumstances of the case, the tax arrears being pursued by the officer were not properly collectable. HMRC were asked to desist in their action to pursue the matter further unless it was desired to have a hearing before the First-tier Tribunal.

All's well that ends well?

The HMRC officer accepted the position (without formally taking the matter to a hearing before the tribunal) and wrote closing the matter. No reference was made to the arguments advanced. The officer simply asked that, in future, Mr X make sure he enter details of his pension in the correct space as well as giving further details in Box 19. There was no hint of an apology and no suggestion from the officer that the most important failure which occurred was that of HMRC.

First, was there not a failure by HMRC to capture the data properly?

Secondly, was there not a failure on the part of the officer reviewing the case in 2009 and deciding not to enquire into the return before the deadline for doing so (given the absence of the annual pension from the data captured by the data capturer)?

Thirdly, was there not a failure of the department in asserting that: (a) the tax (and interest) was collectable under the law; and (b) that penalties could be pursued under TMA 1970, s 29? In short, was it not HMRC which would be acting illegally if they sought to pursue the matter further?

As far as Mr X is concerned, all's well that ends well. However, is his experience an isolated case or a sad reflection on the conduct of some HMRC officers in implementing tax system? No one expects the administration of the tax system to be perfect, but cannot the public expect more professionalism from our fellow tax professionals working within HMRC?

Could it be that HMRC's officers are given too little time to devote to getting the job right? For an HMRC officer to suggest that Box 19 could not be considered part of the return for the purposes of considering whether penalties should be levied was clearly muddled thinking, but how many people reviewed the case officer's letters before they left the department? Was the structure of the line management in the particular office just that – nothing more than a structure with little in the way of functioning parts? Does anyone within HMRC look at what is said on the tin?

Should it not be that at least one other officer of a senior rank will review any letter if that letter suggests to a taxpayer there is a case for penalties under s 29 to be considered?

While the officer agreed in this case to retrieve the actual return document – and duly did so – why is it not standard procedure for all officers to call for the actual return (and associated documents) before writing to the taxpayer suggesting things might be wrong in some serious way? Given the repeated problems with the data capture process, can it not be said that HMRC are acting carelessly?

It is not unusual for letters to arrive from HMRC suggesting possible tax arrears, interest and a liability to pay penalties, only for the officer to find later that the actual return submitted, the covering letter, and supporting documents, contained the answers to many, if not all, of an officer's doubts about the situation.

I think I can state irrefutably that since the introduction of self assessment, one matter is clear beyond all doubt: all too often, the so-called capture officers let matters of importance escape capture.

Objectivity lacking?

Another sensitive question to be addressed is whether HMRC officials would broadly be content with the conduct of the case by the case officer. Simply put, s 29 was structured to give statutory effect to the pre self-assessment decision in *Olin Energy Systems Ltd v Scorer* [1985] STC 218. The tests referred to above were designed with this in mind.

On 1 September 1994, my article 'The hidden principle' addressing the conduct of certain inspectors when dealing with mistakes was published (see *Taxation*, 1 September 1994, page 537). This article also highlighted the conduct of some Inland Revenue inspectors and suggested that their actions might lead one to the conclusion that some staff were not as objective as the law required them to be. It may be bad form to quote one's own articles, but I shall do anyway.

Looking to the future, the September 1994 article closed with the followings words:

> 'The new-self-assessment provisions seek to incorporate the *Olin Energy* principle in a statutory form with effect from the year 1996/97. It remains to be seen whether the climate will change as time marches on and whether the Revenue's interpretation of the new provisions will fall far short of that required under present case law – case law that will lose its significance as self-assessment takes hold.'

"The experience of Mr X suggests that little has changed in over the 18 years since I was conducting dispute resolution."

Conclusion

The experience of Mr X suggests that little has changed in over the 18 years since I was conducting dispute resolution in the cases which formed the basis of the 1994 article – except that I am now a grandad!

Please do not blame the staff – it is the system within which they must work that appears to be creaking with strain. It is many decades since I ceased to be an employee of the Inland Revenue and while it may be incorrect to say that in the old days the staff were over-trained, we were taught a lot about matters which would seldom – if ever – cross our desk.

Today, alas, it seems the balance has swung too far the other way. It was a false economy to cut HMRC's staffing levels. Those who are left to do a thankless job should be given the training and management support by the department to help them in their daily struggle.

Kevin Slevin practises as Slevin Associates providing taxation support, including HMRC dispute resolution services, to accountants and solicitors in practice. He can be contacted at Kevin@slevinassociates.co.uk.