

1. **Wider issues** - I make no comment on the global issues of the impact of low tax jurisdictions. There is no question that low tax jurisdictions have both negative and positive impact on the global economy, and particular impact on poorer countries where instability can lead to capital drain. The future of global taxation generally is a wider and more fundamental debate, which will require global consensus. In the longer term globalisation may result in global taxes on items such as financial transactions and data.
2. **Expertise** – I have a generalised knowledge and experience in number of areas including accountancy and administrative law. I claim no specialist expertise and have not had the opportunity to research the subject. However my generalised knowledge suggests to me that the zero ten strategy may be fundamentally flawed and not sustainable in the longer term in that it fails to meet the OECD requirements.
3. **OECD Principles** -The OECD has pragmatically come up with a set of very simple but far reaching principles - essentially what is good for the goose is good for the gander. From my skimming of OECD documents it seems to me that the OECD have somewhat reluctantly accepted that it is difficult to prevent any State from setting its taxes as it sees fit. This may include very low tax rates. The OECD, have grudgingly accepted that under this principle that it is not possible to “ban” offshore jurisdictions, but have made it clear that Offshore jurisdictions will have to demonstrate real compliance to the principles, and ability to live by the consequences.
  - 3.1. Offshore jurisdictions are already regarded with a degree of cynicism. I would suggest that schemes that appear to be purely for the purposes of circumventing the OECD requirements, and / or fail to have a basis in established international principles of law, will in the longer term fail to satisfy the OECD
  - 3.2. OECD – The OECD edict in essence as to taxation of residents and non-residents [individuals, companies trusts etc.] = What is good for the goose is good for the gander
4. **Potential consequences** - I would further suggest that jurisdictions that seek to avoid the fundamental principles by schemes of questionable merit, risk censure, market uncertainty, and finding themselves required to secure compliance to fundamental and far reaching economic changes at very short notice if they are to survive as offshore jurisdictions.
  - 4.1. It is human nature that competitors who may be able to claim they have secured compliance e.g. IOM will seek to exploit and point out any failings in the Jersey provisions.
5. **No rational basis in Law** – I would argue that the taxation of Jersey residents on company income on a look-through basis, has no rational in law, and cannot be viewed as anything else but an artificial device.
6. **Real Aim** - The aim would inescapably appear to be to mitigate the fiscal deficit consequent on the zero rate corporate tax (and has been reported in the media as such by government, and on this basis I would suggest denial of this claim might at law be little difficult.)
7. **Outside spirit of OECD principles** - It is suggested that this will be regarded as outside the spirit of the OECD requirement, and such concerns will at some point inevitably be raised by the OECD or brought to their attention by competitors.
  - 7.1. The OECD dictum would demand that a zero corporation tax is applied equally to both residents and non-resident. Jersey companies will not be subject to corporation

tax – BUT residents will be subject to a look through tax. Non-residents will not be subject to such a look through tax.

8. **Legal implications** - Whilst an argument could be applied to look-through that it is acceptable to treat resident and non resident individuals differently for the purposes of income tax (E.g. Jersey has no ability to tax Argentineans as no residents to income tax, if the yardstick of income tax is residence) however;

**8.1.1. It could equally and more powerfully suggested that the reality is that residents are being taxed by the application of a device, which does not in any way reflect the legal realities that arise from companies and individuals having distinct legal persona, and therefore could be argued to be nothing more than an artificial device unsustainable in law and with no base in commercial reality:**

8.1.1.1. It is well established that a director of a company and an individual as shareholder are legally separate personalities. At the most basic level if there was any argument they were not legally separate, companies would have no point, offering no separation of the individual and company (e.g. shareholders would be liable for a companies debts in bankruptcy – a concrete example - shareholders of Enron would be responsible for Enron debts – companies would no longer function as **the concept and legal mechanism that underpin much of our market economy by providing an investment mechanism without personal liability for events outside the control of investors**)

8.1.1.2. It is untenable at a legal level to suggest that that a shareholder except in very exceptional circumstances (majority shareholding dictating policy to the board by alteration of articles) could force the board to distribute all income, and most directors would refuse to continue in such conditions due to their wider obligations under law.

8.1.1.3. The directors are subject to duties of care enforceable at law to wider groups than the majority shareholder – e.g. minority shareholders, employees, customers, suppliers, the public etc.. This precludes directors from simply accepting the dictates of shareholders.

8.1.1.4. Further at a practical level in most scenarios it is very rare for companies regularly to distribute all profits, as retention is required for growth, prudent budgeting etc,

9. **Inequitable and unworkable** - At a practical level under “look-through” scenarios can be envisaged where minority share holders may find themselves with very large liabilities on notional distributions which distributions will never be made, and the shareholder in a position of being unable to pay. [E.g. a IOM based company in which a Jersey resident has a 10% (say a family bequest) shareholding with profits of £10m and a policy of reinvestment – the directors IOM residents have no obligations to consider the impact of Jersey taxation on a shareholder)

9.1. Further the Directors are at liberty never making any distributions.

10. **Anti avoidance** - Further even if the argument for “look through” were accepted **it is a fundamental principle of administrative law** that such provisions are fairly and equally applied. The provisions would have to be equally applied to Jersey “wealthy” residents and their tax shelter vehicles. Such provision could also be argued to be applicable to companies under the control of types of trust settled by such residents. If a case were brought against government citing serious inequities the government would be obliged to apply the provisions

fairly and equally to all without exception, and further to demonstrate that is was doing so.

11. There is a strong irony, which I would suggest is untenable under the moral principles of the OECD dictum for an offshore jurisdiction to seek shelter under the complexities of tax legislation to derive its income from providing tax shelters to non residents, whilst at the same time seeking to impose anti avoidance legislation for its own residents that is reportedly amongst some of the most draconian in the world.
12. **Further Issues – personal taxation.** - There is a whole set of further issues which have not yet risen to the level of political and public conscience in respect of the taxation of trusts. Trusts are in value terms probably at least equal to if not exceeding those of companies. Trusts are currently taxed in Jersey under income tax. Trusts of with resident beneficiaries / settlors are taxed, whilst those of non-residents are not.
  - 12.1. To meet the terms of the OECD dictum on the uses of trusts in tax mitigation schemes the Island will either have to significantly reduce or remove income tax, or separate and reduce / remove tax on trusts whilst seeking to maintain income tax, if it is to maintain a finance industry which relies heavily.
13. **Migration** - Once companies and trusts of both residents and non residents suffer low or zero tax, it is only human nature that all who can, generally will seek to mitigate their tax by setting up companies and trusts (if only because they do not see why they should pay if their neighbours do not, driven by a mix of a sense of fairness and envy powerful human motivators). This will only leave the directly employed paying significant tax. I would suggest that this scenario would be politically untenable in the long term. The logical consequence is that the Island will have to seek to rely on other sources of tax other than company or personal tax, which would include self evidently sales type taxes. It may have to significantly cut public expenditure, find alternative ways of funding health pensions etc.. Such alterations may prove politically unacceptable, but those are the dilemmas that must be resolved, and the minimum hurdle set by the OECD in recognition of the balance of a right of self-determination v the harm to the international community of tax competition.
14. **Conclusion** - I would suggest that the proposed arrangements to mitigate loses of company taxes by look through;
  - 14.1. Are untenable under the spirit of the OECD requirements
  - 14.2. And unworkable at a practical level giving rises to impossible scenarios of inequity un-payable liabilities etc.
  - 14.3. Will result in those for whom it is economic setting up offshore vehicles such as trusts to hold company shares.
  - 14.4. Raise the indefensible scenario of Jersey having the highest level of anti avoidance legislation, but failing to apply it in many instances if current policy is extended at the same time by the arrangement limitation of liabilities to tax of high net wealthy persons (wealthy immigrants). [The practical consequence is that the Island must accept that the implementation of this principle may result in such immigrants moving from the Island] [If vehicles such as offshore (non Jersey) trusts are allowed for wealthy immigrants they must be generally available to the wider population]
  - 14.5. The comparisons that are frequently made as to non domiciled persons residing in the United Kingdom are not tenable – the end effect may be the same {and indeed offshore jurisdictions benefit as often funds are maintained in such jurisdictions} but

the an argument can be put forward that the treatment of non domiciled persons is consistent across the class, and based on well founded legal principles. In contrast the Jersey “look-through” is arguably unsustainable at a legal level. Such niceties may appear at a practical level to be splitting hairs but tax planning is based upon observance of a law, that itself accedes to principles of administrative law and wider international agreements. It is the legal arguments of such fine points and the constant struggle between governments to close loopholes and advisors to utilise them that makes tax such a complex subject

14.6. IF Jersey wishes to maintain a position in the longer term in the offshore finance industry it has to sooner rather than later accept and resolve the associated difficulties that come as a consequence of observing the OECD dictum of what is good for the goose is good for the gander.

14.7. Based on the very limited knowledge I have it appears that this has already been recognised by the Isle of Man. The offshore finance industry is a competitive one. It is further not beyond the bounds of probability that informal agreements are reached between minister of governments of World Players that they intend to reduce offshore jurisdiction in their sphere of influence [which possibility has already been reported in the financial press]. If that were to happen it is not inconceivable that pressures would be put on the weakest that may force them out of the market.

14.8. It should be remembered that the OECD has received the assurance of the UK government that they would secure compliance of all Crown dominions. Precedent does exist for the UK having the ability to legislate for the Islands in a number of areas including taxation. Whilst such powers are open to interpretation, might is not on the side of Jersey. Jersey cannot compare itself to Switzerland which is truly independent, and has a much more diffuse government which can lead to very lengthy legitimate delays in the decision making process. Whilst it is certain Switzerland will remain equally under pressure from the OECD, it is human nature that in any scenario a practical course will be pursued which means achieving the achievable towards the end of long term global compliance– and UK dominions are an “easier “ compliance target.

15. The current world climate is one of distasteful tolerance on wider grounds of rights of self determination, which implies the offshore jurisdictions will be constantly on the defensive, and to survive will have to demonstrate compliance to the spirit of the OECD principles, and acceptance that such compliance may not come without considerable pain. There will be little tolerance in the longer term to those that do not comply. In conclusion my suggestion would be that if Jersey wishes to remain an offshore centre it will have to embrace the OECD principles both in letter and spirit. This appears to have already been recognised by other competitor jurisdictions. To achieve a low- low or even zero-zero tax base will require fundamental reorganisation of Jersey’s bases of taxation, reassessment of the funding of social projects etc. This may be more painful change than the Island is prepared to accept, and the Island should face considering the alternative of surrendering its offshore status for European or UK subsidy. **What does appear certain is that the OECD will no longer tolerate low tax jurisdictions having their cake and eating it, by the implementation of legally unsustainable commercially / unjustifiable schemes that seek to avoid the impact the OECD requirements.** The longer decisions are delayed the more difficult ultimate implementation of acceptable polices will be.