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States 
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Revenue Jersey

28 January 2019

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Corporate Services Scrutiny Panel
States Greffe: Scrutiny
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Dear Simon,

DRAFT REVENUE ADMINISTRATION LAW : SUBMISSIONS FROM THE TAX PROFESSION

I offered you my comments on the four submissions you have received from the CSSP's Call for Evidence.

2. As I mentioned in my own evidence during the Panel's meeting with the T&R Minister on 8 January, I routinely meet the larger tax agents (the "Big 6") and we have been discussing the provisions of the draft Revenue Administration Law and/or aspects of new powers and penalties for well over two years in one context or another.

3. I do appreciate the deep frustration which some agents feel with the age of parts of our tax law and the slow progress with modernising some of it. However, the answer is not for the "best to become the enemy of the good" by (as seems to be proposed in the submission from Grant Thornton) not lodging any new tax law until a grand (and detailed) plan for all tax law can be articulated and resourced.

Work Programme

4. We are endeavouring to produce a clear work programme for the coming years which will balance the needs and priorities of Ministers; States Members; Businesses; and Revenue Jersey itself. This will, inevitably, be subject to choices about resourcing and priorities – and, of course - subject to the approval of Ministers. It will see significant progress on most aspects of Jersey's tax laws.

Checks and Balances

5. I do not fundamentally believe – as seems to be asserted by two of your correspondents - that Jersey taxpayers are unprotected from unreasonable action by the tax administration. First of all, it is worth remembering that the Comptroller and his/her officers exist as an independent authority to uphold the tax laws and to ensure that everyone pays what they should under the law. We take oaths (re-articulated in the draft law) which require us to act only as necessary to enforce the law - and proportionately. We take those oaths very seriously.

6. All tax decisions are first subjected to internal reviews by senior tax officers. Most tax disputes are resolved in this way. After that, taxpayers may appeal to the Commissioners of Appeal who are in my experience fiercely independent and available to taxpayers free of charge. They are Jersey's tax judiciary; and in no way part of Revenue Jersey.

7. The Commissioners heard fewer than 70 appeals in 2018, mainly from individual taxpayers either "in person" or represented by smaller and medium-sized tax agents. I do understand the concern expressed by some agents - that the degree of administrative support provided to the appeals process from the tax administration – may create a perception of dependence but I do believe that that is a misperception. The Clerk of the Commissioners is, of course, an advocate and is supplied on contract from a local law firm.

8. As I mentioned at the hearing, the Jersey Law Commission has proposed that the Commissioners – amongst other such bodies - are replaced by a Public Services Ombudsman and by some kind of centralised judicial-panel system. Clearly, this may help change the perception of how tax appeals are processed.

9. A taxpayer who is dissatisfied with a decision of the Commissioners can appeal to the Royal Court. That has not happened in the four years since I became Comptroller.

Redress

10. As a matter of fact, taxpayers can sue the Comptroller if they believe s/he or his/her officers have exceeded their powers and thus caused them unnecessary costs fighting an unnecessary tax enquiry. And the Comptroller can, on a discretionary basis, make an ex gratia payment to an aggrieved taxpayers if s/he judges the circumstances warrant that (for example, following an adverse ruling of the Commissioners). That said, again - these circumstances have not arisen in recent years. I understand it is likely that the wider issue of redress will be

considered as the States implement the recommendations of the Jersey Law Commission.

11. All that said, the reality is that the Taxes Office has – historically – undertaken a small number of compliance checks and tax enquiries/investigations each year with taxpayers seldom feeling the need to invoke appeals procedures.

12. Revenue Jersey is unafraid of greater scrutiny or oversight in this regard and is - as part of the work programme - seeing how we can further reassure uneasy tax agents.

The PwC Submission

13. I am grateful for the unequivocal endorsement of PwC for the new measures and note that three of the “Big 6” agents have not made submissions which I hope signifies the degree of engagement we have enjoyed from the tax-agent community.

The CIOT Submission

14. I am pleased that the CIOT raised no significant concern about the draft law. We absolutely concur with CIOT that guidance – for the use of both tax officers and taxpayers – needs to be put in place before the new behaviour-based penalties are used - and that work is under way.

15. CIOT will be very familiar with HMRC guidance in operation in the UK and we will take that into account in developing our own approach and engage the tax-agent community and other stakeholders fully.

16. It is likely that all tax officers who undertake compliance work will have to make decisions about penalties but that those decisions will be agreed by a process of peer review and senior-management approval to ensure consistency of approach.

17. I do not think the CIOT has correctly articulated the UK provisions for seeking to stop a tax enquiry or to appeal a tax penalty. The immediate route (after internal review) is to the UK’s “First-tier Tribunal” which is a judicial panel. The Jersey equivalent is the Commissioners of Appeal.

18. Jersey’s Commissioners of Appeal for tax matters do not currently have the remit to stop a tax enquiry but the Minister is content for us to review the case for extending the remit of the Commissioners in this way. I support this level of scrutiny and would want to ensure that whatever the Minister proposes cannot be abused as a device to halt or significantly delay a tax enquiry which is found to be reasonable and necessary. However, it should be remembered that the ability in the UK to apply for an enquiry to be closed is part of their Self-Assessment legislation. That legislation placed greater burdens on taxpayers in some ways, so gave greater safeguards against administrative inefficiency as a quid pro quo.

19. For avoidance of doubt, anything which can be appealed to the Commissioners may subsequently be appealed to the Royal Court.

The EY Submission

20. Mrs Martin's views on introducing a clear tax enquiry window are shared by me and we expect the Minister will support a new measure to limit the number of years for which tax assessments can be made retrospectively. We will be reviewing international best practice and providing further advice to the Minister in this regard.

21. In the meantime, it is worth saying that the Comptroller has sufficient discretion in law not to assess where s/he judges that tax officers should have acted more quickly - and does take this into consideration on the rare occasions that taxpayers (or their agents) assert that a case has taken a unreasonably long time to resolve on account of poor public administration.

Commissioners of Appeal

22. I have touched upon the question of the independence of the Commissioners above. I was surprised that two of our largest tax agents have raised concerns over this at all - as well as rather late in the day: the concern was first expressed at a meeting with the Minister on 17 December. I think such concerns are misplaced; and I would draw CSSP's attention to the Oath of Office which Commissioners take. Nevertheless, as I say above, I do appreciate that a misperception of dependence may be created by the degree of administrative support which the revenue service provides to the appeals process.

Production Powers

23. Mrs Martin specifically criticises Article 26 of the draft law which is a "production power" to compel taxpayers to produce information where they have hitherto refused to do so. However, there are already numerous powers in the Income Tax (Jersey) Law for the Comptroller to require documents to be produced on pain of penalty - the principal novelty in Article 26 being that the penalties will be civil - not criminal - and judicial oversight is by way of appeal to the independent Commissioners as opposed to being by way of a criminal trial.

24. Production powers will probably remain a point of dispute between myself and some tax agents as we continue to modernise the other production powers embedded in other parts of the tax laws - so I will say quite a bit about them all here.

25. I have over the past couple of years increasingly used production powers to bring a number of long-running tax enquiries to a head. In my opinion, there is a culture of prevarication and delay among some taxpayers in Jersey in the hope (I imagine) - and sometimes, in my experience, the quite realistic expectation - that the taxman will "give up and go away". Production powers are an essential tool in the tax officer's toolkit and help us tackle persistently non-compliant taxpayers. The States Assembly passes the law that creates the tax liabilities of individuals and companies; the revenue service does not know about the profits and gains of those individuals and companies and must be able to obtain information - otherwise tax is raised solely on the honour of the system.

26. Production powers have existed for a long time in Jersey. Article 26 reinforces the new obligations on personal (non-business) taxpayers arising from Online Filing

and the consequent obligation to hold records. There has never been any scope to appeal the use by the Comptroller of a Production Notice.

27. It is worth saying that most taxpayers and their agents co-operate fully with the tax administration when their affairs are subject to a compliance check of one sort or another and will provide all of the information necessary to establish their tax position.

28. Occasionally taxpayers and their agents are unresponsive or simply refuse to provide the requested information. In these circumstances, production powers such as Article 16A of the Income Tax (Jersey) Law 1961 (which was last modified by the States Assembly in 2010) allow the Comptroller to serve a notice on the taxpayer; the taxpayer's agent; or any other person compelling them to provide information by a set date. If the Notice is ignored, the Comptroller may lay the matter before the Royal Court where the failure to comply is dealt with as a regulatory offence for which the Court may impose a fine.

29. Given the use of Production Notices (such as an Article 16A Notice) is the "last resort" to tackle an unresponsive or obstructive taxpayer, there are good arguments for the present system. Investigations should be conducted quickly; and allowing taxpayers to challenge every request for information with a right of appeal can allow the most obstructive and those with deeper pockets to delay or even frustrate investigations.

30. Unreasonable use of requests by the Comptroller can be challenged either in judicial review or by arguing in proceedings to impose a fine that the notice was invalid for being unreasonable.

31. Production Notices can only be issued over the signature of the Comptroller; the Deputy Comptroller; or one of the Assistant Comptrollers. The courts in the United Kingdom have thought that requiring notices to be issued by someone of seniority in the revenue service was an important safeguard justifying an approach where notices were issued without prior judicial approval. (*R v Inland Revenue Commissioners, ex p. Davis, Frankel & Mead.*)

32. Some tax agents have criticised the recent use of Article 16A by Revenue Jersey as we have attempted to bring to a head the number of outstanding tax enquiries which have, frankly (as I say above), been allowed to run for far too long. Those who conduct business in Jersey necessarily incur taxation obligations, and it is therefore a part of conducting business to be frank with the Comptroller in respect of their tax affairs.

33. That said, the Minister has said that she would be prepared to consider involving the Commissioners of Appeal in the process of investigations: options might include, for example, requiring notices requiring information to be approved by the Commissioners in advance. This has the virtue of giving judicial oversight, and helps to prevent requests in investigations turning into lengthy litigation in their own right. The broader question of appeal processes is under review following the report "Improving Administrative Justice" by the Jersey Law Commission.

Debt - Interest (Rates) and Surcharge

34. I think we can certainly take Mrs Martin's views on interest rates into consideration when proposing the draft Order to the Minister; and we will ensure that Mrs Martin is consulted on that. The extent to which the combination of interest and a surcharge are potentially excessively punitive has been a matter of considerable debate. Given the fairly chronic problems we have encountered with tax debtors, we judge it is reasonable to help us correct the current levels of non-compliance. However, I think once debt management is in a more-stable position the Minister will wish to consider a reduction in the surcharge rate.

The Grant Thornton Submission

35. Mr Shenton is a strong advocate for the complete overhaul of Jersey's tax laws and I do not think he is wrong. We are currently undertaking a root-and-branch review of the personal tax system. The Tax Policy Unit is constantly reviewing existing tax law or working on new forms of taxation – at the behest of Ministers; CSSP; States Assembly (usually reviews are commissioned during Budget debates); in response to international initiatives (OECD/EU etc); Revenue Jersey itself; and in response to requests from stakeholders such as tax agents.

36. As we discussed at the recent hearing, some of the things that are important to tax agents have been long-promised and simply not delivered due to the size of the administration and the competing priorities for tax reviews. The Minister, the Treasurer and Revenue Jersey are all very keen to deliver on some of those things - subject to the availability of resources and Ministerial judgements about overall priorities.

37. I do hope, however, that the CSSP will not support Mr Shenton's view that this draft law should be rejected. We are seeking to meet some of Mr Shenton's calls for the "bigger picture of tax reform" by producing the work plan I mention above.

The Comptroller's Discretionary Powers

38. I share Mr Shenton's unease that the tax law leaves a good deal of judgement and discretion in the hands of the Comptroller where it would be possible to be more specific in statute. We certainly aim to create draft laws that are more specific.

39. In the meantime, I believe that I have very clearly articulated for the tax community my approach to the interpretation of tax law and the supremacy of the Rule of Law in matters of taxation. I have largely ended the historic practice of administering the tax system by "extra-statutory concession".

40. In particular, I can absolutely assure CSSP that the tax system will not during my tenure rely "on the arbitrary unpublished opinion" of the Comptroller. I rely solely on the law in accordance with my Oath of Office; and I am happy always to publish my interpretation of any part of it if there is ever doubt.

Publication of Commissioners' Decisions

41. It is currently the case – as Mr Shenton describes – that decisions of the Commissioners of Appeal are not made public and I sympathise with his view that they ought to be. I believe that the Commissioners share this view. We can certainly review the case for legislating to enable the Commissioners to publish their decisions and the key question will be whether to publish cases anonymously to protect taxpayer confidentiality. You may wish to canvass the views of the Commissioners direct on this matter.

42. The United Kingdom only in the last decade moved to generally publishing all first-instance tax decisions and revealing the names of all litigants save where there is a strong justification for privacy. There are arguments for and against such a move.


The Approach of Revenue Jersey to Tax Compliance

43. Finally, it is perhaps worth saying – for avoidance of doubt – that the office of Comptroller and Revenue Jersey is a “creature of statute”. Our sole mandate is – on behalf of the States Assembly – to help ensure that everyone pays the taxes due under the laws of Jersey. The vast majority of taxpayers want to – and do – pay their dues and our main obligation to them is to provide the help and advice they need to meet their tax obligations. We also owe it to them to deal promptly and justly with those who do not get their taxes right, either by accident or design.

44. Our compliance checks and tax enquiries usually seek to focus on those where we judge risk of non-compliance exists (some random checking does take place). It is important that tax officers are provided with the right legislative support to do that effectively and efficiently.

45. I agree with Mr Shenton that Revenue Jersey should adopt a **Taxpayers' Charter** which sets out what taxpayers can expect from Revenue Jersey; and what Revenue Jersey expects in return from taxpayers. A number of “model” charters exist - produced by the EU and the OECD - and I am keen to adapt one of these for Jersey with minimal tinkering. For 2019, I had proposed to Jersey's tax-professional bodies that we explore working with the EU code on a trial basis: some of the larger tax accountants did not seem entirely keen on this and it is likely we will now take more time to consider the best way ahead.

46. Revenue Jersey's abridged **tax compliance strategy** is available to CSSP (Section 9/Page 13 of the Revenue Jersey Public Briefing document issued on 4 October 2018); and I am happy to discuss it with the Panel in further detail.

Yours sincerely,


RICHARD SUMMERSGILL

