WRITTEN QUESTION TO THE MINISTER FOR TREASURY AND RESOURCES BY DEPUTY G.P. SOUTHERN OF ST. HELIER

ANSWER TO BE TABLED ON TUESDAY 26th SEPTEMBER 2006

Question

Further to a recent statement made by the Comptroller of Income Tax regarding reassurances of his powers to counteract risks associated with possible increased tax avoidance by Jersey residents following recent changes to Article 9(a) of the Trust (Jersey) Law, would the Minister inform members –

(a) what the substance of this ‘risk’ is and how it is to be counteracted?

(b) whether the ‘settler reserved powers’ referred to elsewhere in the statement pose a risk of possible greater tax avoidance by non-Jersey residents and, if so, how?

(c) what consideration, if any, has been given to the possibility of a legal challenge to the actions of the Comptroller under his ‘strengthened Article 134A’ or the proposed ‘tick the box scheme’?

Answer

(a) The Comptroller initially made a general enquiry aimed at gaining a fuller understanding as to whether the recent changes to the Trust Law had any impact on the potential for Jersey residents to engage in tax avoidance. His enquiry was interrogative and did not attempt to pre-judge that there was such an increased risk of tax avoidance. The subsequent debate held shows that Settlor Reserved Powers are not a material issue in assessing the risk of tax avoidance by Jersey resident settlors of trusts. With or without Settlor Reserved Powers, those determined to avoid and evade tax can do so, by availing themselves of structures available on a global basis, including foreign trusts, which would allow them the opportunity, if they so wished, not to declare such interests and sources of foreign income on their Jersey Income Tax Returns. Such practices amount to tax avoidance and evasion and exist currently. The key point for me is whether this additional clause in the Trust Law, which is aimed at entirely different purposes than that of tax avoidance, unintentionally creates a new set of motives for tax avoidance and evasion. In my view it does not.

(b) No. I do not believe that Settlor Reserved Powers pose a risk of greater tax avoidance by Jersey residents. The primary effect of the new powers is not to confirm that a settlor may reserve powers in relation to a trust, but to confirm that a trustee who follows the exercise of such powers will not be liable for doing so. Trusts that expressly allow the settlor to reserve extensive powers in relation to a trust are found in many jurisdictions, including most of our Caribbean competitors, many US States, including Alaska, Delaware, and Nevada, and jurisdictions that are increasingly our real competitors for international work, such as New Zealand. There is nothing novel in the Jersey proposals, and no reason to anticipate that the introduction of this new article into the Trust Law will pose any additional risk of tax avoidance and tax evasion. I also ought to point out that tax avoidance is legal, and does not constitute a civil or criminal offence, unlike tax evasion, which is illegal, and which the Comptroller of Income Tax will continue to attack vigorously. Tax avoidance is the arranging of your affairs in a legal manner to reduce your exposure or liability to tax. In the words of Lord Tomlin in Duke of Westminister v CIR ‘…every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it would otherwise be…’ Nevertheless, the Comptroller has power, under Article 134A of the Income Tax (Jersey) Law to make assessment to prevent avoidance of Jersey income tax, as he considers appropriate, to counteract such tax avoidance or reduction of a liability to Jersey income tax if he is of the view that the main purpose, or one of the main purposes of a transaction, is to avoid or reduce a Jersey tax liability, and he does so on a regular and consistent basis throughout every tax year. But a sense of proportion must be used in judging whether a transaction should be counteracted. If an elderly person wishes to invest some capital into a capital growth bond, for the prime reason of generating capital growth to ensure that he passes on to his children a greater sum of capital than he otherwise would, rather than keeping his funds in a bank account which attracts interest which is taxable, unlike the capital appreciation on a capital growth bond which does not attract a liability to income tax, the Comptroller may very well not attack such an avoidance transaction despite the fact that it involves an avoidance of Jersey income tax. Trusts can also be legitimately used for tax avoidance purposes, just as they can be used for wholly altruistic and charitable purposes.

(c) There has never been a legal challenge to the Comptroller in the exercising of his powers under Article 134A. This is because the powers are invoked in a sensible and proportionate manner and I anticipate him continuing to use any increased powers I or the States may wish to grant him in the same manner. However, there may conceivably, in the future, be a legal challenge to the exercise of his increased powers and it will then be incumbent upon the Comptroller to defend the use of his powers in a particular case before the Royal Court. Her Majesty's Attorney General will, of course, examine any draft amendment to the Income Tax (Jersey) Law that will bring any new anti-avoidance powers into law and he will give his own opinion on the possibility of a challenge against these new powers. But it must be borne in mind that the States of Jersey, like any other Government, has a very wide margin of appreciation in the area of taxation and that a legislature's assessment will be respected in the area of taxation unless it is devoid of reasonable foundation. I have no doubt at all that any proposed powers to be given to the Comptroller to assist him in tackling tax avoidance will be reasonable and will not be capable of successful challenge in the Courts.