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PRE-EMPTIVE DISCLOSURES[1]

THE IMPORTANCE OF RESIDENCE AND DOMICILE

Most taxing jurisdictions determine the extent to which they subject a person to tax by reference to short and long term connecting factors. In the UK tax system these factors are respectively residence and domicile. Both, even after the enactment of the Statutory Residence Test in Finance Act ('FA') 2013, are concepts of the upmost complexity and imprecision.

DETERMINING RESIDENCE AND DOMICILE REQUIRES DETAILED HISTORICAL ENQUIRY

Determining domicile often requires a detailed historical enquiry to acquire evidence proving the intentions of the taxpayer concerned and, often, the intentions of his father and, sometimes, of his mother and ancestors at multiple times in the past. As Sir Barnes Peacock, citing much older Roman law, said in an 1889 case:-[2]

'It is not by naked assertion but by deeds and acts that a domicile is established'.

Lord Wilson SCJ famously said in the case of *Gaines-Cooper*[3] that determining a person's country of residence may require *'a multifactorial inquiry.'* Even though the Statutory Residence Test has been enacted since the *Gaines-Cooper* decision,[4] such is the imprecision of the concepts used in that test that a multifactorial enquiry is still required to determine residence in all but the simplest of cases.

THE INTERCONNECTEDNESS OF RESIDENCE AND DOMICILE

Since the inception of Inheritance Tax, individuals not actually domiciled in the UK[5] have been treated for the purposes of that tax as if they were so domiciled if they are resident here for an extended period.[6] Similar provisions were enacted for many purposes of Income Tax and Capital Gains Tax by the Finance (No. 2) Act 2017[7] ('F(No.2)A 2017') with effect from 6th April 2017.[8] So in order to determine how an individual is taxed, one often has to determine both his country of domicile and his country of residence for many fiscal years, including years before the enactment of the Statutory Residence Test. Doing so often requires the gathering and evaluation of detailed and voluminous evidence relating to many years.

CERTAINTY IS UNOBTAINABLE

In determining whether complex sets of facts fall within two such vague and imprecise concepts one can rarely reach a conclusion which has practical certainty. The best the taxation adviser can usually achieve is a conclusion which he considers probable and some evaluation of the degree of probability.

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1 A shorter article, based on this longer version, was published under the title 'Considered Revelations' in the August 2019 edition of *Tax Adviser* magazine

2 *McMullen v Wadsworth* [1889] UKPC 50 (27th July 1889)

3 *R (on the application of Davies & Another) v HMRC* and *R (on the application of Gaines-Cooper) v HMRC* [2011] STC 2249 at para. 20

4 In FA 2013 s.218 and Sch. 45

5 In this article we use the 'UK' as a convenient shorthand for the 'United Kingdom' and 'domiciled in the UK' as a convenient shorthand for 'domiciled in one of the constituent kingdoms of the UK'

6 Inheritance Tax Act 1984 ('IHTA 1984') s.267

7 F(No.2)A 2017 s.29(1)

8 Income Tax Act 2007 ('ITA 2007') s.835BA

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THE PROBLEM OF UNCERTAINTY

That poses, with particular acuteness, three problems with which tax advisers are always faced to some degree.

Guarding against penalties

First, how does one minimise the chances of penalties being imposed in the event that, in due course, the Tribunal takes a different view of the correct taxation treatment of one's client's transactions from the treatment reflected in his returns?

Finality

Secondly, how does one give one's client the best possible chance that assessments made on the basis of the treatment reflected in his returns will become final once the statutory enquiry period has expired?

Balancing immediate and future costs

Finally, how does one minimise the costs of an enquiry by HMRC into one's client's residence and domicile status and how does one balance the costs of comprehensive disclosure in the client's tax return against the uncertain costs of a future enquiry?

GUARDING AGAINST PENALTIES

A person who submits a tax return on the basis of a view of his residence or domicile which affects his income or Capital Gains Tax liability with which the Tribunal or Court in due course disagrees will have submitted a return containing an inaccuracy. FA 2007 Sch. 24 para. 1 imposes a penalty on a person where, *inter alia*, that person gives to HMRC a self-assessment tax return under Taxes Management Act 1970 ('TMA 1970') s.8 and two conditions are satisfied. The first condition is that the document contains an inaccuracy which amounts to, or leads to, an understatement of a liability for tax, a false or inflated statement of a loss or a false or inflated claim to a repayment of tax.[9] The second condition is that the inaccuracy was careless or deliberate.[10]

The burden of proving that the inaccuracy was careless or deliberate falls on HMRC but, in practice, it is prudent for the taxpayer to preserve evidence to demonstrate that the inaccuracy was not careless.

A person is liable to a penalty for the submission of an inaccurate document where the document is given to HMRC on that person's behalf. He will not, however, be liable in respect of anything done or omitted by his agent where he satisfies HMRC that he took reasonable care to avoid the inaccuracy (FA 2007 Sch. 24 para. 18(3)). A taxpayer wishing to ensure that a penalty will not be imposed for an inaccurate document, therefore, would do well to preserve evidence that he has appointed a tax agent with the requisite qualifications to correctly complete his tax return, he has no reason to think that the agent would not do so competently and efficiently and that he has provided the agent with all of the information which the agent has specifically requested or which the client might reasonably have supposed was necessary for the agent to complete his return on his behalf accurately.

This evidence might, of course, be preserved merely by way of preserving correspondence and other relevant documents. It is useful, however, to submit a detailed disclosure with the relevant tax return to HMRC which, by setting out all of the relevant facts and analysis,

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[9] FA 2007 Sch. 24 para. 1(2)
[10] FA 2007 Sch. 24 para. 1(3)

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demonstrates the care taken. As we shall see, doing so is also essential if the client is to have the highest practical chance of obtaining finality once the period for HMRC to enquire into his return has expired.

FINALITY

TMA 1970 ss.34 & 36 – extended time limits

TMA 1970 s.34 provides that:-

> *'Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.'*

Longer time periods for assessment, however, apply, under TMA 1970 s.36, where a loss of Income Tax or Capital Gains Tax is brought about carelessly (extending the period to six years) or deliberately (extending the period to 20 years) by the person assessed. For this purpose, a loss brought about by the person assessed includes a loss brought about by another person acting on his behalf. So if a taxpayer's tax agent makes a careless or deliberate error in a self-assessment return submitted on the taxpayer's behalf, the taxpayer may be assessed under the extended time limits even if he has taken all reasonable care to avoid the inaccuracy. TMA 1970 s.36A extends the time period for assessment for losses which are not deliberate which relate to an offshore matter or transfer to twelve years.

Discovery

The time period within which HMRC may make an assessment is further restricted by the discovery provisions.

If HMRC's assessment to Income Tax and Capital Gains Tax on an individual is not made in the course of, or on the closure of, an enquiry, it may be made under TMA 1970 s.29 on the making of a 'discovery.' Where tax which ought to have been assessed has not been assessed due to an error in an individual's self-assessment return, if the enquiry period has ended without an enquiry being raised or an enquiry into the relevant year has been closed, the under-assessed tax may only be assessed under TMA 1970 s.29 and then only if one of two conditions is satisfied:-[11]

> *'… The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.*
>
> *… The second condition is that at the time when an officer of the Board—*
>
> *(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or*
>
> *(b) in a case where a notice of enquiry into the return was given—*
>
> *(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or*
>
> *(ii) if no such partial closure notice was issued, issued a final closure notice,*
>
> *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 situation mentioned in subsection (1) above.'* [12]

[11] TMA 1970 s.29(3)

[12] TMA 1970 s.29(4) & (5)

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So, if a loss of tax has not been brought about by a careless or deliberate error in the return, no assessment may be made after the enquiry window has closed[13] (which will normally be 12 months after the day on which the return was delivered)[14] only if, on that day, '*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 situation [leading to a loss of tax].*'

For this purpose:-

'(6) … information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred[15] by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.' [16]

For this purpose:-

'…(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding years of assessment;

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.'

The prudent course, therefore, is for an adviser to advise his client that if anything in his tax return is dependent on his residence and, or, his domicile the 'white space' in his tax return should refer to an attached document which sets out all the information relevant to determining the status concerned at the relevant dates and an analysis determining the status by applying the information to the law for determining the status concerned.

BALANCING IMMEDIATE AND FUTURE COSTS

Careful drafting

If such a disclosure is to achieve its purpose it must be very carefully drafted to ensure that all relevant information, not just information favourable to the treatment adopted by the taxpayer,

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[13] Under TMA 1970 s.9A(1)

[14] TMA 1970 s.9A(2)

[15] This provision was given a very restricted construction in *Langham v Veltema* CA 2004 76 TC 259 although, whilst being decided on the basis that *Veltema* was a correct construction of the law, the cases of *HMRC v Charlton* [2012] UKUT 770 (TCC) and *Cooke v HMRC* [2017] UKFTT 844 (TC) appear to be based on a broader construction

[16] TMA 1970 s.29(6). This text does not reflect amendments to be made under F(No.2)A 2017 ss.6(1) and Sch. 24 para. 20(2)&(3) with effect from a day to be appointed

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is included, that all relevant technical issues are covered and that arguments unfavourable to the taxpayer are objectively set out so as to demonstrate that the taxpayer has considered them and has reasonably concluded that they are invalid.

Indeed, there will be matters where the treatment adopted is simply, as a matter of judgement, more likely than not to be the correct construction of the relevant law so that the opposing arguments are not invalid but merely less likely to be correct than those on which the treatment adopted by the taxpayer is based. If that is the case the disclosure should say so.

An additional benefit of such a disclosure is that it enables the taxpayer to demonstrate to HMRC that the treatment adopted is, indeed, the correct, or at least the most supportable, one so that time is not wasted, as it so often is in HMRC enquiries, with HMRC starting from a position which is unsupportable on the law or the evidence.

HMRC's standard lists of requested information and documents

HMRC's Residence, Domicile and Remittance Basis Manual gives, at para. RDRM23080, a list of '*the types of information that might be requested during an enquiry'*. It lists 41 categories of information and 27 categories of documents. The paragraph says that *'any information request should be tailored to the particulars of the individual's claim'* but, as we discuss below, it is clear that HMRC officers are routinely demanding all or most of the information in the list without first considering its relevance.

The equivalent section in the Manual concerning residence enquiries has been withheld from publication under '*exemptions in the Freedom of Information Act 2000.*'[17] Anecdotal evidence, however, suggests that HMRC officers, in respect of residence matters, are also routinely using some form of checklist to demand information and documents without properly considering the relevance to the taxpayer concerned of the information requested.

Although HMRC's indifference to the burden placed on taxpayers by its indiscriminate demands for irrelevant information is reprehensible, where a taxpayer's return is to include a comprehensive disclosure in respect of his residence and, or, domicile, the taxpayer is best served by gathering, before one provides advice, all the information and documents which HMRC is likely to request if an enquiry is launched and by his agent providing with the taxpayer's disclosure a comprehensive statement of that information, including the information contained in the documents referred to its sources unless it clearly cannot be relevant. Any apparent inconsistencies in the information and documents can be explained in the disclosure so that the information is placed in its proper context.

A costly process

The trouble with such an approach is that such a disclosure requires the input of a considerable amount of expensive professional time and for the drafter to have considerable technical and literary skills, skills which demand a high hourly rate. It, therefore, involves a considerable initial investment. The tax at stake in smaller cases will often not justify such an investment.

It is a fundamental failure of our tax system that it has become so complex that many taxpayers simply cannot afford to determine their tax liabilities with reasonable accuracy and to a reasonable level of probability.

Hoping that HMRC will not enquire

Even taxpayers with larger sums at stake, may be tempted to skimp on this initial expense in the hope that their domicile and, or, residence status will not be enquired into by HMRC. In the past, such an approach, although in most cases unethical, may have been the course of action

[17] HMRC's Residence, Domicile and Remittance Basis Manual para. RDRM10635

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which generally produced the most favourable results for taxpayers. HMRC's enquiries into domicile and residence matters were woefully inadequate so unethical taxpayers were tempted to make claims not to be domiciled or resident in the UK which were unjustified in the knowledge that such claims were unlikely to be enquired into by HMRC with any vigour.

Where the tax at stake is significant the probability of avoiding an enquiry into transactions treated on the basis that the taxpayer is non-UK resident or non-UK domiciled is now very small. Even where the tax at stake is quite modest it would be very unwise to assume that the relevant return will not be the subject of an enquiry.

HMRC has greatly increased both the number and the intensity of its enquiries into domicile and residence questions. Unfortunately, it has not done so in a rational, proportionate or ethical manner. The representatives of the major professional bodies concerned with taxation have raised concerns that, in its conduct of domicile enquiries, HMRC now routinely asks, as we have seen, for a very extensive standard list of information and documents from the client regardless of the relevance of the items requested, abuses the issue of information notices and conceals its position and concerns in the early stages of the enquiry process unnecessarily adding to the burden of its enquiries. Members of these bodies report that HMRC's officers lack an understanding of the basic legal concepts concerned, write so poorly that they are unable to communicate accurately their requests and position to the taxpayer and treat taxpayers generally as if they were dishonest and with unconcealed hostility and aggression. The result of such behaviour is that the vulnerable, and in particular the elderly, are so intimidated that there is a serious risk that they will make settlements which are not in accordance with the law.

THE BEST POLICY

The best way of minimising the risk of one's clients being treated in this way, and of resisting such treatment when it arises, is for a client to make with his return a full and considered disclosure of the type we have described. The costs of dealing with an ill-informed HMRC officer making ill-considered, blanket demands for information, both relevant and irrelevant, in a piecemeal fashion over an extended period is likely to be several times the cost of dealing with an enquiry where such a duly considered and comprehensive disclosure has been made with the return.

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CAUGHT IN A SPIDER'S WEB[18]

Innocence is not a sufficient defence

Taxpayers caught, by reason of their innocent errors, in the toils of a HMRC investigation often assume, at first, that their honesty and goodwill will protect them, that HMRC will conduct its investigation with due regard to the evidence which is produced to it and that it will not make demands which are disproportionate to the culpability of their errors or to the tax at issue.

The first job of any adviser advising such clients is to disabuse them of such notions and to prepare them for an investigation conducted purely with a view to raising money without regard to whether the burden placed on the taxpayer is proportionate or not. This article considers an example based upon an actual situation. The names of the persons involved have been changed and much detail omitted but the circumstances given are those which occurred. It is a cautionary tale.

The Infortunatus Group

A businessman, Mr Infortunatus, came to us for advice. He ran a successful trading group (the 'Infortunatus Group') all of the members of which were UK incorporated and resident. Its trading activities were strongly regulated and its major customers were local authorities so that its, and his, reputation for probity were essential to the continued success of the business.

The Infortunatus Group conducted its trade in various properties. Fifteen years ago Mr Infortunatus had been considering the acquisition of further such properties to be financed primarily with bank borrowing when he met a partner in 'AccountLLP', a firm of chartered accountants and chartered tax advisers.

The Arrangements

Mr Infortunatus was not domiciled in the UK although he had been resident here since 1982. In April 2004, on the advice of AccountLLP he put in place the following arrangements (the 'Arrangements'). He settled assets (the 'Settlement') on a corporate trustee (the 'Trustee') which was incorporated and tax resident in Guernsey to hold on trusts under which he had a life interest subject to broad flexible powers over capital and income which could be exercised by the Trustee in favour of a wider beneficial class consisting of Mr Infortunatus, his issue and their spouses.

In turn, the Trustee acquired the entire share capital of a company ('OffCo') incorporated and resident in the British Virgin Islands.

The Trustee borrowed money at interest and lent, also at interest, those moneys to OffCo. With them, and with the proceeds of further bank loans secured on the UK properties, OffCo purchased various UK properties (the 'Properties'). The Properties were let to a member of the Infortunatus Group, Infortunatus Ltd which used them in its trade.

The tax advantages and disadvantages of the Arrangements

Inheritance Tax

An offshore trust and company structure of this sort was at the time absolutely standard tax planning for non-domiciliaries. To those who had not been resident in the UK for a long time, they offered both Inheritance Tax ('IHT') and Capital Gains Tax ('CGT') advantages. To taxpayers, such as Mr Infortunatus, who had been resident for 17 or more of the 20 years up to and including the year the Settlement was made and were, therefore, treated as if they were

[18] A shorter article based on this longer version was published under the title 'Innocent Entanglements' in the 11th April 2019 issue of *Taxation* magazine

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domiciled in the UK for IHT purposes, the Arrangements offered no IHT advantages but they did offer a considerable CGT advantage.

Capital Gains Tax
Had a company in the Infortunatus Group, or Mr Infortunatus himself, acquired the Properties, any gain arising on a later disposal of one of them would have been fully charged to Corporation Tax or CGT. Neither the Trustee nor OffCo would be subject to CGT on gains arising on such disposals. The Settlor Charge, under TCGA 1992 s.86, would not apply to the Settlement. The Capital Payments Charge under TCGA 1992 s.87 would apply to the Settlement. If trust gains, (including gains realised by OffCo and attributed to the Trustee), were matched, with capital payments made to a non-UK domiciliary (who might, of course, be the settlor), although gains would be treated as accruing to the non-domiciliary thus reducing the unmatched trust gains of the trust, the non-domiciliary would not be chargeable to CGT on those gains.

With careful management, therefore, the Arrangements offered Mr Infortunatus complete freedom from CGT on gains arising on future disposals of the Properties.

Income Tax
The Arrangements, however, also created an Income Tax disadvantage.

Had a member of the Infortunatus Group acquired the Properties funded by interest bearing bank loans, the interest on the bank loans would have been deductible in arriving at the company's assessable profits.

In contrast, the Income Tax effect of the Arrangements was as follows.

Under the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA 2005') s.624, the income of the Settlement was to be treated as the income of Mr Infortunatus alone and Income Tax was chargeable on that income under s.619. Under Income Tax Act 2007 ('ITA 2007') s.721, an amount of income was treated as arising to Mr Infortunatus which was calculated by reference to the income of OffCo. Income Tax was chargeable on that amount (under s.720).

Under the Arrangements, the rent paid by Infortunatus Ltd was deductible in its accounts and formed the gross income of OffCo. In calculating the profits of the UK property business of OffCo, by reference to which the income treated as arising to Mr Infortunatus under ITA 2007 s.731 was calculated, a deduction was to be made for the interest OffCo paid on its loans from the Trustee and the bank. In calculating, however, the income of the Trustee which was treated as that of Mr Infortunatus under ITTOIA 2005 s.624, the bank interest paid by the Trustee was not to be deducted. The following example illustrates the Income Tax disadvantage which arose from the Arrangements as a consequence of this by reference to some simple figures.

Example
Infortunatus Ltd might have bought five Properties for £10,000,000 to use in its trade borrowing £10,000,000 from its bankers at an annual interest rate of 5% pa. It would then have received a Corporation Tax deduction for the annual interest of £500,000.

Instead, the Trustee borrowed £5,000,000 at 5% pa and lent it to OffCo. OffCo borrowed a further £5,000,000 from the bank at 5% interest and purchased the Properties for £10,000,000. OffCo let the properties to Infortunatus Ltd for an annual rent of £500,000.

All these transactions took place on market terms.

The Income Tax and Corporation Tax effects of these transactions were as follows:-

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	Income assessed on Mr Infortunatus under ITTOIA 2005 s.619 (£)	Income assessed on Mr Infortunatus under ITA 2007 s.720 (£)	Taken into account in the Corporation Tax computations of Infortunatus Ltd (£)	Aggregate effect (£)
Payment of rent to OffCo	0	500,000	<500,000>	0
Payment of interest by OffCo to bank	0	<250,000>	0	<250,000>
Payment of interest by OffCo to the Trustees	250,000	<250,000>	0	0
Bank interest paid by Trustee not deductible	0	0	0	0
Net (credit/debit) to tax computation	250,000	0	<500,000>	<250,000>

The net effect of the Arrangements is, therefore, to deny a deduction for the interest on the bank loans made to the Trustee. The Arrangements result in the aggregate amount deductible for tax purposes being £250,000 less than if Infortunatus Ltd had purchased the Properties.

The prior advice

Unfortunately, AccountLLP did not advise Mr Infortunatus that he would be assessable under ITA 2007 s.720 in respect of an amount of income calculated by reference to the income of OffCo or that he would be assessable under ITTOIA 2005 s.619 as if the income of the Settlement were his.

He assumed that the Arrangements did not offer an Income Tax advantage because he had not been told by AccountLLP that they did but it did not occur to him that they would create a disadvantage or that he would be taxed on merely hypothetical income, being income which actually arose to the Trustee (assessable under ITTOIA 2005 s.619) and income which did not exist in reality at all (the income assessed under ITA 2007 s.720). He assumed that the profits of the UK property business would be charged to tax on OffCo as UK source income and that, as the life tenant of the Settlement, he would be charged to Income Tax on any income of the Settlement net of expenses including interest paid.

He, and OffCo, submitted self-assessment returns on this basis for all years from 2004/05 to 2012/13. The Settlement in fact never had a surplus of interest received over interest paid and so no entries were made in respect of the Trust on his tax returns. For every year, OffCo made a net profit on its UK property business and submitted self-assessment returns accurately reflecting that profit.

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In 2008, having become aware that there were to be significant changes to the taxation of trusts, Mr Infortunatus took taxation advice in respect of the Arrangements from an expert firm of solicitors, 'LawCo.' They explained the IHT and CGT effects of the proposed changes on the Arrangements but did not mention Income Tax.

In 2014, prompted by a standard circularisation letter from the Trustee in respect of exchange of information arrangements, Mr Infortunatus asked his taxation agent, a high street firm of chartered accountants ('HighstreetCo') whether he had to report any income in respect of the settlement on his self-assessment return. HighstreetCo advised that he would be assessable only on the net income of the Settlement and, as the Settlement had always had a net deficit on its income account, there was no amount which needed to be included on his return.

<u>The first indication that income might have been incorrectly omitted</u>

So, by the end of 2014, Mr Infortunatus had taken advice from three separate professional firms on the Arrangements, two of whom had a considerable degree of specialist expertise in respect of the areas of the taxation relevant to them, and not one of them had mentioned that he had a liability to tax under both ITTOIA 2005 s.619 and ITA 2007 s.720.

In April 2015 Mr Infortunatus received a marketing approach from one of the Big Four firms of chartered accountants ('Big Four Co'). The approach was primarily an attempt to sell the firm's auditing and Corporation Tax services to the Infortunatus Group but in one meeting it was mentioned that Mr Infortunatus might have a liability to Income Tax in respect of the income of OffCo although the nature of the putative charge was incorrectly described.

Mr Infortunatus did not take up the Big Four Co's offer of its services but he determined that, when his returns were prepared, he would obtain further advice in respect of the Arrangements.

<u>The Enquiry</u>

Before he did so, in November 2015 HMRC raised an enquiry into Mr Infortunatus' 2013/14 return asking questions on some routine matters which did not concern the Arrangements.

This prompted him to engage our advice in respect of the Arrangements. We immediately advised that it appeared likely that assessable income had been omitted from his previous returns. On our advice, in January 2016, Mr Infortunatus alerted HMRC to this possibility and informed it that he had engaged us to investigate the matter. Obtaining all the relevant factual information took some time as did our analysis of the relevant legislation but in August 2016 we submitted a 241 page report (the 'HMRC Report') to HMRC setting out all the relevant factual information, including a full account of the advice Mr Infortunatus had received, and providing a comprehensive analysis of the application of the relevant law, including a consideration of all relevant issues of construction in respect of which there was any significant uncertainty.

At this stage, HMRC had been provided with every relevant fact and alerted to every relevant technical issue which subsequently proved of any significance in the matter. We concluded in the HMRC Report that income (the 'Omitted Income') had been omitted from his returns which should have been included in them in every fiscal year from the year when the Arrangements were first put in place, 2004/05, to the fiscal year 2013/14.

We also concluded, however, that the loss of Income Tax brought about by this omission had not been brought about by Mr Infortunatus either deliberately or carelessly and so the conditions of Taxes Management Act 1970 ('TMA 1970') s.36 were not satisfied in respect of the omissions with the result that the omitted income could be assessed only for the fiscal year 2012/13 and following years.

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Our client was not primarily concerned at the prospect of having to pay tax on the omitted income but at the prospect of having a penalty imposed on him which would enable HMRC to place him on the Tax Defaulters' Register which, in turn, might affect his reputation for probity. To a lesser extent he was also concerned at the possibility that substantial penalties might be imposed.

Four months later, in December 2016, HMRC opened an enquiry into the fiscal year 2014/15 and informed our client that enquiries for 2013/14 and 2014/15 were to be conducted under Code of Practice 8. Code of Practice 8 governs HMRC investigations where HMRC suspect that the taxpayer concerned has *'deliberately ….[tried]… to pay less than the correct amount or take advantage of a scheme or device to reduce a tax liability.'* HMRC requested certain further information which turned out to have no relevance to the matter but which we supplied in January 2017. At the end of February 2017, HMRC raised further assessments in relation to the fiscal years 2010/11 and 2012/13. We appealed against the 2010/11 assessment on the basis that it was out of time and against the 2012/13 assessment because it had been raised in an incorrect amount. At the same time we gave notice under TMA 1970 s.49A that we required HMRC to review the assessment but subsequently agreed that the deadline for the review might be postponed whilst we attempted to agree the matter with HMRC.

In early correspondence, HMRC asserted that our client must have omitted the Omitted Income from his returns deliberately and that, therefore, it could assess all the years from which omissions had been made from the first such year, 2004/05. In doing so it did not ground its assertions on the words of the legislation but on the much less precise wording of its manuals, referring repeatedly to 'deliberate behaviour', a phrase which does not form part of the statutory wording.

We carefully and patiently demonstrated, as we had done in the HMRC Report, that far from our client's omissions being deliberate it was quite clear that they had not even been careless because our client had taken every effort to obtain appropriate advice. That, having done so, he had not been advised that the Omitted Income was assessable. That, when he had become aware that he might have omitted income from his returns which should have been included in them, he had informed HMRC of the fact and he had expended large amounts of money and time to determine his correct liability.

During a telephone conference between us, the tax officer concerned and his line manager, the reason for HMRC's intransigence became apparent. It was clear that the manager had not bothered to acquaint himself with the facts of the case but had simply assumed that, as income had been omitted from our client's returns, that omission must have been deliberate. Having taking up that position, however, he was not willing to resile from it whatever facts and arguments were put forward on behalf of the taxpayer. From them on no progress could be made towards an agreement with HMRC. Wholly unnecessary information notices under FA 2008 Sch. 36 para. 3 were issued to AccountLLP and LawCo which only elicited information which was entirely consistent with the information which we had supplied. Exchanges of correspondence took place in which HMRC simply reiterated the same points which it had made before without taking any account of the further arguments and responses which we submitted to it. It is only fair to say that the HMRC officer concerned, very unusually in our experience of dealing with HMRC, was a model of courtesy and efficiency. He seemed to be constrained in his conduct of the case from the hasty view taken by his line manager and that manager's unwillingness to admit his error.

The review under TMA 1970 s.49A

In the face of HMRC's refusal to take account of our patient demonstration of the factual position, we required the review under TMA 1970 s.49A(2)(a) to proceed. We submitted representations under TMA 1970 s.49E, and then further representations in response to a

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submission made by the HMRC officer which again simply repeated HMRC's original assertions taking little account of the subsequent material we had submitted. Our representations included a careful point by point refutation of each and every assertion made by HMRC and were accompanied by an opinion given by the distinguished Queen's Counsel, Miss Hui-Ling McCarthy.

In late November 2017 the reviewer issued his conclusion. It was that Mr Infortunatus' omissions had been made neither deliberately nor carelessly, that the assessment for 2010/11 was, therefore, out of time and that the assessment for 2012/13 should be reduced to the correct amount which we had originally calculated. Even so we had to correct certain ambiguities in the conclusion and agree those corrections with HMRC with the result that the relevant amendments of the assessments were not issued until January 2018. Even after that, HMRC subsequently raised penalty notices in error which required further work from us to ensure that they were withdrawn.

The result

Our client had been subject to the stresses of an investigation for two and a quarter years, had expended enormous amounts of time in searching for information which was up to twelve years old and in reviewing our draft letters and submissions to HMRC and his costs in the matter were approximately equal to the amount of tax at stake in respect of the years which proved to be out of time for assessment. Nonetheless it had been worthwhile for him to bear those stresses, burdens and costs because the potential penalties were very significant and because, by ensuring that penalties were not exigible, we also ensured that our client's name would not be placed on the Tax Defaulters' Register. The time and costs he would have expended had he, and we, not taken an active role in determining his omissions and alerting HMRC to them would have been enormously greater.

It was as good a result as one could have hoped but what a sorry tale it is of the operation of our tax system upon a client who had taken every possible step to determine his tax liabilities and to account for them properly to HMRC.

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