
The Personal Tax Planning Review

A WAY FORWARD?

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This year's Philip Hardman Memorial Lecture given by David Goldberg QC has stimulated a good deal of discussion and comment. The theme for David Goldberg's address was "Between the Taxpayer and the Executive; Law's Inadequacy: Democracy's Failure". He argued (persuasively to some but not to others) that the power of the Inland Revenue over the citizen is excessive and their influence over the way the law is applied is inappropriate in today's tax environment. Some of his comments will have struck a chord with tax practitioners — and have struck a nerve with others. He suggested a number of proposals to control the Inland Revenue's powers of care and management over the tax system — including a lay tribunal to decide whether the Revenue's conduct in any particular case was acceptable on a common sense test.

I do not seek to defend or challenge any of the ideas which were put forward but merely to pick up one aspect where there is genuine and wide-spread concern among taxpayers and their professional advisors — and to suggest a comparatively simple solution.

It is a truth universally acknowledged that for small and medium sized businesses the Inland Revenue have awesome power. The position is not quite the same for large organisations. They are able to withstand the expense and aggravation of enquiries (of whatever depth) from the Inland Revenue and are able to call on the best professional advice to protect them. The problem is that although the same rules apply to everybody, the world is not made up of homogenous taxpayers — or tax inspectors. There are some weak and vulnerable taxpayers and there are some horrid and aggressive Inspectors of Taxes. When these two groups meet each other there will be injustice. It is no good pretending that all Inspectors of Taxes are really nice and gentle; most of them might be, but some certainly are not, and the taxpayer encountering an unpleasant version is going to come off second best. Conversely, it must be acknowledged that some taxpayers are

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thoroughly disagreeable and will act in a gratuitously unpleasant manner even to the most courteous Inspector of Taxes; furthermore, there will be others who will try and cheat the Inland Revenue out of tax which is properly due.

Everybody would agree that the Inland Revenue must have the necessary powers to deal with serious fraud and with smaller scale tax evasion. The skill and cunning of the perpetrators of such criminal activities will be considerable and the Inland Revenue must be provided with adequate resources for detection. However, I am sure everybody would also agree that the ordinary individual taxpayer struggling with his tax affairs ought not to be treated in the same way as the serious fraudster. Some rules are designed theoretically to differentiate between the two by, for example, placing restrictions on the use of the most intrusive powers of the Inland Revenue, but in reality that does not even begin to deal with the problem. What happens if the Inspector thinks that there might be something wrong or if he finds that some error has been made and he is not sure whether the error is innocent or deliberate. The answer is that he uses his discretion, having regard to the powers available to him. Those powers must be enough to find out whether his discovery is the tip of an evasive iceberg. In the vast majority of cases the Inspector will conduct his enquiries reasonably and will treat the taxpayer with courtesy and respect whilst explaining what he thinks may be wrong. Such cases are settled without animosity every day.

Sometimes, however, it is not like that. Sometimes things get out of hand. It may be the fault of the taxpayer; he might not be unfailingly polite and may prefer to express himself in a forthright fashion. Human nature being what it is, the Inspector is likely to respond by an inflexibility of approach and an express or implied demonstration of what he can do to the taxpayer if he wants to. One could say that this should not happen. Of course not, but it does and it always will. If the Inland Revenue pretend that it does not, they do themselves no credit. But equally, it does not happen all the time and those who suggest that it does are not being fair either.

It is regrettable that some members of the public are rude and badly behaved towards Inspector of Taxes. However, that is all it is; a matter of regret. It has no bearing whatsoever on their tax liability — or at least it should not. Ordinary people will often express themselves robustly, without fear or favour; that is what we call freedom of speech. On the other hand, aggressive and menacing behaviour by an Inspector of Taxes is not just regrettable — it is unacceptable. Inspectors are public servants and are obliged not to abuse the powers vested in them. The extensive Inland Revenue training will doubtless emphasise how Inspectors should conduct themselves and how their powers should be exercised, which is obviously how most Inspectors carry on. However, training does not stop nasty Inspectors from being nasty or from abusing their powers — indeed, it just highlights the powers at their disposal. In the real world nothing will prevent such characters from behaving badly, except a system which in practice and not just in theory,

makes such conduct unprofitable. Unfortunately the system does not do so and to that extent I suggest the system should be changed.

A crucial point is the onus of proof. At the moment, as everybody knows, once an assessment has been validly made it will stand good unless the taxpayer shows to the satisfaction of the Inspector or the Commissioners on appeal that, on balance of probabilities, the assessment is excessive. The assessment must be properly made in the first place but Inspectors are entitled to make assessments to the best of their judgment and they are faced with little practical difficulty in doing so. The effect of this is that the Inspector can make an assessment and invite the taxpayer to prove that it is wrong. He need do nothing further. The inexperienced taxpayer will be wholly incapable of proving the necessary negative — even the professionally represented taxpayer will frequently be in some difficulty. The result, which occurs all too often and about which the Inland Revenue ought to be deeply ashamed (and some Inspectors are), is that the taxpayer will accept an adjustment to his profits of a modest amount knowing it is wrong, simply to avoid the professional costs of the argument which could be more than the tax at stake. He knows this is wrong, he knows it is unjust, he has contempt for the Inspector and contempt for the system. He merely makes a commercial judgment and pays up. All Inspectors know this and they can trade on it if they wish. Most do not wish to do so because they realise it is improper, but some bad ones do. This is one illustration of how the system rewards, and does nothing to inhibit, the improper use of the Inspectors' powers. That is not a good way to operate a tax system.

(It is true that the Inland Revenue will allow a tax deduction for the professional costs if no adjustment of profits is made; however, that is woefully unsatisfactory. For the Inland Revenue to contribute 24% to 40% of the professional fees if the Inspector is found completely and utterly wrong is not a proper solution — and anyway it merely encourages the Inspector to stick his heels in and ensure that there is a trivial adjustment; again, the incentive is the wrong way round.)

One answer to this particular problem would be simply to reverse the onus of proof. If the Inland Revenue wish to seek tax from a citizen, they should have to prove that the tax is owed — only on the balance probabilities, of course, but the onus should be on the Revenue to do so. It is sometimes said that only the taxpayer knows whether he has disclosed all his income and whether the assessment is right and therefore the onus should be on him. But that is no reason. In many cases the taxpayer will know very well that he has correctly disclosed all his income and that he does not owe any more tax — but the Inspector may not be satisfied. Where the Inspector has doubts, reasonable or otherwise, he can and will make enquiries. The Inland Revenue are hardly short of information powers so if they feel that the taxpayer has more income than he has disclosed in his returns, why should it not be up to the Inland Revenue to support that assertion by making whatever enquiries are thought to be necessary?

This does not of course compare very well with criminal code. If a person is suspected of a crime he is presumed innocent until his guilt is proved. Furthermore, his guilt must be proved beyond reasonable doubt. It is perhaps unobjectionable that in tax cases the civil standard should apply, but even in civil cases the general rule is that he who asserts must prove. The protection afforded to the citizen in criminal matters (which is jealously and increasingly guarded and improved) is conspicuously absent in tax matters, even when the subject matter involved is analogous to (if not actually) a crime. This appears to be the result of some inverted logic which regards the taxpayer as the one making the assertion which needs to be proved — namely that the assessment to tax is wrong. This is clearly nonsense. For the taxpayer to be presumed guilty is widely regarded as grossly unfair and if the Inland Revenue are serious about improving their image, this should be a prime candidate for reform.

A switch in the onus of proof should not significantly affect the ability of the Inland Revenue to collect tax. However, if it were to do so, this would simply emphasise how badly the change was needed. More importantly, it would deprive those Inspectors of Taxes who are disposed to abuse their powers of one of their principal weapons. We would be left with a situation that if an Inspector wishes to charge tax he would have to prove that the tax was owing. Is that so awful? Indeed, is that not exactly what should happen?

Such a change would not necessarily deal with all (or perhaps any) of the points highlighted by David Goldberg — some of which are hotly disputed by the Inland Revenue. However, it would create greater fairness and the tax system would be more widely accepted as being fair by the general body of taxpayers. For these reasons alone, it would seem to be in everybody's interest for there to be a change.