



HM TREASURY

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19 October 2009

Mr Nigel Jagger

Information Rights Unit

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Ref: IRU9/805, 806,813 and 822
CEU email /21505 & 21475 & 21467 &
21462/2009

Re: Freedom of Information Act 2000: Requests for information on section 58 of the Finance Act 2008:

- "Government Minister misled about the true intention of s58 FA2008";
- "When did HMT first learn of the scheme";
- "Retrospection was signalled well in advance"; &
- "Did Jane Kennedy get it right?"

Dear Mr Jagger,

Thank you for your enquiries dated the 19th and 22nd September 2009. I am treating all four of your requests as requests under the Freedom of Information Act 2000 (FOIA).

2. Request of 19th September timed at 09:53 – our reference 9/806

You asked us:

- To publish any information we have that confirms one way or another a statement made by the then Financial Secretary to the Treasury, Jane Kennedy, in debate in Finance Bill Committee on 22 May 2008 with regard to the measure that became section 58 of the 2008 Finance Act. The statement read:

"I hope I get this right. It is because HMRC has not consistently made the case throughout the time period that the scheme does not work, that it is a deliberate and wilful avoidance scheme that flouts the 1987 legislation, and that it would be challenged."

3. FOIA provides a right to request recorded information from public authorities. Public authorities are obliged to confirm whether or not they hold particular information and, if they do hold such information, to disclose it to the requestor unless certain specified exemptions are engaged. As you are aware from our earlier correspondence the Treasury does hold background information, briefing, and submissions on the Finance Bill clause that became section 58. Whether or not the information that we hold could be said to "confirm one way or another" the accuracy of a particular statement made by a Minister in the course of a debate would require a subjective judgement on the part of officials. We do not think that under the Act it would be appropriate for us to make such judgements.

4. We note that the Financial Secretary's comments responded to a question about why this measure should be retrospective. We would suggest that the reading of the rest of the relevant debate provides a clear indication of the overall arguments being made in relation to this decision.



INVESTOR IN PEOPLE

To help you locate this the relevant link to the Hansard records of this particular section of the 2008 Finance Bill Committee can be found at:

<http://www.publications.parliament.uk/pa/cm200708/cmpublic/finance/080522/pm/80522s01.htm>

5. Request of 19 September timed at 11.19 – our ref: 9/805

You asked us:

- To publish details of when and how the Government “signalled well in advance” that the tax avoidance scheme covered by section 58 of the Finance Act 2008 would be closed retrospectively.

6. The quote you highlighted comes from the Finance Bill Committee debate. We consider that a reading of the rest of the record of the debate provides the wider context within which this statement was made.

7. As the Minister stated in the debate, previous attempts to undertake tax avoidance through the abuse of treaty provisions relating to double taxation had been dealt with through retrospective action. This previous action provides a clear signal as to how the Government would deal with such matters in the future. Moreover, HMRC believed that individuals attempting to utilise these schemes knew that they were undertaking an action that was a clear and deliberate breach of the law. To assist you, I have provided below a number of relevant excerpts from the debate:

- “Users of the scheme have deliberately tried to frustrate the will of Parliament, and they will have been aware that Parliament had closed down similar schemes 20 years ago and with retrospective effect.”
- “Tax avoidance is unfair to the great majority of taxpayers who pay their fair share. We discussed the nature of avoidance earlier. I can understand that people want to reduce their liability, but where a scheme is in clear and deliberate breach of the law, Parliament has a duty to act to protect the Exchequer. None of the scheme’s users were entitled to artificially avoid paying their fair share of tax at the expense of others. They ought to have been aware of the likely consequences of their wilful attempt to flout the law. The 1987 decision to tackle treaty abuse with retrospective effect was a clear signal.”
- “It [HMRC] strongly believes that this is an exceptional circumstance and that none of the scheme users could have been in any doubt that they were deliberately flouting the clear intention of the 1987 legislation.”

8. Request of 21st September, timed at 13:36 – our ref: 9/8133

You asked us:

- To confirm on what date the Treasury first learned of the existence of the scheme and how they became aware of it.

9. I am afraid that this is not a straightforward question to answer. As you may be aware, policy within the Government on tax avoidance is led by HMRC. Under this arrangement, whilst HMT is made aware of general areas of avoidance risk, and HMRC’s broad thinking on those areas, proposals to take action to counter specific schemes will generally only be discussed in the run up to a specific fiscal event, in this case Budget 2008.

10. From the material that we have found in carrying out our searches of the information we hold following your various FOI requests I can confirm that HMT began its discussions on what became section 58 in late 2007. It is however not clear from this set of material when HMT first became aware of the scheme itself. It is possible that the department was made aware of this ^{specific}

scheme, or similar schemes, at an earlier date, but we estimate that it would breach the cost limit set for central Government departments to carry out the additional searches needed to identify whether, and if so, at what stage the Treasury was made aware of this specific scheme. The appropriate limit has been specified in regulations and for central Government it is set at £600. This represents the estimated cost of one person spending three and a half working days in determining whether the Treasury holds the information, and locating, retrieving and extracting the information. Under section 12 of the Freedom of Information Act departments are not obliged to comply with requests if they estimate that this limit would be breached. In this case we have identified that we hold over 14,000 documents stored in the period from 1 January 2000 alone that contain the terms 'tax avoidance' and 'double taxation'. We consider that it would breach the cost limit under the Act to check whether these contain information about the date the Treasury first learned of the existence of the scheme.

11. As noted above, HMRC have policy responsibility for tackling particular tax avoidance schemes. There are discussions between HMT and HMRC on general tax avoidance issues, but such discussions will not necessarily focus on the detail of a particular scheme.

12. Request of the 22nd September, timed at 16:50, our ref: 21505/2009

You asked us:

- Whether the Treasury had anything on record that supports or refutes the former Minister's (Former Financial Secretary to the Treasury, Jane Kennedy) claim that she had been told by officials that "very few would be affected" by the retrospective provisions of Section 58?

13. We cannot comment on what the former Financial Secretary may have said following her departure from the Treasury.

14. However I can confirm that, when advice was being given to the Minister prior to Budget 2008 on this issue, that advice included a clear statement of the number of cases that HMRC & HMT were aware of and where former tax claims would be automatically invalidated by the proposed course of action. The overall magnitude of the tax at stake was also clearly set out. Naturally specific information on individual taxpayers was not included, as this would have run counter to the HMRC's commitment on taxpayer confidentiality.

15. The assessment of the number of cases that would be likely to be affected by the retrospective provisions of section 58 was also contained within internal briefing that accompanied Budget 2008 and in briefing for the committee stages of Finance Act 2008.

16. The number of cases that HMRC were aware of in 2008, and the amount of tax this involved was also set out in the Finance Bill Committee debate on clause 55 on the afternoon of Thursday 22nd May 2008. To assist you in finding the relevant part of the debate I have quoted it below, and also provide an internet link to the relevant Hansard pages:

<http://www.publications.parliament.uk/pa/cm200708/cmpublic/finance/080522/pm/80522s01.htm>

Quote from Hansard of Finance Bill Public Committee – Thursday 22nd May 2008, PM, Column 376:

"The Committee might not be aware of the scale of the risk to the Exchequer as a result of this avoidance scheme. HMRC is aware of more than 2,000 scheme users, and it involves tax on £50 million a year – a not insubstantial sum"

Conclusion:

17. We have set out our response to each of your individual queries above. In relation to your first, second and fourth requests the Treasury does, as you know, have further background information and briefing relating to the clause that became section 58. We believe that we have identified all



relevant information directly relating to the measure that became section 58 in the course of dealing with the various FOI requests that you have made. As you are aware we consider that this information engages the exemptions listed below:

- i. Section 29 (1) (a) and (b) relating to information where release would or would be likely to prejudice 'the economic interests of the UK or of any part of the UK', or 'the financial interests of any administration in the UK.'
- ii. Section 35 (1) (a) covering information relating to the 'formulation and development of Government policy'.
- iii. Section 35 (1) (b) relating to 'Ministerial communications'
- iv. Section 36(2)(b)(i) and (ii) and (c) relating to information that would be prejudicial to the effective conduct of public affairs.
- v. Section 42(i) relating to information where a claim to legal professional privilege could be maintained in legal proceedings.

18. As we have explained, all of these exemptions are qualified exemptions and require us to balance the public interest between maintaining the exemptions and disclosure of the information. My response to you of the 15th September 2009 concerning your request for an internal review of our previous replies to your FOI requests on section 58 set out the competing public interest arguments at some length and I will not therefore repeat them here.

19. We realise that you will be disappointed by our response. We do recognise that there are clear public interest arguments in favour of releasing this information. In particular, we recognise that this measure has impacted on a number of people and those affected by the measure have an interest in understanding the basis on which the measure was introduced. In this respect we note that 24 people have written to the Treasury raising questions, under FOIA, in relation to section 58. We also understand that a number of people have written more generally to the Treasury about this measure and that a significant number of people have made representations to the Parliamentary Joint Committee on Human Rights.

20. Whilst we recognise and understand the concerns of those affected by this measure we are required to consider the balance of the public interest in a broad sense. In this case, whilst recognising that there are pertinent public interest arguments in favour of disclosure, we have concluded that they are outweighed by the strong public interest arguments in favour of maintaining the relevant exemptions.

21. We appreciate that you take, and may continue to take, a different view of how the public interest balance should be struck in this case. We would respectfully suggest that further correspondence about the underlying material held by the Treasury relating to section 58 is unlikely to alter this position and that these issues may now best be dealt with by way of a complaint to the Information Commissioner.

22. If you have any queries about this letter, please contact me. It will be helpful to us if you remember to quote the reference number above in any future communications.

Yours sincerely,



Kate Jenkins
Head Information Rights Unit

Your right to complain under the Freedom of Information Act 2000

If you are not happy with this reply, you may request a review by writing to HM Treasury, Information Rights Unit, 2/S2, 1 Horse Guards Road, London SW1A 2HQ.

Email FOI.responses@hm-treasury.gov.uk

Any review request must be made within 2 months of the date of this letter.

It would assist our review if you set out which aspects of the reply concern you and why you are dissatisfied.

If you are not content with the outcome your complaint, you may apply directly to the Information Commissioner for a decision. Generally, the ICO cannot make a decision unless you have exhausted the complaints procedure provided by the Treasury. The Information Commissioner can be contacted at: The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.



