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Dear Mr Webber

Freedom of Information Act 2000 (FOIA)

Thank you for your request, which was received on 7 February, for the following information:

"I refer to the oral evidence given to the Treasury Committee by
Jim Harra, Second Permanent Secretary and Tax Assurance Commissioner HMRC; Penny Ciniewicz, Director General, Customer Compliance, HMRC; Mary Aiston, Director, Couter Avoidance, HMRC on 30th January 2019.

This was reported and can be found at the following link.

http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/tax-enquiries-and-resolution-of-tax-disputes/oral/96049.pdf

In response to question 33, Ms Aiston said:

However, the legislation does provide that where that employer is offshore and no longer exists—in some of these schemes, the employer was purely an offshore construct set up as part of the avoidance scheme—in those sorts of circumstances, the legislation allows us to go to the individual who benefited from the scheme.

Can HMRC please provide a reference as to where this legislation exists? Specifically, where does the legislation refer to offshore or non existent employers?

In response to question 34, Ms Aiston said:

and the rest comes to them via an offshore trust in the Cayman Islands, or somewhere like that

We look after over 120 schemes and none of them have Cayman Islands connections. We suggest therefore that in the absence of evidence, Ms Aiston has used the Cayman in order to influence public opinion rather than supply an accurate answer. If this is incorrect, can HMRC point to and identify any contractor loan scheme in which the Cayman Islands hosted a trust?

In response to question 35, Ms Aiston said:

The intention of the loan charge is to ensure that these people who have gotten into disguised remuneration avoidance pay their fair share

Mr Stride MP, has often said that the loan charge is a new tax on a new source. Ms Aiston now concedes that it is far from this and instead a punitive and retrospective tax charge. Who is correct, HMRC or Mr Stride?

In response to question 42, Ms Aiston said:

We think that the typical settlement that an individual is facing is somewhere in the order of £13,000,

HMRC has published data previously saying that only a very small percentage of those facing settlement are amongst the lower paid, preferring instead to make unsubstantiated claims that those earning more than the average wage are being targeted. It now seems that, when convenient, this is inaccurate.

Which is correct?

At question 46:

Q46 Rushanara Ali: With respect, if you spotted a problem eight, nine or 10 years ago, you could have flagged this up to people to say, “You are in a scheme that you really should not be in”, and they could have sorted it out. Is that something you did?

Mary Aiston: Yes.

The House of Lords criticised HMRC for its lack of communication on this issue. Can HMRC point to any evidence that supports Ms Aiston’s assertion?

At questions 59, Ms Aiston said:

HMRC raised thousands and thousands of enquiries and assessments. It has litigated cases.

Can HMRC please send us a reference for those cases and explain how they relate to contractor loan schemes?”

Response

The Government has decided the charge on disguised remuneration (DR) loans is the right way to tackle the use of DR schemes to ensure DR scheme users pay their fair share of tax.

The charge on DR loans, legislated in Finance Act 2017, is not retrospective. It is a new charge, arising at a future date, on DR loan balances outstanding at that date. It does not change the tax position of any previous year, the tax treatment of any historic transaction, or the outcome of any open compliance checks. Its announcement at Budget 2016 provided scheme users with a three-year period to repay their DR loans, or to agree a settlement with HM Revenue and Customs (HMRC) before the charge takes effect.

I can advise that the £13,000 to which you refer was the median settlement figure from data available at that time.

HMRC has always been clear that disguised remuneration (DR) schemes do not work, warning against their use through our day to day contact with customers by letters, emails and telephone. We also raised awareness through our series of tax avoidance ‘Spotlight’ publications. You might be interested in Spotlights 5 and 6 in the link below:
https://webarchive.nationalarchives.gov.uk/20091102175030/http://www.hmrc.gov.uk/avoidance/spotlights.htm

You might also be interested in a written Ministerial statement by the Paymaster General (Dawn Primarolo) in Dec 2004 where she says that “This Government are determined to ensure that all employers and employees pay the proper amount of tax and NICs on the rewards of employment, however those rewards are delivered...” and “I am therefore giving notice of our intention to deal with any arrangements that emerge in future designed to frustrate our intention that employers and employees should pay the proper amount of tax and NICs on the rewards of employment.”
https://publications.parliament.uk/pa/cm200405/cmhansrd/vo041202/wmstext/41202m02.htm.

Tax is charged on employees’ earnings under Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and before that on emoluments, as defined, under Income and Corporation Taxes Act 1988.

In terms of who is chargeable, the income tax liability rests with the individual in the first instance, this being clear from s13 ITEPA 2003. Pay As You Earn (PAYE) is a collection mechanism which seeks to ensure that, by the end of the tax year, the correct amount of tax has been paid by individuals. The requirement to operate PAYE lies with the employer in the first instance and HMRC will pursue employers who have set up and used DR schemes for the tax that is due. HMRC will only go to the employee to settle their income tax liability in cases where it cannot reasonably be collected from the employer, for example where the employer is located offshore or is no longer in existence.

Regulation 80 of the Income Tax (PAYE) Regulations 2003 gives HMRC the power to determine the PAYE tax that ought to have been paid to HMRC but was not. Under Regulation 80, HMRC may serve a determination notice on the employer to recover the unpaid tax.

Once the Regulation 80 Determination is final and conclusive and 30 days have passed without payment being made in full or part, HMRC may consider issuing a direction under Regulation 81(4). This directs that the employer is no longer liable to pay the amount, or any part of that amount, of the tax due. The sums will instead be recoverable from the employee in accordance with the direction made.

In addition there are powers available to HMRC under s684(7A)(b) ITEPA 2003 to ‘switch off’ the requirement for the payer to account for PAYE where HMRC is satisfied it would be unnecessary or not appropriate for the payer to do so. That can include where the employer is offshore. In anticipation of the new Loan Charge, s689 ITEPA has been amended to specifically switch off the deemed employer provisions such that the liability will automatically transfer to the individuals who have received the loan as there is no UK-based employer to operate PAYE.

More information is available at: https://www.gov.uk/government/publications/disguised-remuneration-transfer-of-liability-technical-note/tackling-disguised-remuneration#transfer-of-liability

HMRC is aware that some individuals have had a DR loan originating from arrangements made where the Cayman Islands (amongst many others) is or has been a location for the vehicle used to facilitate or provide those loans and these will be affected by the 2019 loan charge. You have asked the department to identify these arrangements, whilst I can confirm that such information is held by HMRC it is exempt from disclosure pursuant to section 44(1)(a) FOIA.

You have also requested the details of relevant litigation, similarly whilst I can confirm that this information is held by HMRC it is exempt from disclosure pursuant to section 44(1)(a) FOIA.

Section 44(1)(a) of the FOIA, applies when the information requested is prohibited from disclosure by another piece of legislation.

In this instance, the Commissioners for Revenue and Customs Act 2005 (CRCA) section 18 specifies how the department must treat information as confidential and when it may be released. To determine whether the exemption applies, we are required to consider two questions at section 23(1) of the CRCA:

- is the requested information held in connection with a function of HMRC? and
- does the information relate to a "person" who is identified, or who could be identified from the information requested?

If, as in this case, the answers to both questions is "Yes", then the statutory duty of confidentiality (at section 18(1) of the CRCA) means the information is exempt under the FOIA. It also removes any possibility of disclosure under the FOIA on a discretionary basis.

The term "person" includes legal entities such as companies, trusts and charities, as well living individuals. (See Schedule 1 of the Interpretation Act 1978.)

I can advise that court decisions regarding tax avoidance cases are available at the links below:

First Tier Tribunal and Upper Tribunal:

http://www.financeandtaxtribunals.gov.uk/Aspx/default.aspx

Court of Appeal:

http://www.judiciary.gov.uk/judgments/

Supreme Court:

http://supremecourt.uk/decided-cases/index.shtml

This non-government website has all decisions in one place:

http://www.bailii.org/

If you are not satisfied with this reply you may request a review within two months by emailing foi.review@hmrc.gsi.gov.uk, or by writing to the address at the top right-hand side of this letter.

If you are not content with the outcome of an internal review you can complain to the Information Commissioner's Office

Yours sincerely,

Freedom of Information Team