

Fixing the Finance Bill Process

Read Chris Sanger's article (page 8 of Issue 987) on the Finance Bill process with interest. As a former Head of Business Tax Policy at HM Treasury, he is eminently qualified to comment on whether the Finance Bill process needs to change. We discussed this topic with him at the recent inaugural meeting of the Tax Practitioners' Group (see news item on page 3 of Issue 987). It was suggested that I should attempt to capture the mood of the discussion in this article.

Exit ESCs

Our starting point was the withdrawal of the extra-statutory concession (ESC) on equitable liability from April 2010 (there is a petition to save equitable liability at www.lexisurl.com/Lzye5, which the ever-vigilant Keith Gordon has submitted).

Following Chris Sanger's article on the Finance Bill process and the inaugural meeting of the Tax Practitioners' Group, George Gillham, McGrigors LLP, proposes a new approach to tax law development

strict statutory position is narrower than it had supposed (other commentators might date the death knell for ESCs to the decision of the Outer House of the Court of Session in *Al Fayed and others v Advocate General for Scotland* [2002] STC 910 – see paragraph 106); and in any case taxpayers are now subject to self-assessment, so any failure is *prima facie* the taxpayer's fault. The cynical might query the timing of this change: the decision in *Wilkinson* was back in 2005; and the change to self-assessment

the number of experienced and technically trained policymakers in the process of legislative development. Time-consuming and difficult issues with legislation are by their nature soluble: it is just that the legislative solutions are expensive to develop. Although it might be unpopular to suggest increasing staffing in any area of the civil service when the economy is collapsing around our ears, the resultant additional certainty would undoubtedly be welcome.

However, the legislative process already makes it difficult for Parliament to meaningfully debate the Finance Bill. Adding to the lengthy existing Bills could only make things more difficult.

We were less confident than Chris Sanger about the value of discussing clauses in detail in Finance Bill Committee. The debate in Committee is detailed but, I would argue, not necessarily in the right way. Whether or not interested external parties give briefings to the opposition, or civil servants give briefings to Ministers, the in-built governmental majority in Committee means that real discussion as to the merits of a clause (that is, discussion that might lead to its significant amendment or removal) is very unlikely. As such the process is not real debate on the clauses of the Finance Bill at all, but almost exclusively political points scoring; at best it provides ammunition for a *Pepper v Hart* challenge. If there was the opportunity for genuine debate of the rules at a policy level first it would be much better.

It might be more useful, therefore, if the discussion in Parliament is accepted to be more about policy and politics than technical implementation, and discussion about technical implementation is left

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Equitable liability is a concession which allows for the acceptance of time-barred returns and accounts for direct tax debts in instances where there was never a legal right to adjust the liability. The amount of the legal liability is not actually amended but the difference between the original liability and the excess amount is not pursued by HMRC. This was of particular use as a last resort for small businesses which had just got themselves into a hell of a mess.

As Dave Hartnett pointed out in response to a question at last week's *Tax Journal* Conference, 'The Future of UK Tax', HMRC's hands are tied on the withdrawal of this concession: the decision in *R v HMRC ex parte Wilkinson* [2005] UKHL 30 made clear that the scope of HMRC's administrative discretion to make concessions that depart from the

was far back in the mists of time (1995). But given that it is undoubtedly the case that many ESCs have to go, what do we replace them with?

There were traditionally two reasons for needing ESCs. First, they allowed HMRC to sidestep complicated situations that were just too time-consuming or difficult (and in either case therefore expensive) to put into legislation (I am not aware that anyone has done a study on the mean total cost of developing a page of the Finance Act: but my own experience tells me it is at least in the tens of thousands of pounds). Second, they allowed HMRC to deal with manifest unfairness created by a rigid application of the law.

Dealing with complexity

The first reason for needing ESCs could be dealt with in another way by increasing

to another forum. The obvious forum is a consultation process with the users of the proposed new law: the individuals and companies who would be affected, and of course the tax advisers who advise them. My own view is that when HMRC consultation with industry is done properly, with the debate not too sharply curtailed by time pressures, and the parameters correctly and honestly set out in advance ('we all know policy X is going to happen because Parliament has debated and approved the outline: let's get on with reviewing the detailed implementation so we can get the legislation right') it works very well.

Avoiding manifest unfairness

The second reason for needing ESCs is more complicated to address but still capable of solution.

It is possible to argue that guidance notes are the new ESCs. There has undoubtedly been a trend towards vaguer legislation, with guidance notes to explain what is meant by the vagueness. The recent rash of targeted anti-avoidance rules are prime examples of this trend. But legislation by fiat (which is what guidance notes amount to in these cases) is unacceptable for three reasons. First, less certainty results from the use of guidance notes: certainly there is a diminished ability to challenge or enforce the law against HMRC in the tribunals and courts. This could increase manifest unfairness, not reduce it. Secondly, guidance notes, because they are not subject to any parliamentary scrutiny, may not reflect the actual will of the people as expressed by Parliament. Thirdly, and this is related to the previous point, guidance notes can be updated. If they are, we run the risk of a situation where HMRC can move from arguing, as an aid to interpretation, what the intent of Parliament was at the time that the legislation was passed, to a situation where HMRC can argue that the intent of Parliament is a moveable feast. This would be an extremely unwelcome move. In this context, the practical difficulty (which is that updates to guidance notes which are not widely trailed make it more difficult to advise taxpayers on the interpretation of the law) is of only relatively minor importance.

The upshot of this debate is that while we agree with Chris Sanger that it might be useful to return the Pre-Budget Report to its original purpose, we suggest going further than that. Any proposal should allow for debate as to the implications of a policy in Parliament, the working up of detailed draft legislation at a sensible speed, and detailed consultation with external stakeholders,



George Gillham

before legislation is put on the statute book. To achieve this we suggest that changes to the tax system (as opposed to changes to rates) should be announced at one Budget and debated thereafter on the principles. Once the principles have been agreed, draft

would be to an extent self-policing, since if bad law got on to the statute book without challenge in consultation it would be interested parties' own fault.

There may be concern about the impact of this proposal on measures to counteract marketed avoidance schemes, always a necessary element of a Finance Bill. These have the effect of alerting the taxpayer to the existence of the possibility of the tax avoidance scheme and any delay in implementation could allow for the scheme to be more widely exploited. There is no difficulty with derogations from the process set out above to counteract significant tax losses, allowing anti-avoidance rules to take effect, as they do now, from the date of their announcement. Although for obvious reasons of certainty it is important that this is not the general rule for measures introduced under the new approach suggested above, at least it would mean that the anti-avoidance provisions were properly drafted when they entered into the statute books, and did not create more opportunities for avoidance than they removed.

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legislation could be worked up. This draft legislation could be released at the time of the Pre-Budget Report (renamed the Post-Budget Report perhaps?) and a consultation then undertaken as to the detail of that legislation. It could then enter into law in the following year's Finance Act.

Benefits of slower law-making

This new approach would have a number of positive effects. First the wasteful Budget Starter system could be scrapped. The only policies that would need to be worked up in significant technical detail would be the ones that were going to be adopted. Secondly, the gap between the date of announcement and the release of draft legislation would allow time for a decent first attempt at the wording of the legislation, potentially avoiding the necessity for hundreds of governmental amendments at late stages in the procedure. Thirdly, effective consultation could take place on the detail of the legislation, allowing for the views of stakeholders on the detail to be properly taken into account. Fourthly, it

There may also be concern, to return to the starting point of ESCs, that the tax system could not be fit for purpose if all that HMRC can do is rigidly apply the law. The answer to that is that it would be – so long as all stakeholders had participated in the process of making sure the detail of the law was right in the first place. Clearer legislation where the policy has been agreed in advance would mean more certainty. More certainty should mean fewer disputes between taxpayers and HMRC. The focus of HMRC's resource-constrained disputes teams could then be on quicker resolution of those issues that remain.

George Gillham (george.gillham@mcgrigors.com; 020 7054 2555) is a Senior Solicitor at McGrigors LLP, a member of the Tax Practitioners Group, and a former Tax Inspector and Policy Adviser at the Inland Revenue. The views above do not necessarily reflect those of McGrigors LLP.