

## **General Communication with Tax Authorities in friendly or unfriendly ways**

**Tax Commission – of course...!**

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## 1. Introduction

Tax authorities – surely each one of us had the pleasure to deal with one: as taxpayer at least with the tax authority of the country you are resident of, as a lawyer helping others in tax matters you might have had the chance to deal with the tax authorities of other countries as well. If the latter is the case you might have seen some differences in the behaviour of the different tax authorities. You might have realized that the tax authorities in some or even the majority of the countries do treat the taxpayers not as their customers or clients but rather as subordinates. In such cases the communications tends to be rather hierarchical and often results in administrative proceedings against the tax authorities with more or less success.

Other countries have realized that treating the taxpayer in ways like we know from the tale of Robin Hood and the Sheriff of Nottingham only results in the tax payers trying to circumvent their tax obligations. Some countries, thus, have not only reduced the taxes in their countries. They also made their tax authorities treat the taxpayers as their clients e.g. in offering the taxpayers the possibilities for tax rulings and trying to take a more tailored approach towards their taxpayers .

These – sometimes very significant – differences are what we are focusing on in this year's tax report: We want to show that there are big distinctions in the behaviour of and the dealing with the tax authorities in different countries both in the stage of an advance agreement on a tax position as well as in an objection or litigation phase. For this reason AIJA members from several countries around the globe were so kind to volunteer as national reporters for this report which is crucial for such a comparative topic.

The General Reporters would like to thank you all in advance for your contributions and are already very interested in the results of this year's annual congress session of the AIJA Tax Commission.

## 2. Questionnaire

*Note:* General assumption is discussions with the tax authorities regarding (corporate) income tax or indirect taxes. If a difference would apply in the treatment between either of these, please indicate in your report. Also, if there are different levels of tax authorities for different taxes or issues, please mark that in your report.

### 2.1 Communication general

How does the General Communication with the Tax Authorities take place?

- a. Is a direct contact in between the tax payer and the Tax Authorities possible/common/advisable?

*Yes, it is possible for the taxpayer to communicate with HMRC – the UK tax authority. HMRC will communicate with the taxpayer directly, unless the tax payer notifies HMRC that communication should be sent to an agent on his behalf. Large corporations will have an HMRC customer relationship manager assigned to them. Whether it is advisable for the taxpayer to communicate with HMRC directly will depend on the taxpayer and the complexity of the particular matter. Generally it would be better for the taxpayer to seek professional advice to determine how to proceed before responding to HMRC's communications.*

- b. If not, does the communication only take place via tax counsels?

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- c. How can the communication regarding special matters be described?

*In general a case worker who specialises in the specific tax will be assigned to the matter. The taxpayer (or his agent) will then liaise with that specific case worker.*

- d. Does it take place only in a written form or are meetings possible?

*It depends on the nature of the matter. If the matter is quite simple it will often be dealt with in writing. If the matter is more complex it is common to have telephone calls and/or meetings.*

- e. Can the behaviour of the Tax Authorities in your country be described as all dominant, cooperative, customer-oriented or otherwise?

*The behaviour of HMRC is affected by the level of risk involved in a matter and the behaviour of the taxpayer. HMRC review matters to decide the level of risk (i.e. extent of possible loss of revenue) involved for HMRC and this will influence the actions that follow. If the taxpayer has been involved in criminal activity or fraud HMRC's behaviour will be less understanding/accommodating than if they are dealing with a taxpayer who has made an innocent mistake.*

*HMRC is increasingly driven by the need to meet revenue targets at certain times of the year and this affects communications and decisions made by HMRC.*

## **2.2 Agreements between taxpayers and tax authority**

- a. Is there the possibility of a tax ruling and, if so, which costs can be expected?

*There is no general provision which allows for tax rulings/clearance. However, HMRC can provide advance clearance or approval in a number of different circumstances. Some of these circumstances are provided under statute and others are not. Non-statutory clearance or approval is possible under company migration rules, controlled foreign company rules and for business investment relief. Statutory clearance or approval is required for employee share schemes, certain pensions provisions and certain transfer pricing agreements.*

*In the case of VAT, HMRC will provide clearance in complicated transactions where there is uncertainty as to how the legislation should apply. HMRC is currently participating in the trial of the VAT ruling requests for complex cross-boarder matters. This trial lasts until 31 December 2014. If a request made under this trial is accepted the relevant, participating member states will consider the issues "but there is no guarantee that they will agree on the correct VAT treatment of the situation envisaged".*

- b. What is the average time frame to get a tax ruling done?

*For this question and the remaining questions in this section the answer varies between each type of agreement.*

- c. Are these consultations binding and, if so, which possible remedies do exist?

- d. Once a tax ruling between all the parties concerned has been achieved, can one rely on it?
- e. What is the exact legal status of a tax ruling?
- f. Is it common in order to get a tax ruling that the tax payer has to give up certain rights or explicitly agree to e.g. information exchange?
- g. Is a tax ruling a public document or will it be treated confidentially by the tax authority? Does the taxpayer have an obligation to keep it confidential?

### **2.3 Remedies against decisions of the Tax Authorities**

- a. Is it common that one has to litigate if a decision has been made by the Tax Authorities and which remedies do exist?

*In the case of indirect taxes, there are two options available when a taxpayer receives a decision. Within 30 days of receiving the decision the taxpayer can ask for HMRC's decision to be reviewed by an HMRC officer who was not involved in the original decision. The officer will review the matter and try to respond within 45 days. If the taxpayer does not agree with the decision of the reviewing officer the taxpayer can appeal to the tax tribunal. Alternatively (apart from in a few limited circumstances), the taxpayer can skip the review and can apply to the tax tribunal straightaway.*

*In cases relating to corporation tax, if a taxpayer disagrees with a decision made by HMRC the taxpayer can send a written appeal to HMRC. Many appeals are settled at this stage. If the appeal is not successful, the same case review and tribunals options as described above are available.*

- b. Is there the possibility of addressing a court or is this an administrative procedure?

*If the taxpayer asks for a review of the matter it is an administrative procedure. However, if the matter goes to the tax tribunal the tax payer can address the tribunal.*

- c. Which costs are to be expected in such a case?

*It is difficult to say as it depends on the complexity of the issues and the amount of tax involved. A complex matter may result in a 5 day hearing, the involvement of solicitors, barristers and accountants to prepare and present the case, plus witnesses to attend the hearing and can cost tens of thousands of pounds. In a straightforward matter a taxpayer may choose to represent himself and keep costs to a minimum.*

- d. Is it compulsory to have a lawyer in case of any remedy?

*A taxpayer may choose to represent himself at the tax tribunal.*

- e. What timeframe can be expected in case of a remedy/litigation?

*If a taxpayer chooses to have his file reviewed he can normally expect a response within 45 days. However, if a taxpayer goes to the tribunal, the timeframe will be affected by the length of hearing required and how quickly it can be listed (ie. a date being set for the hearing). For a five day hearing it may take 9 to 12 months to set a hearing date.*

- f. Is it possible to postpone the payment of the tax debt as assessed by the tax authority until the end of a pending litigation with the tax authority? Will the tax authorities require guarantees for the postponement (Bank guarantees, mortgages etc.)?

*Currently, a taxpayer does not generally have to pay the tax liability until a decision has been reached. However, the taxpayer may decide to make a payment to HMRC to stop any further interest accruing. There are currently proposals for accelerated payment which will require taxpayers to pay liabilities before a decision has been reached.*

- g. Is it possible that the tax authorities submit a report to the public prosecutor to investigate on possible criminal tax offences and under what circumstances?

*HMRC generally deals with tax fraud using civil investigation procedures as they are considered to be more cost effective. However, HMRC has a discretion to conduct a criminal investigation for certain offences. The offences include those involving:*

- *organised criminal gangs attacking the tax system or systematic frauds where losses represents a serious threat to the tax base;*
- *individuals who hold a position of trust or responsibility;*
- *materially false statements or materially false documents are provided in the course of a civil investigation;*
- *where deliberate concealment, deception, conspiracy or corruption is suspected;*
- *money laundering with particular focus on advisors, accountants, solicitors and others acting in a 'professional' capacity who provide the means to put tainted money out of reach of law enforcement;*
- *a perpetrator who has committed previous offences / there is a repeated course of unlawful conduct or previous civil action;*
- *evidence of assault on, threats to, or the impersonation of HMRC officials; and*
- *a link to suspected wider criminality, whether domestic or international, involving offences not under the administration of HMRC.*

*For a limited number of fraud offences, such as bogus VAT registration fraud, HMRC will not consider the civil fraud investigation procedure.*

- h. Is it possible to include a clause in an agreement to automatically amend this agreement in accordance with the outcome of a discussion or litigation with the tax authority (e.g. if an “at arms length payment” is not accepted as such by the tax authority or if interests are held to be dividends or a loan is seen to be a gift)?

*Careful consideration should be given to using such a clause as it may impact the strength of arguments put forward to HMRC.*

## **2.4 Sanctions**

- a. What is the statute of limitations for tax related matters?

*In general, there are three main time limits (with some specific variations in relation to certain taxes). The main time limits are:*

- *4 years – to make an assessment to recover tax that has been under-assessed or under declared or over-repaid.*
- *6 years where tax has been paid but revenue has been lost as a result of careless behavior of the taxpayer or the person acting on their behalf.*

- 20 years – where the revenue was lost as a result of deliberate behavior or the taxpayer has failed to meet certain obligations.

b. What is the typical sanction/amount of fines in your jurisdiction? Is there a different fine level for direct or indirect taxes?

*Like the limitation period, the level of penalties applied is affected by the behavior of the taxpayer and the action/failure to act which has given rise to the charge.*

*In the case of VAT, if a deadline is missed the penalty takes into consideration the level of turnover of the taxpayer (over/under £150,000), whether other defaults have been made in the previous 12 months and then the penalty is calculated as a percentage of the VAT due. For example, if the turnover is over £10,000 and the taxpayer made four defaults in the previous 12 months the taxpayer must pay 10% of the VAT due.*

*If an inaccurate VAT return is submitted then HMRC will issue a penalty after a decision has been reached about the correct tax position. The penalty for an inaccurate return is affected by the reason the error was made and whether the taxpayer makes a prompted or unprompted disclosure (see table below). For example, if the mistake was deliberate and concealed the penalty can be between 50 – 100% of the tax due.*

<b>Reason for the error</b>	<b>Disclosure of the error to HMRC NB A disclosure is unprompted if HMRC are told about the issue before the taxpayer believes HMRC are aware of it.</b>	<b>Minimum penalty (as a percentage of the tax)</b>	<b>Maximum penalty (as a percentage of the tax)</b>
<b>Careless</b> (the taxpayer fails to take reasonable care)	Unprompted	0%	30%
	Prompted	15%	30%
<b>Deliberate</b> (the taxpayer gives HMRC a document which he knows contains an	Unprompted	20%	70%
	Prompted	35%	70%



inaccuracy)			
<b>Deliberate and concealed</b> (the taxpayer gives HMRC a document which he knows contains an inaccuracy and he has tried to hide that inaccuracy)	Unprompted	30%	100%
	Prompted	50%	100%

*The same type of procedure applies to the underpayment of corporation tax or the inaccurate submission of company returns (see the table below)*

Type of error	Penalty range for unprompted disclosure	Penalty range for prompted disclosure
Careless	0% - 30%	15% - 30%
Deliberate but not concealed	20% - 70%	35% - 70%
Deliberate and concealed	30% - 100%	50% - 100%

- c. Is it possible for a taxpayer to prevent tax penalties to be imposed should he/she be able to prove her good faith or reasonable interpretation of the law?

*If the taxpayer can show 'reasonable care' was taken and the taxpayer made an unprompted disclosure to HMRC it is possible for no penalty to be applied.*

- d. Is it possible to regularize your tax situation with reduced or no fines/sanctions?

*As the answer to b) above shows the level of penalty varies depending on the circumstances of the matter – particularly the behavior of the taxpayer. In recent years, there have been a number of disclosure facilities to enable the taxpayers to regularize the tax affairs with reduced fines. Examples include the Liechtenstein Disclosure Facility and amnesties aimed at specific professions such as plumbers and self-employed tutors.*

- e. May tax advisors/tax lawyers be held responsible by the tax authority for their advice to taxpayers?

*Provision was made in the Finance Act 2012 for HMRC to hold tax agents responsible if there is dishonest conduct. HMRC can investigate tax agents and if dishonest conduct is found or the agent refuses to supply documents requested HMRC can charge civil penalties and “name and shame” – i.e. publicise details of the tax agent.*

## **2.5 Tax information exchange**

- a. Does a tax information exchange on the EU level or OECD level happen and how does it take place?

*The UK exchanges tax information based on a number of different provisions. These include:*

- *tax information exchange agreements (‘TIEAs’) based closely on the OECD model;*
- *reciprocal and non-reciprocal TIEAs relating to the EU Directive on the taxation of savings income;*
- *under the joint Council of Europe/OECD Convention on mutual administrative assistance in tax matters;*
- *with other EU Member States under the terms of EU directives and regulations; and*
- *under the terms of some double taxation treaties.*

- b. Does your country enter into tax treaties that oblige to exchange information spontaneously, automatically and/or upon request?

*Yes, the UK does sign up to such treaties. Increasingly, treaties and current discussions are focusing on automatic exchange. This can be seen in the*

*FATCA intergovernmental agreement and FATCA style arrangements with other jurisdictions.*

- c. Is the tax payer notified in case information is exchanged with foreign tax authorities?

*It varies depending on the tool used, e.g. TIEA, and the specific provisions of the tool.*

- d. Can the tax payer object against an exchange of information?

*It varies depending on the tool used, e.g. TIEA, and the specific provisions of the tool.*