

## **Tax Law Review Committee: Submission to Tax Administration Framework consultation in respect of HMRC's 'reliance statement'**

### **Background**

1. As part of the government's 10-year tax administration strategy, *Building a trusted, modern tax administration system*, HMRC has issued a call for evidence<sup>1</sup> seeking views on how the tax administration framework could be updated and simplified to provide a better experience for individuals and organisations, enable opportunities to further reduce the tax gap, and help build greater resilience and responsiveness to future crises.
2. This paper forms part of a wider response by the Tax Law Review Committee (TLRC) to this call for evidence.
3. The Institute of Fiscal Studies (IFS) created the TLRC to keep under review the state and operation of tax law in the UK. The TLRC asks in particular whether aspects of the tax system are working in a satisfactory and efficient manner and, if not, what might be done to improve matters. The TLRC does not routinely respond to consultative documents or new developments but chooses themes of importance for longer term reviews. However, this sometimes involves reacting to current consultations where this fits into its work programme.
4. The TLRC has taken a sustained interest in tax administration, HMRC powers and taxpayer safeguards, as evidenced by its previous publications, which may be found on the IFS website <https://ifs.org.uk/research/TLRC>
5. For this reason, the TLRC has concluded that it should respond to the call for evidence on the TAF, within the wider context of the Government's 10-year strategy to build a trusted, modern tax administration system, published in July 2020.

### **Introduction**

6. Question 1 of the call for evidence asks the following: Are there reforms which HMRC should focus on for the framework review? Which changes should we prioritise to drive improvements in the taxpayer experience? Where is the tax administration framework creating challenges to the trust that taxpayers place in the tax system and HMRC's administration of it? How could the framework be reformed to address these challenges?

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<sup>1</sup> HMRC, *The tax administration framework: Supporting a 21st century tax system: Call for evidence* (23 March 2021).

7. Question 2 asks: Where is the tax administration framework creating challenges to the trust that taxpayers place in the tax system and HMRC's administration of it? How could the framework be reformed to address these challenges?
8. By way of response in part to these questions, we believe that HMRC should amend its 'reliance statement'.<sup>2</sup> This should fit more broadly with HMRC's agenda, as the body has agreed already to consult on the circumstances in which a taxpayer can rely on published guidance.<sup>3</sup> It must be stressed that the proposed changes do not require any changes in the law and can be accommodated within the existing tax administration framework.
9. After providing the executive summary, this note proceeds to provide background for the discussion, setting out what the law does and does not require when HMRC provides advice to taxpayers. The note moves then to consider what changes to HMRC's 'reliance statement' are mandated and desirable.

### **Executive Summary**

10. HMRC's fundamental role is to collect tax according to the law and pay out financial support to people who need it.<sup>4</sup> However, it is critical that this duty to collect taxes is balanced with the duty to manage the tax system. Important considerations such as taxpayer certainty, trust and economy of resource allocation should be taken into account.
11. We believe that HMRC's 'reliance statement' as currently formulated fails to strike an appropriate balance. There are also aspects of the statement that are either outdated or inexact.
12. We recommend that HMRC update its 'reliance statement' to make it clear that it applies both in respect of general as well as individual advice; there are avenues other than appeal available to taxpayers affected by HMRC advice; HMRC's duty is not so strict as to insist that taxes due must be collected even where HMRC has previously issued erroneous advice to taxpayers; and erroneous advice can be binding even where detrimental reliance is not proved. We also recommend that HMRC introduce a policy whereby changes in advice should be applied prospectively in general. No changes in legislation would be required to give effect to any of these proposed amendments to the 'reliance statement'.
13. It is suggested that HMRC's 'reliance statement' should be amended in order to read as follows (the deleted words have been struck through ~~with a line~~, whilst the added words are in red):

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<sup>2</sup> HMRC, *When you can rely on information or advice provided by HM Revenue and Customs* (4 March 2009), available at: <https://www.gov.uk/guidance/when-you-can-rely-on-information-or-advice-provided-by-hm-revenue-and-customs> [HMRC's 'reliance statement' (2009)].

<sup>3</sup> See HMRC, *Evaluation of HMRC's implementation of powers, obligations and safeguards* (4 February 2021), para 5.15, available at: <https://www.gov.uk/government/publications/evaluation-of-hmrCs-implementation-of-powers-obligations-and-safeguards>

<sup>4</sup> HMRC, *The tax administration framework: call for evidence*, p 27.

## Why HMRC provides information or advice

Information or advice from HMRC either in general form or provided to individual taxpayers gives you certainty on your obligations, liabilities, entitlements and the consequences of your transactions. You are not required to act on the advice.

## Limitations

~~The information or advice applies to the applicant~~ **If advice is communicated to an individual taxpayer, the information or advice applies to the applicant - even where the application has been made by the applicant's adviser. It only applies to the particular matter that was the subject of the request. Where it takes the form of guidance or Public Notices issued to taxpayers more generally, the information applies as stated within those documents.**

## Right of appeal

There is no general right of appeal against the advice or information HMRC provides, ~~except where rights of appeal are set out in law~~ **though there a small number of instances where a right of appeal in relation to HMRC advice is provided by law. However, if you believe HMRC is departing from its advice, you can complain directly to HMRC and thereafter to the Adjudicator's Office and the Parliamentary Ombudsman if you are still dissatisfied. Further, you may commence judicial review proceedings against HMRC.**

## Advice or information considered binding

~~To make sure that HMRC's information or advice can be considered binding, you~~ **When interacting with HMRC directly, you must set out all the relevant facts and draw attention to all the issues in order to ensure that HMRC's information or advice can be considered binding. For example, HMRC expects you to provide information on any relevant and related transactions. Where guidance is concerned, it is important that your case clearly falls within its terms and there is no qualifying language which, in particular, might suggest that you should approach HMRC directly with your query.**

As a result, advice or information may not be considered binding in scenarios such as the following:

- when the nature of the transaction on which HMRC advice given directly to a taxpayer changes after the advice has been given in a way that has a material impact on the transaction as a whole
- when you provide incorrect or incomplete information when requesting advice
- when the legislation on which the advice was based has changed before the transaction has been effected
- when a publication uses qualifying language indicating that taxpayers seeking more specific advice should contact HMRC directly, but the taxpayer does not do so

## **When advice or information ~~may not be binding~~ changes**

HMRC has a duty to collect the correct amount of tax as required by law at the time the transaction takes place. It remains your responsibility to take account of any **relevant judgments or changes in the law to the legislation** following the advice being given and the transaction taking place, **as HMRC will be bound to collect tax according to the prevailing law.**

Advice is based on the understanding of the law at the time it is given. Where this understanding ~~is changed by the courts~~ **changes**, HMRC must collect the correct amount of tax as required by the new understanding of the law. ~~This means that there are some circumstances in which HMRC's primary duty to collect tax according to law may mean that it can no longer be bound by advice it has given~~

**HMRC may decide however that it is appropriate not to apply the new understanding to past years or periods and to apply it instead prospectively only. In order to determine whether this is appropriate, HMRC will consider whether previous HMRC statements gave rise to a clear, unambiguous representation which did not contain any qualifications which would suggest that it was not capable of being relied upon. HMRC will also consider whether there is an overriding factor which suggests retrospectivity should apply such as that there is evidence of fraud or evasion in a particular case, or tax avoidance is involved.**

### **Examples**

~~Examples of when advice or information may not be binding include:~~

- ~~- when the nature of the transaction on which advice is given changes in a way that has a material impact on the transaction as a whole~~
- ~~- when you provide incorrect or incomplete information when requesting advice~~
- ~~- when the law relevant to the transaction for which the advice was given changes~~
- ~~- when a court or tribunal judgment changes the established understanding of the law on which the advice was based and your liability to tax for that period has not been finalised (an example might be where you haven't yet submitted your return or, if you've submitted your return, the opportunity to amend that return remains) - HMRC will, however, consider whether or not the original understanding should be taken into account~~

## **Where ~~HMRC provides incorrect~~ **HMRC information or advice is binding in law****

**Regardless of the policy on prospective-only changes, HMRC will be bound in law by incorrect information or advice it gives, provided that it's clear and you can demonstrate that:**

- you reasonably relied on the advice
- you made full disclosure of all the relevant facts **(in the case of advice communicated to an individual taxpayer)**
- **applying the law would result in your financial detriment or comparative unfairness, or there is some similar reason why it would be unfair to a high degree if HMRC were permitted to impose the correct charge**

Where HMRC gives advice and later tells you that it's wrong, ~~you'll have to~~ **you should** start working out your tax the correct way from then on. **Or you should disclose and explain to HMRC why you have continued to work out the tax in accordance with the previous advice.**

### Understanding the scope of HMRC's primary duty

14. HMRC's primary duty, as enshrined in section 5 of the Commissioners for Revenue and Customs Act 2005 (CRCA 2005) is to collect and manage taxes and credits due.
15. It is important to recognize that HMRC's primary duty does not amount to an absolute duty to collect all taxes due. The duty of management is also inherent in the section 5 obligation and that introduces a wide managerial discretion into the hands of HMRC.<sup>5</sup> To that end, it is best to understand HMRC's primary duty as to collect taxes due unless there is a legally defensible justification for not doing so. This is also HMRC's understanding, as evidenced by the followed statement in its Administrative Law Manual:<sup>6</sup>

The starting point for all considerations must be that the courts will seek to apply the law, in other words **HMRC should collect the correct amount of tax unless there are compelling reasons to not do so.**

16. In *IRC v National Federation of Self-Employed and Small Businesses Ltd*,<sup>7</sup> the House of Lords explained that resource limitation stood as a good justification in this respect for neglecting to collect taxes due. Lord Diplock explained that:

[T]he board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.

17. In the case of *Vrang v HMRC*,<sup>8</sup> Mr Justice Ousley agreed that personal hardship on the part of the taxpayer too could stand as a defensible justification. There, HMRC had developed a policy on remitting taxes due by those affected by the UK-Swiss Agreement on Cooperation in the Area of Taxation who could demonstrate that personal hardship had brought about an error on their part. For Ousley J, this policy 'undoubtedly' fell within HMRC's discretion.<sup>9</sup>
18. On the other hand, simply considering the underlying taxing provision(s) to be unfair does not suffice as a justification for neglecting to collect taxes due. In *R (Wilkinson) v IRC*,<sup>10</sup> the House of Lords rejected a taxpayer argument that HMRC should exercise its discretion to extend by way of 'concession' a relief for widows to widowers. After quoting Lord Diplock's above statement in the *National Federation* case, Lord

<sup>5</sup> *R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2011] UKSC 47, para 26 (Lord Wilson).

<sup>6</sup> HMRC, *ADML1400 - Incorrect Advice to Customers: Detriment* (13 January 2021), available at: <https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml1400>

<sup>7</sup> *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

<sup>8</sup> *Vrang v HMRC* [2017] EWHC 1055 (Admin).

<sup>9</sup> *Vrang* [2017] EWHC 1055 (Admin), para 123.

<sup>10</sup> *R (Wilkinson) v HMRC* [2005] UKHL 30.

Hoffmann held that it was not within HMRC's discretion to extend an 'allowance which Parliament could have granted but did not grant'.<sup>11</sup>

19. The fact that HMRC has made an error in a previous communication with a taxpayer can be a justification for collecting less than the full amount of tax, as will be elaborated in the following section. This is contrary to HMRC's current position, as set out in the 'reliance statement', that it 'must collect the correct amount of tax as required by the new understanding of the law' unless the taxpayer can demonstrate a legitimate expectation to be treated in line with the previous position, on which they had relied to their detriment.<sup>12</sup>

### **Collecting tax due where HMRC has issued incorrect advice**

20. By virtue of section 5 of CRCA 2005, and as aided by section 9 (which empowers HMRC to do anything which they think necessary or expedient in connection with the exercise of their functions, or incidental or conducive to the exercise of their functions), HMRC may lawfully provide advice to taxpayers about how it will treat the application of the tax code to particular facts. Moses LJ put the point forcefully in the Court of Appeal in *Gaines-Cooper* in a quote later endorsed by the Supreme Court.<sup>13</sup>

It is trite to recall that it is for the revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the revenue itself has long acknowledged that the best way is by encouraging co-operation between the revenue and the public

21. HMRC provides advice to taxpayers generally in various publications such as Codes of Practice, Statements of Practice, Extra-Statutory Concessions, Manuals (though these were originally directed towards tax officials), guidance notes, and in communications to groups of taxpayers such as in meetings with representative organisations. These general forms of communication will be grouped together as 'guidance' for present purposes.
22. HMRC also provides advice to individual taxpayers, whether that is orally through HMRC's helplines for instance or in writing through non-statutory clearances or statutory clearances.
23. The focus in this note is on advice which is not binding by virtue of statute (as is the case for instance with statutory clearances and some VAT notices<sup>14</sup>).
24. In short, advice may come in many forms and in many forums. Even direct answers to questions on Twitter and during Webinars by HMRC representatives can be

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<sup>11</sup> *Wilkinson* [2005] UKHL 30, para 21 (Lord Hoffmann).

<sup>12</sup> HMRC's 'reliance statement' (2009).

<sup>13</sup> *R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2010] EWCA Civ 83, para 12. See *Gaines-Cooper* [2011] UKSC 47, para 25 (Lord Wilson).

<sup>14</sup> See for instance HMRC, *Freight containers for export from the UK* (VAT Notice 703/1) (31 December 2020), available at: <https://www.gov.uk/guidance/vat-on-freight-containers-for-export-from-the-uk-notice-7031>

understood as advice insofar as the answers give clear guidance to taxpayers about their obligations and responsibilities.

25. It is right, as HMRC puts it, that taxpayers ‘should be able to have confidence in a tax administration system that is simple, clear, and easy to understand’.<sup>15</sup> Advice serves a crucial role in the tax system in that respect. It provides certainty to taxpayers, it can increase trust between taxpayers and the tax authority, and it is a pragmatic use of limited resources.
26. Advice also plays an important role for HMRC in that it communicates to taxpayers HMRC’s position, which taxpayers are encouraged to adopt. Failing to do so can result in heightened scrutiny from HMRC. If a taxpayer applies to HMRC for an informal ruling but disagrees with HMRC’s advice or adopts a different view of the law from that published as HMRC’s view, then (according to HMRC) that taxpayer should bring this to HMRC’s attention, such as by highlighting the disagreement in the ‘Additional Information’ space in their tax return.<sup>16</sup> More recently, some legislative measures have sought to give greater weight to HMRC’s advice and thereby further disincentivise taxpayers from disagreeing with HMRC published or communicated position. Section 211(3)(a) provides that a court or tribunal may take into account ‘guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into’ when determining any issue in connection with the general anti-abuse rule. The proposal currently being mooted that large businesses should be required to notify HMRC where they have adopted an ‘uncertain tax treatment’ uses triggers to determine where there is such uncertainty, many of which are engaged where taxpayers depart from HMRC advice.<sup>17</sup>
27. It is important to highlight however that **where HMRC realises that it has made an error in its advice, it is not bound *per se* by law to correct the error retrospectively.**
28. Bingham LJ (as he then was) in *R v IRC, ex parte MFK Underwriting*<sup>18</sup> rejected as too narrow the notion that any mistake on the part of the tax authority resulting in less tax collected than due would be in conflict with the statutory duty. The Inland Revenue had argued in the case that it ‘could not without breach of statutory duty agree or indicate in advance that it would not collect tax which, on a proper construction of the relevant legislation, was lawfully due’.<sup>19</sup> Bingham LJ responded as follows:<sup>20</sup>

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<sup>15</sup> HMRC, *The tax administration framework: call for evidence*, p 11.

<sup>16</sup> See HMRC, *Find out about the Non-Statutory Clearance Service* (25 March 2020), available at: <https://www.gov.uk/guidance/non-statutory-clearance-service-guidance> and HMRC, *Statement of Practice 1/06* (3 January 2006), available at: <https://www.gov.uk/government/publications/statement-of-practice-1-2006/statement-of-practice-1-2006>

<sup>17</sup> See triggers (a), (b), (c) and (f) as explained in HMRC, *Notification of uncertain tax treatment by large businesses – second consultation: Consultation document* (23 March 2021) at paras 3.9, 3.13, 3.16, 3.30, available at: <https://www.gov.uk/government/consultations/notification-of-uncertain-tax-treatment-by-large-businesses-second-consultation>.

<sup>18</sup> *R v IRC, ex parte MFK Underwriting* [1990] 1 WLR 1545 (DC).

<sup>19</sup> *MFK Underwriting* [1990] 1 WLR 1545, 1567C.

<sup>20</sup> *MFK Underwriting* [1990] 1 WLR 1545, 1568F.

I cannot for my part accept that the revenue's discretion is as limited as Mr. Beloff [for the Inland Revenue] submitted. In the *Fleet Street Casuals* case [1982] A.C. 617 the revenue agreed to cut past (irrecoverable) losses in order to facilitate collection of tax in future. In *Ex parte Preston* [1985] A.C. 835 the revenue cut short an argument with the taxpayer to obtain an immediate payment of tax. In both cases the revenue acted within its managerial discretion.

29. Indeed, despite what counsel may have argued in the case, Leonard Beighton, the Director-General of the Inland Revenue at the time, recognised that the Inland Revenue could stand by the prior assurances 'however unsound the rulings [given to the taxpayers] might have been'.<sup>21</sup>
30. Bingham LJ also noted in *R v IRC, ex parte MFK Underwriting* that general advice formally published by the Inland Revenue 'might safely be regarded as binding, subject to its terms, in any case falling clearly within them'.<sup>22</sup>
31. In *Gaines-Cooper*, HMRC also accepted that if its guidance did not accurately reflect the law, it would be bound by its terms irrespective of the discrepancy.<sup>23</sup> There, the Supreme Court accepted that HMRC could issue advice which contained an incorrect interpretation of the law if the reason for publishing the guidance in the first place was that it would assist in the aggregate with achieving compliance. Lord Wilson explained his reasoning as follows:<sup>24</sup>

Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (*R(Wilkinson) v Inland Revenue Comrs* [2005] 1 WLR 1718, para 21 per Lord Hoffmann), it is lawful for the Revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return.

32. The position is slightly different in respect of erroneous statements about future events. In *Al-Fayed v IRC*,<sup>25</sup> the taxpayers entered into a forward-looking agreement concerning the level of taxes for prospective years that would be paid to the Inland Revenue. The Inner House of the Court of Session in Scotland, the equivalent to the Court of Appeal for England and Wales, found that the agreement was *ultra vires* the Inland Revenue.<sup>26</sup> The fact that the agreement made no provision for material changes in circumstances was critical in rendering the agreement unlawful. As highlighted by the Court, the agreement was based on assumptions which could only hold by virtue of the good will and careful planning of the taxpayers. Once the tax position had been agreed, there was no incentive on the part of the taxpayers to actually stick to the agreement, such as for instance ensuring that remittances stayed below the agreed

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<sup>21</sup> Leonard Beighton, 'The Finance Bill process: scope for reform?' [1995] *British Tax Review* 33, p 41.

<sup>22</sup> *MFK Underwriting* [1990] 1 WLR 1545, 1569C.

<sup>23</sup> *Gaines-Cooper* [2011] UKSC 47, para 32.

<sup>24</sup> *Gaines-Cooper* [2011] UKSC 47, para 26.

<sup>25</sup> *Al-Fayed v IRC* [2004] ScotCS 112.

<sup>26</sup> *Al-Fayed* [2004] S.T.C. 1703, paras 69-82.

level or that the taxpayers would not become domiciled in the UK.<sup>27</sup> In short, the agreement purported to require the Inland Revenue to relinquish its investigatory and collection powers, even where the taxpayers' affairs or the transactions it would enter into materially differed from those previously presented. To that end, it is crucial to contextualise the *Al Fayed* decision and understand the limited range of instances in which it is relevant. This outcome for instance would not prevent HMRC from providing advice about how it would treat future transactions if those transactions are entered into in the same material manner as the taxpayer had advised HMRC they would be.<sup>28</sup>

33. In short, **the duty to collect and manage taxes does not compel HMRC to collect taxes due where a taxpayer seeks to rely upon earlier erroneous advice from HMRC. Instead, HMRC may lawfully choose to renege on its earlier advice or it may choose to stand by an earlier mistake (except for those rare instances identified at paragraphs 42-44 below where HMRC is bound by law to follow its advice).** *HMRC v Hely-Hutchinson*<sup>29</sup> is an example of the former. The Court of Appeal found that HMRC's decision to retrospectively apply a change in advice to the taxpayer was lawful. The Court highlighted that HMRC had 'good reason' to depart from the guidance because it was mistaken.<sup>30</sup> It was 'well established that it is open to a public body to change a policy if it has acted under a mistake'.<sup>31</sup> *UK Uncut Legal Action v HMRC*<sup>32</sup> is an example of the latter, albeit that it arises in the context of a settlement agreement rather than advice *per se*.<sup>33</sup> The taxpayer and HMRC had agreed to settle a long-standing dispute on an erroneous basis, with the consequence that the taxpayer was treated more favourably than ought to have occurred. The agreement was to be ratified by HMRC three weeks later and rather than seeking to settle the matter on the correct basis, HMRC decided there were good reasons to stand by the original settlement. The High Court found that HMRC did not act unlawfully.

### Justifying a prospective-only approach

34. There are sound reasons *not* to collect tax retrospectively where HMRC has previously issued incorrect advice, where that advice is **sufficiently specific** so as to be relied on (as opposed to generalised and abstract guidance). Whether the information relayed to taxpayers is sufficiently specific will depend on the circumstances – sometimes individual interactions can be couched in generalised terms so as to prevent a distinct commitment as to certain treatment by HMRC from arising, whereas conversely manuals and guidance issued publicly to taxpayers can be couched in discrete and precise terms.<sup>34</sup> As a guiding principle, and adopting a

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<sup>27</sup> *Al-Fayed* [2004] S.T.C. 1703, paras 74 and 81.

<sup>28</sup> See for instance *R v IRC, ex p Matrix Securities Ltd* [1994] 1 WLR 334.

<sup>29</sup> *HMRC v Hely-Hutchinson* [2017] EWCA Civ 1075.

<sup>30</sup> *Hely-Hutchinson*, paras 62-65.

<sup>31</sup> *Hely-Hutchinson*, para 72.

<sup>32</sup> *UK Uncut Legal Action v HMRC* [2013] EWHC 1283 (Admin).

<sup>33</sup> The fact that this is a settlement agreement case is slightly misleading – as there was no binding TMA 1970, s. 54 agreement on the 19<sup>th</sup> of November when the 'agreement' actually took place. The settlement agreement in the case, because it was to be ratified retrospectively, means that the case is one in essence an instance of a taxpayer seeking to hold HMRC to erroneous advice.

<sup>34</sup> For an example of a Manual which contains information which is technical and specific, see: HMRC, *RDRM35270 - Remittance Basis: Amounts Remitted: Mixed Funds: Remittances from mixed funds - collateral in*

formulation which has been established in the caselaw on legitimate expectations,<sup>35</sup> **information or advice will be ‘sufficiently specific’ where there is a clear, unambiguous representation which does not contain any qualifications which would suggest that it was not capable of being relied upon.**

35. Prospective-only changes in such advice provide certainty to taxpayers, which has consequent effects for instance on investment decisions. It accords with the logic of providing advice – if advice is to provide guidance to taxpayers, then taxpayers must have some assurance that the advice can be relied upon.<sup>36</sup> It generates trust between taxpayers and HMRC, assisting in the further development of a co-operative rather than combative relationship which should ultimately lead to greater overall compliance in the long-term. Finality is beneficial too for HMRC, as it allows the body to focus its limited resources on ongoing and future challenges. To that end, adopting a general policy of applying reformed advice prospectively only would accord with HMRC’s strategic objectives. Objective 2 is to ‘make it easy to get tax right and hard to bend or break the rules’, whilst objective 3 is ‘to maintain taxpayers’ consent through fair treatment and protect society from harm’.<sup>37</sup> Giving taxpayers the assurance that HMRC will follow its own advice does make it easier for taxpayers to ‘get tax right’ as they can be assured that they can indeed rely upon HMRC advice. It further will ‘maintain taxpayers’ consent through fair treatment’ as it leads to greater harmony and trust in the taxpayer-tax authority relationship.
36. The Tax Law Review Committee has previously written that it would be a positive step forward for a basis to be agreed on which various communications from HMRC could be used and relied upon.<sup>38</sup> We believe that a prospective-only approach where past advice was sufficiently specific could serve as this basis as it strikes a fair balance between, on the one hand, the need to protect the Exchequer and, on the other hand, taxpayer certainty, trust and economic use of resources.
37. Further, other jurisdictions such as Australia operate a policy of making prospective-only changes of approach where the Australian Tax Office (ATO) changes its approach on a point of law.<sup>39</sup> The ATO’s Practice Statement 2011/27 sets out the considerations which ought to be taken into account when determining whether it is appropriate to *not* take action to apply the ATO view of the law to past years or periods. As with HMRC, the ATO needs to make decisions about the allocation of ATO resources, but in doing so the ATO takes account not just of what might be an efficient use of those resources, but also what might be effective, economical and ethical.<sup>40</sup> This means giving substantial weight to broader considerations beyond a

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*respect of relevant debts* (16 March 2021), available at: <https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm35270>

<sup>35</sup> See *Gaines-Cooper* [2011] UKSC 47, paras 29-29 (Lord Wilson); *MFK Underwriting* [1990] 1 WLR 1545, 1569G.

<sup>36</sup> Tax Law Review Committee, *HMRC’s Discretion: The Application of the Ultra Vires Rule and the Legitimate Expectation Doctrine* (11 December 2014) para 2.12, available at: <https://www.ifs.org.uk/publications/7475>.

<sup>37</sup> HMRC, *About us*, available at: <https://www.gov.uk/government/organisations/hm-revenue-customs/about>

<sup>38</sup> Tax Law Review Committee, *HMRC’s discretion*, para 2.14.

<sup>39</sup> ATO, *Practice Statement Law Administration 2011/27* (29 October 2015), available at: <https://www.ato.gov.au/law/view/document?docid=PSR/PS201127/NAT/ATO/00001>

<sup>40</sup> ATO, *PSLA 2011/27*, para 13.

simple cost-benefit analysis, including the benefits to the tax system of administering the law in a way that promotes certainty and fairness in practice.<sup>41</sup>

38. In deciding whether there are circumstances which would make it appropriate to not take action to apply the ATO view of the law to past years or periods, the ATO official should:

(a) consider whether previous ATO publications and conduct could be reasonably seen as conveying a different view of the law

(b) consider the following relevant factors in deciding whether the ATO will not take action to apply its view of the law to past years or periods:

(i) whether the ATO became aware of the position adopted by taxpayers or an industry practice in applying the law (for example, through compliance activity) but did not challenge it within a reasonable timeframe having regard to the size of the risk

(ii) whether the taxpayers' position or industry practice can be reasonably understood from ATO statements on how to apply the law

(iii) whether a general administrative practice supporting the taxpayers' position or industry practice can be deduced from other ATO conduct

(iv) the time that has elapsed since the ATO's first awareness of the issue, publicly announcing it would challenge the position or practice and the time taken to finalise its view

(v) whether there is an overriding factor which suggests retrospectivity should apply such as that there is evidence of fraud or evasion in a particular case, or tax avoidance is involved

39. It would be inappropriate for present purposes however for the UK to adopt an approach which mirrors the ATO's policy. There are various references in the policy for instance to practices that have emerged following either ATO conduct or ATO acquiescence (see factors (i), (iii) and (iv) in paragraph 38 above).<sup>42</sup> These aspects of the policy are not related to ATO statements. To that end, this is not the time to discuss the advantages or disadvantages of safeguarding taxpayers where reliance is placed upon HMRC conduct or industry practice which follows HMRC actions and inactions<sup>43</sup> rather than statements.

40. In brief, there are compelling reasons why HMRC should consider *not* reneging on earlier, sufficiently specific advice. A prospective-only approach should focus on **whether previous HMRC statements gave rise to a clear, unambiguous representation which did not contain any qualifications which would suggest that it was not capable of being relied upon.**

41. Where, on the other hand, information or advice is provided by HMRC which is not sufficiently specific so as to give rise to reasonable reliance on the part of taxpayers,

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<sup>41</sup> ATO, *PSLA 2011/27*, para 13.

<sup>42</sup> These aspects of the policy were likely driven by the circumstances surrounding a particular case (*Macquarie Bank Limited v Federal Commissioner of Taxation* [2013] FCA 887) which precipitated the reformulation of the ATO's policy.

<sup>43</sup> The UK case of *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681 (CA) does touch upon these issues, however.

HMRC should not feel compelled to refrain from making changes. **However, in order to provide taxpayers (and tax officials) with as much certainty as possible, HMRC should ensure that wherever possible its information or advice is specific. Where it is not possible, HMRC should make it clear that its statements should not be relied upon.**<sup>44</sup>

### **Instances where a prospective-only approach is mandated**

42. The discussion heretofore of HMRC's discretion to generally adopt a prospective-only approach is entirely separate from a discussion of those rare instances in which HMRC will in fact be compelled *not* to collect taxes which are due because to do so would be to act unlawfully. This can most notably occur where a taxpayer can demonstrate that they have a legitimate expectation to be treated in line with HMRC's previous advice and that frustrating the expectation would be unlawful. Where HMRC believes that the advice was based on an erroneous understanding of the law, the taxpayer must be able to point to a persuasive countervailing reason as to why it would be inappropriate for HMRC to collect the tax due, such as that they have relied to their detriment on the previous advice or that it would be comparatively unfair to hold the taxpayer to the correct position as a similarly placed taxpayer did not suffer such a fate<sup>45</sup> or that there is some similar reason why it would be unfair to a high degree if HMRC were permitted to impose the correct charge.<sup>46</sup>
43. The doctrine of legitimate expectation can apply to both individual and general advice, though it is easier to gain protection from the doctrine in the case of individualised advice, as noted previously by the Tax Law Review Committee:<sup>47</sup>

The various forms of HMRC statement and practice have the potential to give rise to different levels of legitimate expectation. A specific and unambiguous clearance following a letter setting out all the relevant facts can be relied upon by the taxpayer concerned. In practice, the courts have been wary of straying beyond that to hold HMRC to statements made more generally

44. There are various instances also where statute prevents HMRC from collecting taxes which are later deemed to be due, such as where a dispute has been settled by agreement between HMRC and the taxpayer,<sup>48</sup> or where a binding advance pricing agreement is in place.<sup>49</sup>

### **Miscellaneous matters**

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<sup>44</sup> See a similar recommendation from Office of Tax Simplification, *Guidance for taxpayers: a vision for the future* (October 2018), p 36 that HMRC make clear when it is expressing an opinion, which will place a taxpayer in a vulnerable position if they seek to assert that they should be able to rely upon it.

<sup>45</sup> *R (Hely-Hutchinson) v HMRC* [2015] EWHC 3261 (Admin), para 43 (Whipple J). Although the decision was overturned on appeal, the Court did not reject Whipple J's decision that comparative unfairness in addition to detriment is a relevant consideration when assessing whether it is lawful to frustrate a legitimate expectation. See: *Hely-Hutchinson* [2017] EWCA Civ 1075.

<sup>46</sup> *R (Aozora) v HMRC* [2019] EWCA Civ 1643, para 60 (Rose LJ).

<sup>47</sup> Tax Law Review Committee, *HMRC's discretion*, para 2.10.

<sup>48</sup> Taxes Management Act 1970, s. 54.

<sup>49</sup> Taxation (International and Other Provisions) Act 2010, Part 5.

45. In terms of some miscellaneous matters, it is worth considering how any change of approach on HMRC's part towards prospective-only changes would interact with subsidy rules and whether there would be a risk that tax avoiders could use prospective-only changes to their advantage.
46. In terms of the UK's domestic subsidy regime, which is still in a nascent stage, the provisions of the EU-UK Trade and Cooperation Agreement<sup>50</sup> require both parties to maintain a subsidy regime which largely mirror the existing EU State aid rules.<sup>51</sup> It is highly unlikely that a prospective-only policy would fall foul of this Agreement. The Agreement makes allowances for what might be otherwise understood as a specific subsidy if it is justified by reference to 'administrative manageability'.<sup>52</sup> Further, a prospective-only policy would operate similarly in all material respects to State aid compliant tax amnesties. The EU Commission regards an amnesty as State aid compliant provided (i) it is open to all similarly placed taxpayers, (ii) there is no *de facto* preference for certain taxpayers or sectors, (iii) the tax authority does not have a power to increase the benefit to any particular taxpayer, (iv) verification requirements on the part of the taxpayer are not forgiven, and (v) it operates only for a short period to liabilities before a pre-defined date and which are still due at the time of the introduction of the amnesty.<sup>53</sup>
47. As for issues around tax avoidance, the benefits of a prospective-only policy can be withdrawn for those who seek to use it for tax avoidance purposes, just as occurs with respect to the ATO's policy<sup>54</sup> and as HMRC already does in respect of its statutory and non-statutory clearances regimes.<sup>55</sup> To that end, when it comes to deciding whether to apply changes prospectively-only, **HMRC should also consider whether there is an overriding factor which suggests retrospectivity should apply such as that there is evidence of fraud or evasion in a particular case, or tax avoidance is involved.**

### Updating HMRC's 'reliance statement'

48. With that background set, it is time to turn to HMRC's 'reliance statement':<sup>56</sup>

#### Why HMRC provides information or advice

Information or advice from HMRC gives you certainty on your obligations, liabilities, entitlements and the consequences of your transactions. You aren't required to act on the advice.

<sup>50</sup> See *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* [2021] OJ L 149/10, Title XI, Chapter 3.

<sup>51</sup> See principally Articles 107-108 TFEU.

<sup>52</sup> See *Trade and Cooperation Agreement*, Title XI, Chapter 3, Article 3.1.2(b).

<sup>53</sup> See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU [2016] OJ C 262/1, sec. 5.4.3.

<sup>54</sup> See ATO, *PSLA 2011/27* paras 5 and 14.

<sup>55</sup> HMRC, *How to apply for clearance or approval of a transaction from HMRC* (11 September 2019), available at: <https://www.gov.uk/guidance/seeking-clearance-or-approval-for-a-transaction>

<sup>56</sup> HMRC's 'reliance statement' (2009).

## **Limitations**

The information or advice applies to the applicant - even where the application has been made by the applicant's adviser. It only applies to the particular matter that was the subject of the request. Where it takes the form of guidance or Public Notices, the information applies as stated within those documents.

## **Right of appeal**

There is no general right of appeal against the advice or information HMRC provides, except where rights of appeal are set out in law.

## **Advice or information considered binding**

To make sure that HMRC's information or advice can be considered binding, you must set out all the relevant facts and draw attention to all the issues. For example, HMRC expects you to provide information on any relevant and related transactions.

## **When advice or information may not be binding**

HMRC has a duty to collect the correct amount of tax as required by law at the time the transaction takes place. It remains your responsibility to take account of any changes in the law following the advice being given and the transaction taking place.

Advice is based on the understanding of the law at the time it is given. Where this understanding is changed by the courts, HMRC must collect the correct amount of tax as required by the new understanding of the law. This means that there are some circumstances in which HMRC's primary duty to collect tax according to law may mean that it can no longer be bound by advice it has given.

## **Examples**

Examples of when advice or information may not be binding include:

- when the nature of the transaction on which advice is given changes in a way that has a material impact on the transaction as a whole
- when you provide incorrect or incomplete information when requesting advice
- when the law relevant to the transaction for which the advice was given changes
- when a court or tribunal judgment changes the established understanding of the law on which the advice was based and your liability to tax for that period has not been finalised (an example might be where you haven't yet submitted your return or, if you've submitted your return, the opportunity to amend that return remains) - HMRC will, however, consider whether or not the original understanding should be taken into account

## Where HMRC provides incorrect information or advice

HMRC will be bound by incorrect information or advice it gives, provided that it's clear and you can demonstrate that:

- you reasonably relied on the advice
- you made full disclosure of all the relevant facts
- applying the law would result in your financial detriment

Where HMRC gives advice and later tells you that it's wrong, you'll have to start working out your tax the correct way from then on.

49. This statement has not been substantially updated since 4 March 2009.<sup>57</sup> It is perhaps unsurprising then that in 2018, the Office of Tax Simplification called for HMRC to undertake a consultation on the circumstances in which a taxpayer can rely on published guidance and the extent to which a taxpayer will be subject to interest, penalties and the tax in dispute where guidance is found to be incorrect.<sup>58</sup> In response, HMRC are carrying out a consultation on the circumstances in which a taxpayer can rely on published guidance and the extent to which a taxpayer will be subject to interest, penalties and the tax in dispute where guidance is found to be unclear or incorrect.<sup>59</sup>
50. There are several aspects which *need* updating and there are parts which it would be desirable to update.
51. **First it is written from the perspective of reliance upon individual interactions between HMRC and a taxpayer.** For instance, it provides that for advice to be considered, the taxpayer 'must set out all the relevant facts and draw attention to all the issues'. This has no application in respect of advice which is communicated generally to taxpayers. There, instead, the issue is rather whether the advice is 'clear, unambiguous and devoid of relevant qualification'.<sup>60</sup> The examples provided too as to when advice may not be binding are not particularly attuned to general advice cases. It might be helpful to add an example such as 'when a publication is qualified to the extent that taxpayers seeking more specific advice should contact HMRC directly, but the taxpayer does not do so'.<sup>61</sup>
52. **Secondly, it neglects to mention that while taxpayers cannot generally appeal against HMRC advice or information,** other avenues such as through the Adjudicators' Office, the Parliamentary Ombudsman and judicial review are available.

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<sup>57</sup> HMRC's 'reliance statement' (2009).

<sup>58</sup> Office of Tax Simplification, *Guidance for taxpayers: a vision for the future* (October 2018), p 36, available at: <https://www.gov.uk/government/publications/guidance-for-taxpayers>

<sup>59</sup> See HMRC, *Evaluation of HMRC's implementation of powers, obligations and safeguards* (4 February 2021), para 5.15

<sup>60</sup> See *Gaines-Cooper* [2011] UKSC 47, para 29 (Lord Wilson).

<sup>61</sup> This would reflect some of the judicial comments in *Gaines-Cooper* [2011] UKSC 47, para 32 (Lord Wilson), para 64 (Lord Hope), para 66 (Lord Walker).

53. Thirdly, HMRC's position is that it *must* collect the correct amount of tax as required by a new understanding of the law. However, **it is not that HMRC *must* collect the tax due where there's been a change of understanding, but rather that it *may choose not to do so if there is a legally defensible reason for collecting less than the full amount of tax due.*** The fact that HMRC has provided advice based on the previous understanding does serve to generate such a legally defensible reason – taxpayer certainty, trust and economy of resource allocation are all advanced. Further, it would be desirable for HMRC to adopt a more differentiated policy setting out circumstances in which HMRC will apply a new understanding of the law prospectively only.
54. **Fourthly, its position on when incorrect advice will be binding does not reflect the legal position today, as it regards detrimental reliance as a condition of incorrect advice being binding.** Cases such as *R (Cameron) v HMRC*<sup>62</sup> highlight that detrimental reliance is not a necessary condition in tax cases, whilst the Court of Appeal in *Hely-Hutchinson v HMRC* accepted that comparative unfairness could suffice to render it unlawful to frustrate a legitimate expectation.<sup>63</sup> The position on the importance of detrimental reliance is in short more nuanced than HMRC's advice suggests. It is best summarised by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*:<sup>64</sup>
- It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest
55. Fifthly, the 'reliance statement' gives examples of scenarios in which advice or information may not be binding. However, the first three of those examples are of a different order from the final example. The first two relate to instances in which the information or advice relied upon is simply not relevant to the taxpayers' position because the transaction is materially different from that to which the advice related or because there was inaccurate information from the taxpayer which informed the advice. The taxpayer here is not in fact relying upon HMRC's advice or what advice HMRC would have given if appropriate information from the taxpayer had been provided. The third example relates to an instance in which the information or advice relied upon is simply not relevant anymore to the taxpayers' position because the law has changed. Legislative supremacy dictates this outcome.
56. It is entirely correct that HMRC should not considered itself bound in these three cases. As highlighted above (in paragraph 51), it would be useful also to add a further example to this list: where a publication uses qualifying language indicating that taxpayers seeking more specific advice should contact HMRC directly, but the taxpayer does not do so. To add clarity to the 'reliance statement', the examples should be moved to the heading '**Advice or Information considered binding**'.

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<sup>62</sup> *R (Cameron) v HMRC* [2012] EWHC 1174 (Admin).

<sup>63</sup> See for instance *Hely-Hutchinson* [2017] EWCA Civ 1075, para 73.

<sup>64</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, para 60.

57. However, the final example provided is that HMRC information or advice may not be binding where a judgment has changed HMRC's understanding of the law. This example should be removed, as it should be subsumed instead within the policy on prospective-only changes.
58. Finally, there are aspects of HMRC's 'reliance statement' which should be clarified in order to ensure that it does not mislead taxpayers. For instance, the text under the heading '**Right of appeal**' is awkwardly worded and does not stress how few instances there are where a taxpayer does have a right of appeal against HMRC in relation to its advice. The text under the heading '**Where HMRC provides incorrect information or advice**' meanwhile does not make clear that a taxpayer may continue to disagree with HMRC about whether its previous advice was a proper reflection of the application of law to particular facts. The text under the heading '**When advice or information may not be binding**' (which the paper recommends should be changed to '**When advice or information changes**') should be amended to clarify the different consequences for reliance by taxpayers on HMRC advice where there is a legislative change, where there is a judicial decision which changes the understanding of the law, or where there is a change within HMRC.
59. On the basis of the above, it is suggested that HMRC's 'reliance statement' should be amended in order to read as follows (the deleted words have been struck through with a line, whilst the added words are in red):

### **Why HMRC provides information or advice**

Information or advice from HMRC either in general form or provided to individual taxpayers gives you certainty on your obligations, liabilities, entitlements and the consequences of your transactions. You are not required to act on the advice.

### **Limitations**

~~The information or advice applies to the applicant~~ **If advice is communicated to an individual taxpayer, the** information or advice applies to the applicant - even where the application has been made by the applicant's adviser. It only applies to the particular matter that was the subject of the request. Where it takes the form of guidance or Public Notices **issued to taxpayers more generally**, the information applies as stated within those documents.

### **Right of appeal**

There is no general right of appeal against the advice or information HMRC provides, ~~except where rights of appeal are set out in law~~ **though there a small number of instances where a right of appeal in relation to HMRC advice is provided by law. However, if you believe HMRC is departing from its advice, you can complain directly to HMRC and thereafter to the Adjudicator's Office and the Parliamentary Ombudsman if you are still dissatisfied. Further, you may commence judicial review proceedings against HMRC.**

## Advice or information considered binding

~~To make sure that HMRC's information or advice can be considered binding, you~~ **When interacting with HMRC directly, you must set out all the relevant facts and draw attention to all the issues in order to ensure that HMRC's information or advice can be considered binding.** For example, HMRC expects you to provide information on any relevant and related transactions. **Where guidance is concerned, it is important that your case clearly falls within its terms and there is no qualifying language which, in particular, might suggest that you should approach HMRC directly with your query.**

**As a result, advice or information may not be considered binding in scenarios such as the following:**

- when the nature of the transaction on which HMRC advice given directly to a taxpayer changes after the advice has been given in a way that has a material impact on the transaction as a whole
- when you provide incorrect or incomplete information when requesting advice
- when the legislation on which the advice was based has changed before the transaction has been effected
- when a publication uses qualifying language indicating that taxpayers seeking more specific advice should contact HMRC directly, but the taxpayer does not do so

## **When advice or information may not be binding changes**

HMRC has a duty to collect the correct amount of tax as required by law at the time the transaction takes place. It remains your responsibility to take account of any **relevant judgments or changes in the law to the legislation** following the advice being given and the transaction taking place, **as HMRC will be bound to collect tax according to the prevailing law.**

Advice is based on the understanding of the law at the time it is given. Where this understanding ~~is changed by the courts~~ **changes**, HMRC must collect the correct amount of tax as required by the new understanding ~~of the law. This means that there are some circumstances in which HMRC's primary duty to collect tax according to law may mean that it can no longer be bound by advice it has given.~~

**HMRC may decide however that it is appropriate not to apply the new understanding to past years or periods and to apply it instead prospectively only. In order to determine whether this is appropriate, HMRC will consider whether previous HMRC statements gave rise to a clear, unambiguous representation which did not contain any qualifications which would suggest that it was not capable of being relied upon. HMRC will also consider whether there is an overriding factor which suggests retrospectivity should apply such as that there is evidence of fraud or evasion in a particular case, or tax avoidance is involved.**

## **Examples**

**Examples of when advice or information may not be binding include:**

~~– when the nature of the transaction on which advice is given changes in a way that has a material impact on the transaction as a whole~~  
~~– when you provide incorrect or incomplete information when requesting advice~~  
~~– when the law relevant to the transaction for which the advice was given changes~~  
~~– when a court or tribunal judgment changes the established understanding of the law on which the advice was based and your liability to tax for that period has not been finalised (an example might be where you haven't yet submitted your return or, if you've submitted your return, the opportunity to amend that return remains) – HMRC will, however, consider whether or not the original understanding should be taken into account~~

**Where HMRC provides incorrect HMRC information or advice is binding in law**

Regardless of the policy on prospective-only changes, HMRC will be bound in law by incorrect information or advice it gives, provided that it's clear and you can demonstrate that:

- you reasonably relied on the advice
- you made full disclosure of all the relevant facts (in the case of advice communicated to an individual taxpayer)
- applying the law would result in your financial detriment or comparative unfairness, or there is some similar reason why it would be unfair to a high degree if HMRC were permitted to impose the correct charge

Where HMRC gives advice and later tells you that it's wrong, ~~you'll have to~~ you should start working out your tax the correct way from then on. Or you should disclose and explain to HMRC why you have continued to work out the tax in accordance with the previous advice.

TLRC 13/7/2021

For queries please contact TLRC Chair [judith.freedman@law.ox.ac.uk](mailto:judith.freedman@law.ox.ac.uk) or TLRC member [stephen.daly@kcl.ac.uk](mailto:stephen.daly@kcl.ac.uk)