Peak Tax Day 21st September 2016

Amongst the topics discussed by Robert Venables were proposals for new legislation that had been announced by HMRC. In respect of one of these, which was proposed in a government consultation document to operate retrospectively, he said

> Again you can understand that I don't agree with it, especially retrospectivity, absolutely awful, it's not English, it's not cricket, the concept which is understood not only in this country but in many commonwealth countries. If it's a scheme proposed you know in North Korea or Zimbabwe you wouldn't be surprised at all. But the fact that this can be proposed in the UK in 2016 is most appalling.

Another of the proposals which he discussed were the penalties which HMRC had announced were being considered under which those who designed or otherwise enabled tax avoidance schemes may have to pay a penalty equal to the amount they had been paid for designing, or otherwise enabling, the scheme (which later became known as the enablers legislation). What Mr Venables said on that topic included the following:

> I'm sorry, we seem to have lost my last slide. My apologies. It's for first penalties for enablers of tax avoidance. When I mentioned earlier North Korea or Zimbabwe and I'm sure that we can all think of one or two other places on earth. The consultative document came out in the middle of August, always good timing to let loose a consultative document, when everybody's on holiday so we reduce the time people can actually reply cos they don't want to listen to what people have got to say. And the worst feature of this is that it proposes penalties on enablers of unsuccessful tax avoidance and that's defined to mean anybody basically with virtually no exceptions, well minimal exceptions who have any part in any tax planning tax avoidance strategy which was held not to work. The irony of it is if you enable successful tax avoidance your fine, there's no penalty. I, this is how bad the Revenue are. If I'm the Revenue I'd be much concerned about people who enable successful tax avoidance (*audience chuckling*) the clever ones rather than the less clever ones but there it is. You know it all confirms our view that the Revenue is just full of people who are unemployable elsewhere (*laughter*). That's why they've finished up in the Revenue. Your experience may be different oh dear oh dear.

and he went on to say

> Oh one thing I forgot to mention is that the penalties will be so enormous that they will bankrupt everybody in this room including me. They are just extraordinary, it is totally disproportionate. Now I need

hardly say that this is totally unacceptable in a free society. We have the rule of the Human Rights Act, we have freedom of speech. Now that involves the freedom to give legal advice, tax advice, it also involves the freedom of individuals to receive advice and we ought to be able to advise them freely on what their legal position is. Whether it's the law generally or tax in particular. It also means that we're free to advise them as to the consequences of what they're doing, but we are not keepers of their conscience. It is not for us to say I would not do this, it is for us to say well you can do it, technically it works, I better warn you there is a risk that the courts will be hostile but we cannot tell people how to make a decision. We can simply inform them as to what the law is. So I see huge problems under the Human Rights Act if anything like this were to go through it's a pity if we do leave the EU and I'm still hopeful that we won't, we knew that the European Court of Justice, which has not always been helpful, but on the whole has been very helpful to taxpayers. The European Court of Justice thinks that the giving of legal advice is a very important right. It's going to be, had a case a few years ago in which it talked about legal confidentiality and the principle of advice being privileged and said it's an absolutely key part of what our fundamental values are, of course it is. So I believe that if this goes through at all, it will be in a highly diluted form, a very, very diluted form indeed, it will only be for the absolutely outrageous cases and we've all seen schemes out there which we all know probably even the people promoting them could never work in a thousand years perhaps even that. I cannot see this getting through. Now the Bar Council which represents all the barristers in England, is of course very concerned about this. It's not just tax barristers because they can see the old story know first they came for the socialists, then they came for the Jews then they came for whatever, I did nothing and finally they came for me and there was nobody left. They're aware of that, this is the thin end of the wedge because Civil Service at this time do not like to have a free society or people who give advice to people saying that the government or rather the Civil Service is wrong. [*inaudible*] Hitler lost the war. If he'd won it and we were a Police state, yeah things would be different. Now the Bar Council's response has been orchestrated by the Revenue Bar Association, I of course no longer run that I used to be its Chairman a few years ago, when I did my three or, I travelled a little bit more than the statutory maximum term of tenure and the Revenue Bar Association has set up a committee to respond and when I first heard of that the Chairman of the committee was going to be Julian Ghosh QC (*laughter*) I thought this is rather like setting up a committee on whether the press should be controlled and making Rupert Murdoch the Chairman. And then I thought actually no actually

> because if even Julian Ghosh much of whose work is for the Revenue if even Julian Ghosh tells the Revenue, hey you cannot do this, this is not one step too far, it's 50,000 steps too far, that perhaps will have a lot more influence on them than if someone like me who they don't particularly think (*inaudible*) say so and somebody else who does a hell of a lot of Revenue work again probably like Julian Ghosh the majority of his time appears for the Revenue, Malcolm Gammie QC is very, very concerned about this too, and I think if the Revenue were told by as it were their own friends and allies at the Bar you cannot do this, you cannot do this in a democratic country, I think the message is likely to get through.

Mr Venables was asked a question about accelerated payment notices ('APNs', by which taxpayers who make use of a tax avoidance scheme may be asked to pay tax before it is determined whether the scheme succeeds in providing the desired tax advantage): "*are you confident that the non-disclosable point in relation to the APN and Contractors might be given a fair hearing?*" He replied:

> Well it all depends. Now I have been given advance notice of this and I think we are, actually I did make a few notes, I'm just trying to find my, can you tell me which number it was? Or have you altered them since? Oh here yes here I have found it. Well firstly I know absolutely nothing about any impending litigation in relation to accelerated payment notices and contractors. Now I've got to say that there is a really big if here. One of my, I told my clients right from the beginning when this came in that the biggest danger would be that cases would be taken, I better explain something. The Revenue know me and it's a good thing because when they see I'm involved they fight shy right. I had a case a few months ago where a client wanted a, an opinion and the solicitor got a quote from my clerk and from another QCs clerk and I should never have seen this quote in fact it was in an email. I saw that my QC my, my clerk had quoted five times as much as the other QCs clerk, but the solicitor said to the client stand the money it's worth it. Sorry? He did, I wrote the opinion, the Revenue saw it, backed down immediately. Now the trouble is so many of these APN cases so far, I'm sorry to have to say this cos it's immodest but it's true, having been taken by inexperienced people who have not argued a case anything like as well as I could have done, I know it sounds immodest but it's a fact have actually made it more difficult for me next time round cos I've got to unravel all the bad they did. Who have failed to take vital points. I know you're going to mention the Ingenious case and there's another one this summer called the Nut case, sorry it's not quite called the Nut

> case – [*Someone provided the name Vital Nut*] – Vital Nut, thank you very much indeed. Where it seems I mean in both those cases the obvious best point was the strategy is not disclosable under DOTAS. And in neither case was the argument taken, just appalling. So if I were, if I'm instructed in the matter believe me I and I'd expect to be it as author of the strategy, I would make damn well sure that the applicants were given a fair hearing. I would make damn well sure Counsel for the Revenue didn't get away with any shifty tricks, that the judge was immediately told if they were misleading him or her and I would make sure that the right points were taken and that they were argued properly. The trouble is I can't insist on being instructed and if somebody else decides to saves two pence ha'penny by instructing less able, less experienced and less intelligent and ingenious counsel then frankly anyone can and in that case I would be very sad and disappointed for all the poor people who have would lose out but of course it wouldn't be my responsibility. I (*inaudible*), well the good news is I do have an accel…. at last I've got an, as I was about to say the Revenue normally shy away from me so of course they've left my cases, the ones they know I'm involved in 'til the very last. They've got the lower hanging fruit first. And so I do at last now have an accelerated payment notice coming up, it does not relate to Contractor it does not relate to Delta. At last I'm going to be able to take these points, which have not been taken before and points which have been taken before and I think argue them a damn sight better, that is, that is, that is my main concern, David, it's cases like, like the, the Vital Nut case counsel involved weren't even tax counsel. I mean there's something right at the end saying there was a bit of correspondence after the proceedings have been launched whether this was disclosable under DOTAS but of course that's no part of the issue that I have to decide. Appalling. Just appalling.

Mr Venables was also asked "*on that subject if maximising revenue is HMRCs primary objective which it appears to be these days how can taxpayers expect legitimate disputes to be reasonably and equitably resolved without going to litigation?*" He replied:

> Number seven thank you very much. Oh we seem to be, oh yes there we are. Well there is a legitimate case for HMRC maximising revenues, but not in the way that they think. The care and management issue of the tax system is reposed in HMRC and what they ought to be doing is to take the same approach as any other business and they ought to be asking themselves will pursuing this case to litigation be cost

effective. What they are not permitted to do is to maximise revenue by intimidation and this is what we have nowadays. We have taxation by intimidation and of course those who, they are going for the weakest people, they're trying to cut them off one by one, we've seen this in their spotlight and pronouncements huffing and bluffing, puffing and bluffing whereas those who can stand together and argue against them no problem at all. There's one thing that they've got seriously wrong in their settlement strategy which I think is actually illegal, I won't go into this in this particular context, but how can taxpayers expect legitimate disputes to be reasonably and equitably resolved without going to liquidation, err litigation the answer is probably they can't, which is why you have to band together and to have test cases but because the Revenue has shown itself to be so inflexible it's got this blinkered approach, but all I can say is that the tougher you fight back the tougher you resist them in correspondence the more you make it absolutely clear that you are not going to just roll over on your own, on your back with your legs in the air and settle so called settlements which, what they call settlement I call capitulation, the better. Because they're then going to think twice about going for you, they're going for the weakest people and it is scandalous that is not the way for the Revenue of a civilised country should be working and that is what is happening.

Mr Venables was also asked, by someone named Nicola, whether he was aware of any cases being brought before the courts in relation to the "general anti-avoidance rule" ('GAAR', which does not apply to this case). His answer began as follows:

> I'm not, Nicola. Now you've got to remember as I said earlier that as soon the HMRC see Robert Venables QC involved they say I think we'll back off this one, we'll put this one onto the too difficult for the moment pile. So that doesn't mean that there haven't been any, but I think what happened was they put the GAAR through and having put it through they seem to rely on it very, very little indeed and I think they see it primarily as a threat. A threat which influences behaviour in the first place so, so that it puts some people off. Now as you know, cos you've read my opinions all my opinions nowadays will have an extensive section on does the, can the GAAR possibly apply and that of course, as you know that when it comes to Contractors and Delta the answer is no one, one gives lots of reasons. What I think might make a difference is in the Finance Act which has just become law we now have GAAR linked penalties, ever heard of those? Not really part of the talk and it maybe if, it's all again about getting more money if the Revenue

think they can collect penalties on the basis that people have engaged in behaviour caught by the GAAR this might make them invoke the GAAR more than they would have done otherwise. And in the case, it's going to be very interesting because where it's obvious that the strategy didn't work it's going to be very interesting when the taxpayer suddenly turns round and say well of course it never worked anyway, it wasn't caught by the GAAR, it never even got to the GAAR so I don't have to pay any GAAR linked penalties.

Mr Venables was asked a further question:

Q: I'm going to go back to question one if I may. We're aware that HMRC has received legal advice that they're unlikely to be successful in mitigating a particular strategy but instead of withdrawing they continue to use tactics such as nudge letters, telephone hotlines, requesting even further and further information from taxpayers involved after closure notices have been issued to the lead cases which has allowed the issue of accelerated payment notices. Is this tantamount to extortion on behalf of HMRC?

His reply was

Well it's not legally extortion. I can see it might be reprehensible behaviour and we have it on record that the highest standards of judicial records the highest standards are expected from Revenue officers and indeed many judges nowadays are rather shocked at some of the standards, but it obviously, we know that the Revenue has got out of control. Nobody knows this better than somebody just retired as a judge of the Court of Appeal, Lord Justice Moses. Lord Justice Moses used to be counsel for the Inland Revenue. I used to be against him, his father was a solicitor, the solicitor to the Inland Revenue and nobody I think more deplores the present state of the Revenue than he does, cos he realised the standards have dropped appallingly and you know this is he fought hard but, he fought within the rules, we all did you know. Judges are disgusted by this type of behaviour. Now what can you do, firstly if an appeal is still outstanding you can go for a closure notice. If the closure notice has been issued and there is a certain sorry, if an enquiry is still open of course you can go for a closure notice. But if the enquiry is then and there has been an assessment and there has been an appeal then the Revenue can't delay it, it is something which is within the control of the Tribunal Service and you can say come on we want this case heard. Just in this context this, you may find this comforting we mentioned, I keep on calling the nut case, just (*inaudible-coughing*) because it sounds better although the taxpayers lost in that case because I think they argued only one narrow argument didn't argue the right point the judge, Mr Justice Charles was, and this is a case decided this summer judgement was very recent, only in the last few weeks, he was just appalled at the Revenue conduct. He said look he said you're trying to collect money under APNs on a point which has been open for over five years why haven't you litigated and he actually he, he, he was curious about it and he said come on I want an answer on this. They said counsel said oh I can't, okay consult with the people of the Revenue and come back and tell me tomorrow. He's obviously totally pissed off and quite rightly too, but the Revenue said oh we want money out of the APN but we're just going to dawdle and dawdle and dawdle. We don't want to litigate these cases yeah well and the whole legal system's changed in the last 20 years, we had what we know as the Wolfe reforms after Lord Wolfe and then we've had the Rupert Jackson reforms and they're all aimed at speeding up long civil litigation and making it much more effective and making people concentrate at an earlier stage on how strong their case is and there are now sanctions, very serious sanctions when people fail to comply with time limits and if you fail to comply with a time limit, I was involved in a case yesterday where the defendant had failed to comply with a time limit of putting all his evidence so it was ruled (*inaudible*) can't put in any evidence. And there was a marvellous case this summer, I've forgotten the name of it, but it'll come back to me in a moment, which went to the Court of Appeal and it was a tax case. And the Revenue said yeah but these rules apply to ordinary people, but they don't apply to us do they? And the Court of Appeal said oh yes they do, you have been dilatory in this you were supposed to put in your documents by a certain time, you didn't. Even today you have not one word of apology, not one word of explanation as to why you've couldn't. It is not enough to say that you're the Revenue, same rules apply to you as to everybody else, the appeal is allowed, your defence in effect is struck out and so courts are getting tougher and tougher they will not like this dilatory approach, which is all good news for taxpayers.

Q: Effectively it's about calling their bluff.

Calling their bluff exactly their bluff.

At the end of the talk one of the hosts said:

Absolutely and I think as you were, as you were that completing that answer to Nicola you used the word 'trust' in relation to HMRC. They cannot be trusted that's the bottom line. I think trust is actually exactly what we're about today *here and looking at the, how to challenge HMRC it's about having your clients having their trust in you in the way that we have our trust in our advisors Mr Venables, EDF, Matt Hall and of course RPC. Trust is what it's all about and you're gonna have to make sure that you get your clients all signed on that. I would like to thank you Robert on behalf of everybody in the room for coming along to Birmingham today. All the way up from London, some challenges getting from the station to here I know that, but it is really appreciated because we want to call the bluff of HMRC and take a way forward you said and I think everybody should take this opportunity to thank Robert Venables QC for his talk today (*applause*).*

Mr Venables said

So David's right, don't despair, don't give in, call their bluff. Call their bluff those are the three words.