HOUSE OF LORDS

Economic Affairs Committee

Finance Bill Sub-Committee

Uncorrected oral evidence: Finance Bill 2018

Wednesday 17 October 2018

5.05 pm

Watch the meeting

Members present: Lord Forsyth of Drumlean (Chairman); Lord Hollick; Baroness Drake; Viscount Hanworth; Baroness Kramer; Lord Lee of Trafford; Lord Leigh of Hurley; Baroness Noakes; Lord Turnbull.

Evidence Session No. 3 | Heard in Public | Questions 37 - 42

Witnesses

Victoria Todd CTA, Low Incomes Tax Reform Group; Graham Webber CTA, WTT Consulting; Keith Gordon FCA CTA, Barrister, Temple Tax Chambers.

Examination of witnesses

Victoria Todd, Graham Webber and Keith Gordon.

Q37 **The Chairman:** Ms Todd, Mr Webber and Mr Gordon, welcome. I am sorry that we kept you waiting, but we had a load of practitioners who had quite a lot of anecdotes to tell and points to make to us, which was very helpful.

Perhaps I could begin by asking the first question. Does HMRC achieve an appropriate balance between tackling tax evasion and avoidance, and upholding the rights of individual taxpayers? If not, is this a problem that arises because of the powers that have been given to HMRC, or is it because of the way they are being used in some cases?

Keith Gordon: I would preface my comments by saying I have published and stick to certain concerns about the use of the term "tax avoidance", because it is a very nebulous term. If, however, we work on the assumption there is a concept, my concern is that, according to HMRC's own statistics, tax avoidance is a small and diminishingly small proportion of the tax gap. The latest statistics show that a third of the amount lost is due to evasion and a similar amount is lost due to the hidden economy. I am not sure what the difference is between the hidden economy and evasion; they strike me as pretty much the same thing. Effectively, six times as much is lost due to dishonest conduct as avoidance, and one wonders why everyone is talking about avoidance. It might be true that the Revenue is tackling evasion, and it has been very successful in eliminating what might be considered to be avoidance, mainly through a lot of changes in legislation.

In answer to your question as to whether HMRC achieves an appropriate balance, I think not. I do not see enough action in tackling evasion. The decision to close local offices means there is no one on the ground to see what is happening on local high streets and in people's back garages. It is all done as a computer exercise now. Avoidance is a low-hanging fruit, but that fruit is getting higher and higher, and I think HMRC needs to change its focus.

As to whether there is a problem with powers, the powers it has are sufficient; it is just not using the powers it has, or there are not enough resources to allow the Revenue to use them.

The Chairman: So you do not think it is using its powers in a way which is unfair to taxpayers?

Keith Gordon: I am not sure I am happy with the way its powers are being used. The powers it has are sufficient, but they are being used in a very bullying approach. There is an assumption, "You must do this because we are the Revenue and we are entitled to this", and it will say that whether it is entitled to it or not. It will push, and it is for the taxpayer to assert his or her or its rights through the tribunals to protect their position.

At that stage you find you have a problem of whether you wish to be in the public domain and known to have an argument with the Revenue. The Revenue gets away with an awful lot because people do not want to be

seen to be on the wrong side of the Revenue. The powers that the Revenue has are adequate. It overuses them and should be focusing more on evasion because that is where there is real money to be saved.

Graham Webber: I agree with Keith to a large degree. The issue with avoidance is that the taxpayers have made some form of declaration of what has been going on and, therefore, they are identifiable. HMRC knows where they live and it can trace them easily and apply its powers very easily. There is evasion and the hidden economy and there also is a category called difference of interpretation—I am not sure I understand that one—but avoidance gets a lot of attention. The Revenue has had 100 new avoidance powers in the last 10 years and yet avoidance lost in the tax gap has remained at around £1.7 billion a year, allegedly.

We are not here to discuss the tax gap and its good and bad points. The Revenue, though, has these powers, and every year it gets new powers and every year it is like a child with a toy box and it wants to roll out these powers. Very often there are no checks and balances. The Revenue leaps from perhaps a small error in a tax return to, "Mr Taxpayer is an evader or a potential evader; let's throw everything at them and see what gets shaken loose".

That is going to be a problem until we have workable definitions of evasion and avoidance. The deliberate use of phrases such as "aggressive avoidance" and "abusive avoidance" muddies the waters and allows the Revenue to say, "Well, this particular arrangement is aggressive"—even though it has been disclosed—"whereas this particular arrangement is just avoidance". A good example would be a BPRA—business premises renovation allowance—scheme. It is on the statute book and is there to encourage people to invest in buildings and bring them back to life.

All those schemes were disclosed under the DOTAS regimes. I think we can safely say that over half of them are under active inquiry by the Revenue for avoidance. That strikes me as demonstrating where the balance has gone. Taxpayers have no protection and no power on this issue. The Revenue simply makes the assumption that something has gone wrong and believes it is entitled to throw the kitchen sink at taxpayers.

Victoria Todd: HMRC obviously needs powers to administer and enforce the tax system effectively, but the powers have to be proportionate and there need to be not just safeguards but accessible safeguards, particularly for unrepresented taxpayers who LITRG represents. Recently, with the proposals in relation to the extension of time limits for offshore matters and HMRC's civil information powers, that balance has shifted more in favour of HMRC. We have seen some instances of existing powers, particularly in relation to penalties, where HMRC has ignored the burden of proof on it to demonstrate the person's behaviour and assumed that they are acting deliberately or carelessly. We have also seen a wave of cases getting to tribunal where you look at the case and think, "How on earth did that reach the tribunal?"

Q38 **Lord Lee of Trafford:** Continuing the theme that Ms Todd has focused on,

clauses in the draft Finance Bill will extend HMRC's time limits for dealing with offshore matters to 12 years. What does this mean for taxpayers in practice?

Victoria Todd: The first thing to say is people might wonder why this is an issue for the Low Incomes Tax Reform Group, because sometimes people hear the word "offshore" and assume that it relates to wealthy people. As we said in our written submission, the charities Tax Help for Older People and TaxAid, with which we work, have had a huge increase in the number of contacts in relation to this area. For us it tips the balance further in favour of HMRC. What is important about these measures is they are not tackling deliberate behaviour—it already has the powers to go back 20 years in those cases—these are people who are acting non-deliberately, and we feel there are not adequate safeguards within the legislation.

Lord Lee of Trafford: To follow that up, what form should the additional safeguards take, or could they take?

Victoria Todd: First, we do not think that the time limit should be extended to 12 years, but if that is going ahead we think the rule should apply from 2019-20, whereas they will extend the time limit from the 2013-14 tax year. We think that a minimum amount should be put in to protect people if it is only a small amount of tax. That would be helpful. We think there should be a statutory time limit that HMRC has to collect the information it needs from overseas and make an assessment based on that information. As I say, we do not agree that it should be extended to 12 years, but if it is that might be a further safeguard.

Lord Lee of Trafford: Could you suggest a reasonable timescale?

Victoria Todd: We feel that the current timescales—four years and six years—are reasonable.

Lord Lee of Trafford: No further than that?

Victoria Todd: No.

Lord Lee of Trafford: Is that view broadly shared?

Graham Webber: I would agree. A lot of our clients are in the world of contracting and have used a number of arrangements which, to the surprise of most, had some sort of offshore connection. We have inquiries going back to 2004 and the Revenue has still not settled those.

The Revenue has also missed a large number of inquiries. To give the Revenue a 12-year power is essentially putting a 20-year inquiry window into the process. Twenty years is used by the Revenue in the very worst and most egregious of fraud cases, but by extending these powers you are creating a generation of uncertainty, certainly for most of my clients.

I would agree with Victoria that the Revenue has adequate powers; it has the normal inquiry windows and discovery powers for four years or six years. We see absolutely no need for an extension to 12 years.

Keith Gordon: I am broadly in line with everything that has been said already. When someone has not paid enough tax due to an offshore matter, it is easy to think of money being squirrelled away in some strange location with the Revenue not knowing about it. That is deliberate conduct, which is covered by the 20-year power. Graham has already said that it is very easy to be caught by those rules, because all you need is an offshore connection, and offshore means outside the United Kingdom, so 10 miles south of the Northern Ireland border is offshore for these purposes.

When one drills down a little further, the Revenue gives a reason and says, "It takes us a long time to receive information from overseas", because it is harder for them to obtain. That might have been true a couple of years ago, but it is less true now than it has ever been, because the Revenue gets so much information from overseas. You start thinking, "What's actually going on?" I suspect that the Revenue is absolutely inundated with material from overseas and does not have the resources to deal with it, and the only way of escaping its resource problem is expanding the time limit to catch taxpayers. I think it has been slightly disingenuous in its reasoning. That is speculation, but that is my perception. I cannot see at this time that the Revenue should require additional time for overseas matters.

As far as practical difficulties are concerned, taxpayers are going to have to keep records for longer. If there is a genuine factual dispute over something, the ability to challenge the Revenue's assessment several years down the line is going to be harder, because how can you remember precisely what was said and why in a particular arrangement more than 12 years ago, given that it can take two to four further years to get to a tribunal.

There is a proposed limitation for material that is available to the Revenue through the mutual assistance mechanisms, but the test there is identical to another test used for discovery assessment, and the courts have been full of all sorts of litigation as to what that means in practice. Thus there will be uncertainty. Other than those additional comments, I think the current time limits represent a true and fair balance and should not be tampered with.

Q39 **Viscount Hanworth:** What sorts of changes have we seen in the behaviour of HMRC over the last 10 years? Could I dovetail that question with another question which is: if you were to propose greater oversight of HMRC's activities, what would you propose? How would whatever oversight body it is be constituted?

Graham Webber: We have an issue with particular client groups who are contractors in the main and people who have used what I would call statutory tax reliefs which the Revenue for some reason now deem to be not suitable. A lot of those people were unaware as to what they were doing. A lot of those people were told by their own clients to join a particular scheme because their client wanted a contractor, a short-term person, and did not want a full-time employee. To provide the client with clarity, our contractors joined these schemes.

The Revenue, however, has taken one look at that reasoning and said, “No, that is just not true. What you have done is deliberately, and with malice aforethought, entered into a tax avoidance scheme”. You should bear in mind a lot of these schemes were disclosed in 2004 through to 2010. The Revenue did not really start looking at them until 2011-12 and, all of a sudden, going back six, seven or eight years, it is tax avoidance. To me that is a misuse of the powers. The Revenue has aggravated that by saying, “We need to play catch-up”, bringing these cases through to tribunal through their processes very quickly, and in doing so applying the very harshest penalty they can find.

I will give you an example. One of our clients was sent a list of 65 questions, along with a request for about 40 documents. It took us two attempts to get the Revenue to clarify what it wanted. We eventually got it and we responded. A lot of these parties were offshore and we contacted them; they did not reply. We responded to the Revenue, showed it all our correspondence, invited it to make a third-party request of these parties, which it is perfectly entitled to do.

The next thing we get is two penalties from the Revenue, one for £300 and one for £760. We challenged them and went to the First-tier Tribunal. Literally, on the steps of the tribunal the Revenue withdrew the higher one on the grounds that it was a duplicate of the first one. It defended the £300 penalty. The lady judge in that instance made a direction that the Revenue’s systems were unclear and uncertain and it was not sure if it had received them or not, invited us to hand over duplicates of all the information, which we did, and invited the Revenue to settle at that point by withdrawing the £300 penalty. It has refused and we are waiting a date for the Upper Tribunal.

Viscount Hanworth: There has been an accumulation of powers over the last 10 years or perhaps longer. Could we also say that there has been a certain amount of deskilling in the Inland Revenue over that period and perhaps also an increasing arrogance? Would that be a fair characterisation or not?

Graham Webber: If I were being kind, I would say that the Revenue—I put my hand up here, as I used to work for the Revenue many years ago—has moved from being a tax expert organisation to a tax-processing organisation, and those at the front line are processors. They follow a checklist and are what we would call call centre operators, essentially. A lot of the officers we deal with have no particular background in tax. We spoke with one not two weeks ago who did not know what 64-8 was, which is a general authority for an agent to act. This is very basic.

Penetrating that layer to get to the policy team is extraordinarily difficult. We have done it, but it has taken us nearly four years to get that far. I do not think it is arrogance particularly. I would describe it as callous indifference in that the officers are operating within their known boundaries and are scared to step over those boundaries for fear of repercussions from above.

Viscount Hanworth: What you are saying suggests that they are acting as a car insurance firm would act, and I do not know whether you have any experience of that, but they will quote you what is on the checklist and on what the behaviour has been in the past they will not observe any aspect of the law even if you put it in front of their faces.

Graham Webber: I can give the Committee examples of exactly that.

Viscount Hanworth: Thank you.

Q40 **Baroness Noakes:** Before I ask my question, since Ms Todd mentioned Tax Help for Older People, I should declare that I am a patron of Tax Help for Older People. Being an older person myself, I am much comforted by that.

I would like to shift to the 2019 loan charges, because we received a lot of responses to our call for evidence about their impact. We did not include this in our call for evidence, but we got rather a lot of responses anyway. I wanted to explore what your views were about the application of HMRC's powers in this instance, whether you were aware of the concerns and whether there is any way of ameliorating that in the future.

Graham Webber: That affects my client population hugely. We regard the 2019 charge as HMRC's revenge. We regard it as a panacea for poor Revenue performance in identifying who it should be making inquiries into at which time. The Revenue makes great play of "the right tax at the right time". Clearly, in most contractor cases it has failed to do that. We therefore see the loan charge as a last-gasp attempt to draw a line in the sand and to bully people into settling on terms that frankly are indefensible at the moment, and arguably contrary to a case that was heard in the Supreme Court last year.

The loan charge will destroy lives and will cause family break-up. It will cause divorce and has already. We have clients who are unable to work through stress. We have clients who, if they go bankrupt, will never work again because they work in financial services. That will be the end of their career. Their pension pots and houses will disappear.

I have a client who is a social worker. She was made redundant by her local council. She was told to join a particular agency and was re-engaged as a contractor for five years. At the end of those five years, the council told her it would re-employ her as an employee, which it did. She was unaware of what was going on. She now faces a loan charge equal to probably a year and a half's salary. She has no means of paying it. She is the only worker in that particular house; she has a young child and her spouse stays at home. If she goes bankrupt and it comes up on her next criminal records check, she cannot work. This is not a rich merchant banker who has done something wrong. This is a dedicated social worker. That encapsulates what the loan charge does; it is unfair and pernicious.

Baroness Noakes: Can anything be done about that, anything that can mitigate the impact of that?

Graham Webber: We have made a number of proposals to the Revenue and to Members of Parliament that recognise that the loan charge should be tailored to fit those who have benefited from the alleged mischief. If loans were paid or made, the end client of the contractor has benefited because it did not pay employer's national insurance. The promoter/the agency has benefited through fees. Yes, my contractor client benefited because she paid less tax. The Revenue was supine and silent and by its silence gave tacit approval to these schemes. In fact, that was used in these schemes' marketing: no approach from the Revenue meant they were Revenue approved.

We can discuss the merits of that. There are four parties and the tax due is around 40% in most cases, as that is the band it is taken it into. We propose that each of those parties should pay 10% of the loan balance. Some 95% of my clients would settle in a heartbeat on that basis. They would not go to litigation. They would not lose their homes, their jobs, their careers or their marriages, and it seems to us to be as fair a way as any of dealing with this situation.

Baroness Noakes: Is that within the legislation?

Graham Webber: It could very easily be. At the moment the loan charge simply says you add the loans to the income in 2018-19. You add an extra sentence that says, "and the charge shall be 10%".

Viscount Hanworth: Have your recommendations had any traction?

Graham Webber: We have been trying to get traction on this for a long time. Yesterday I was in Portcullis House talking to an MP. There are two other inquiries of a similar nature going on at the moment in the Treasury Select Committee. I think Keith has appeared before them. We are hoping that those three reports—yours and those two from the other place—will provoke a debate and perhaps bring home to Treasury just what the effect is. HMRC, of course, being a non-ministerial department, there is no particular Minister you can ask questions of. Changing the loan charge to 10% does not require a change of government policy. It does not require any loss of face or backing down. All it requires is a recognition of the facts.

The Chairman: On the facts, the social worker example you gave, and the terms of employment, was that required by the local authority or whoever?

Graham Webber: It was a county council in the south of England.

The Chairman: Did it require that of her?

Graham Webber: Yes. It made her redundant. It had a farewell party on Friday and on the Monday it said, "If you join this agency and use this scheme, we will re-engage you as a contractor".

The Chairman: She was not warned of any consequences?

Graham Webber: No, not at all. The county council did not warn her, the agency did not warn her, and the people behind the agency running the

scheme, as is usual in these cases, were selective about the information that was made available. You could argue that she should have investigated and should have known more about this, but she is a social worker; she is not a tax expert. There are issues in tax law that the three of us here, who been in tax for a very long time, could happily spend a whole day discussing and not agree on. We are meant to be experts and I shudder to think how many years we have between us—a lot. How would a social worker be expected to penetrate that type of arrangement? It is just unfair.

Baroness Noakes: What do we know about the way in which unsophisticated taxpayers should be warned—I am not sure by whom—about the dangers involved of entering into schemes which seem too good to be true?

Graham Webber: The Revenue has started doing that in the last four or five years. We have inquiries going back, and I think the earliest one is 2002, which have not yet been settled. There was a scheme that ran until April 2008 that had a closure notice from the Revenue last month. It has taken them 10 years to investigate and get as far as that. As Keith will tell you, the gap between closure notice and tribunal hearing can be quite a substantial amount of time. We think the Revenue could and should have acted sooner. We think that by staying quiet it has added to the problem. Some of my clients are quite tax savvy, perhaps 5%; some 95% of them would not have a clue. A lot of them even today do not understand why they are being investigated.

Baroness Kramer: I want to push on this. Would you say that an unsophisticated employee should be expected to be able to rely on the instruction of the employer in this circumstance? We are talking about a local council with a legal department, with advisers available to it, which took the position that it was able to instruct an employee first to retire and then to return in a different way into outsourced employment. Surely the liability has to rest there rather than on the individual.

Graham Webber: I could not disagree with that.

Keith Gordon: The problem is the legislation goes for the person who is least able to defend him or herself. The legislation is attacking the worker.

Baroness Kramer: Not the employer.

Keith Gordon: And not anyone else in the chain, not the employer or the person who put the scheme together. I do not want to undermine anything that Graham has said. He has come up with a very practical compromise that sounds—and I have had no direct involvement—very sensible. There are just two qualifications I would like to make. First, not only does the Revenue take a long time to investigate, and things can take a long time going to the tribunal, but in the similar matters I have with my client base, the Revenue seems to be deliberately slowing down the tribunal proceedings with all sorts of procedural objections. Perhaps one can justify

what it says, but I find it very hard. It just looks as if it is trying to find ways of delaying resolution of this kind of case. That is my perception.

Baroness Kramer: Do we not have *Hansard* records of the Government saying that they would be looking to the employer to rectify the underpayment of tax and not for the burden to be on employees?

Keith Gordon: In a normal employment situation that is the first port of call. Where an organisation is deemed to be the employer and has not deducted enough tax under PAYE, the first port of call under the regulations is the employer, not the employee, in that tax legislation almost treats standard employees as people who do not need to get to grips with their tax affairs; it is all done for them. Obviously, there are a few wrinkles to that, but the premise appears to be that an employee does not have to think about tax.

May I make one other point? Baroness Noakes has asked what could be done to improve the situation. Behind that there is an even more important question: how did this legislation actually hit the statute book? The Revenue can very easily say, "This is an aggressive scheme"—whether it is aggressive or not is neither here nor there—"and it involves loans that no one expects to be repaid and we want people to pay the right amount of tax".

Assuming those things are all right, the question, and what the Revenue has probably not said, is whether it had failed to take action over the last 15 years and is using the loan charge as a way of covering up its own failings. I find it extremely worrying that the legislation has been able to get on to the statute book. My personal recommendation is that in the Finance Bill that is due to be published in a couple of weeks' time the legislation should be repealed. That would be my first port of call, but Graham's compromise might be politically more acceptable.

The Chairman: I am not sure we would be able to make recommendations in the timescale to achieve that.

Lord Turnbull: Presumably you are accepting the person in this case from now on will be returned to paying income tax and national insurance, so it is about the backlog. I am not a lawyer—far from it—but is there some legal doctrine such as estoppel that where you have known something was going on and you did not do anything about it, in some sense you have acquiescence, so you cannot now come along and say, "I should treat you as behaving differently in the past. I could have stopped it but I didn't"? It seems to me this is what the Revenue is doing.

There is DOTAS whereby you notify these schemes so it knows they are going on, and it comes to the conclusion that now is the time to stop them, but, as you said, the longer it waits the more of this back tax it can collect. That is an extremely unfair situation in which the Revenue has the knowledge that this is questionable but does not send any kind of warning saying, "You must be aware that if you are being paid in this way the following consequences could apply". It simply comes along and says,

“From now on you go on to the new system on a full tax basis and, what is more, all the years we have been looking at this situation develop and done nothing about it”.

Graham Webber: Keith is probably better qualified to talk about estoppel. Tax law has a concept of legitimate expectation whereby if a particular behaviour had been accepted you can legitimately expect it to carry on, and if the Revenue goes against that it could find itself in some difficulties. In the case of these contractors in particular, it claims that never happened. It claims that 10 years of silence simply meant that it was thinking about it.

Keith Gordon: Generally, one does not need to rely on the concept of estoppel, because there are other time limits and protections within the system. Whether or not the Revenue should have gone for the employer, there are time limits. On those arguments the taxpayer is almost certainly likely to win in all these cases, which is why the Revenue needed to require Parliament to introduce new legislation to overcome all the statutory safeguards.

I do not think estoppel needs to be there. One could—and I have heard vague rumours to this effect—attack the new legislation through the courts as breaching human rights, legitimate expectation, et cetera, because the Revenue had let it go on for so long. The answer to your question is you do not need to rely upon estoppel because the taxpayers are, if I can use the term, in the clear because the Revenue left it too long.

Lord Turnbull: If you look at financial services, there is a concept of treating customers fairly. If you were going to penalise them in some way or charge them, they had to know exactly what the situation was. In the case of PPI, that led to restitution, possibly excessive as it happens. Here is a case where the employee was not treated fairly and given the full information of the possible consequences of this change, and they should be entitled to the same right of restitution—in this case not being asked to pay this money—but the Inland Revenue is pursuing it anyway.

Graham Webber: We could legitimately ask why HMRC is pursuing the employee and not the employer.

The Chairman: This is a general point. In the headlines we had cases of BBC broadcasters and people who were encouraged by the BBC to be on self-employed contracts and now find themselves being investigated. It is the same kind of issue, is it not?

Graham Webber: It is the same sort of issue. The Revenue took a case to the Supreme Court. It is known as the Rangers case, but it is actually Murray Group Holdings v HMRC. This was an arrangement whereby an employment benefit trust was used to pay footballers. I think we would all agree a footballer must be an employee, he does as he is told most of the time, although, perversely, referees are not employees. The Revenue took this case through the courts and eventually to the Supreme Court. In the Supreme Court, Lord Hodge was very clear in a very good judgment and

he said, “Yes, this is taxable income as an employee and, yes, in that case, the employer should pay”. That was July 2017.

A few months later the Revenue came out and said that the loan charge agreed with the Rangers decision that there is a liability but the employee must pay. To us, to a large degree, the loan charge is HMRC trying to rewrite that Rangers decision, which they took all the way to Supreme Court, where it won the case after many years—incidentally, it will not tell us how much it cost—and immediately wrote a piece of legislation to reverse it.

Baroness Noakes: Would a lot of these people not be in business because they would be intermediaries?

Graham Webber: A lot of the intermediaries still exist. A lot of contractors worked in banks in the City, or insurance companies and software houses and a lot of the agencies they used still exist. A lot of the individuals they used through the Isle of Man, Jersey, et cetera, still exist. You can see most of them floating around in various exotic harbours around the world these days. It is not as if they are hiding. The Revenue know where they are. For us, and our clients, we have this massive sense of injustice over this loan charge. I agree completely with Keith that it is there to hide Revenue inadequacies over the last 10, 15, 20 years. It is retrospective. We believe the Revenue briefed Mr Stride, the Financial Secretary to the Treasury.

The Chairman: We are hoping he will come to give evidence.

Graham Webber: They briefed him inadequately and he went to the House of Commons and said tax avoidance is illegal. It is not illegal and never has been. Where the line on illegality begins I will leave to people such as Keith to decide, but it is not illegal. I believe Mr Stride would not have said that unless he had been briefed to that effect.

The Chairman: I do not think that is the Inland Revenue’s position.

Graham Webber: A number of MPs—close to 100 now—have signed an Early Day Motion against the 2019 loan charge.

Lord Leigh of Hurley: You said something about 5% of your clients questioned the whole system, but would not any reasonable person, when offered a very tax-efficient scheme through an Isle of Man company or an offshore entity, be expected to have asked questions about it? I do not understand why you are surprised that the Revenue waited for the Rangers case, because until then they could not do anything, and why people are so surprised that they are going to pay tax that they should have paid in the first place because they have used an Isle of Man company to have their salary stored up as a loan.

Graham Webber: Very often the presence of an Isle of Man or Channel Islands company was not clear.

Lord Leigh of Hurley: It was. I saw the literature.

Graham Webber: In some cases, yes. In many cases, no. You could argue that individuals did not undertake sufficient due diligence, and I would certainly agree with that; some of them did not. Some of them took a deal that was too good to be true, but they were told at the time, and if you read the literature at the time it clearly says, "This is HMRC compliant. It is backed by the finest QCs", et cetera. Why would an employee, a man on the street, not believe an expert that what they were doing was perfectly legal and HMRC compliant?

The Chairman: Is your point that it was only at a later stage that it had the powers to deal with this, having ignored it because it had previously thought it could not deal with it?

Lord Leigh of Hurley: That is my point, not his point.

Graham Webber: No. If you believe the Revenue, and if it is talking through Mr Stride, these schemes have never worked, so if the Revenue said that, if it believed they never worked, why was it not saying so in 2004.

Lord Turnbull: The Rangers case appears to establish there is a liability on the employer and what the Revenue seem to be doing is saying, "I can't get it from the employer so I'm going to go for someone else?"

Graham Webber: Yes.

Lord Turnbull: They are looking for a pocket. Of course, Rangers went bust, so it probably will not get any money from Rangers.

Graham Webber: It was a very rich bust company. It had £40 million when it went bust.

Lord Turnbull: It is the second phase. I think the Revenue was perfectly entitled to establish that this was abusive and that people were doing things they would not need to do other than to avoid tax. What we are questioning here is whether the employee is the person to pursue and, in particular, whether to apply retrospection in the case of the employee.

Graham Webber: As I described earlier, I believe that most of my clients should accept a degree of culpability, so they should make some form of recompense, hence the proposal for a 10% charge. What is particularly galling is that a number of other parties benefited from these arrangements and have essentially got away with it.

Q41 **Baroness Drake:** We have received some evidence that HMRC treats small businesses and ordinary taxpayers less favourably than large corporates and the wealthy? Is that true, in your view?

Keith Gordon: My initial response is they treat everyone with equal contempt. Large businesses have designated officers and are therefore not necessarily subject to the same delays and change of personnel and do not have to explain the same things over and over, so they get a more professional service.

Similarly, those who can afford professional representation are in a better position to stand up to the Revenue. There is a generally wide-held view that multinationals, for example, get a very cushy ride from the Revenue. It is not my main area, but I think that is a misunderstanding. We can blame the press for this, but it is very easy to misunderstand how multinationals are taxed and there have been many changes to the international taxation rules. I think the Revenue will go for anyone it can. People who are less able to defend themselves are more likely to be misled or confused, and, therefore, adversely affected, but I think the Revenue is happy to get money from anyone. I do not think it discriminates in that sense.

Baroness Drake: Going back to your previous comment about HMRC taking a bullying approach, the impact of that approach is going to be disproportionate on the smaller businesses without the resources or sophistication.

Keith Gordon: Absolutely.

Baroness Drake: Would you like to suggest ways in which that difference in treatment could be addressed, controlled or mitigated?

Keith Gordon: There is one easy solution. Whether it would solve all the problems I do not know, but the easy solution would be to give the First-tier Tribunal greater powers to hold the Revenue to account, particularly for judicial review. I do not know whether this Committee is familiar with extra-statutory concession A19. It is a concession that the Revenue will waive tax if it has simply missed the boat. It re-wrote it in about 2005, so it alleges. I was not able to get any evidence despite trying. When I put in a Freedom of Information Act request, it said, “We have no evidence of a change in approach, but we know we changed the approach in 2005”. I am slightly dubious. It changed it back by the time that it got its house in order.

I had a client who went to the adjudicator, who should have been a perfectly good independent person, to see whether the Revenue was acting appropriately. The adjudicator refused to find against the Revenue because the Revenue was acting in accordance with its own guidelines, even if its own guidelines were inherently unfair. There was £16,000-worth of tax. I was doing this pro bono. The client got permission to take it to judicial review. The Revenue put in delays and delays and delays and then wrote to my client and said, “We have so far incurred £38,000-worth of costs which if we win, and we are confident we will win, we are going to get from you”. I am sure they would never have got anywhere near that £38,000-worth of costs had they won, but how many individuals are going to say, “Okay, I’ll take the risk”? She cleared her savings and paid up. It was a clear slam-dunk case covered by extra-statutory concession A19, but the Revenue, through bullying, was more than happy to spend nearly £40,000 to recover £16,000-worth of tax. I am originally an accountant, and Baroness Noakes is an accountant, and that does not quite add up as far as I am concerned.

Victoria Todd: We have also suggested that in areas where HMRC has discretion there should be a greater power for perhaps the Upper Tribunal to adjudicate on some of these points, because judicial review is out of scope for most unrepresented taxpayers. If the question is whether larger companies get better access to HMRC, yes, they do because they have these compliance account managers. It would be wonderful if every taxpayer had somebody allocated to them who they could phone up and have issues resolved, but that is unrealistic. However, what there should be is an accessible service for everybody, particularly people who have additional needs and who need some extra support.

On the point Keith was making about the difference between represented and unrepresented taxpayers, we have seen a number of cases reach tribunal recently where you can see a person has some additional needs that have not been picked up by the Revenue, even though these cases have gone through many stages, and the Revenue has not done anything to try to support the person with regards to what safeguards might exist. The adviser to a represented taxpayer can focus the minds of the Revenue on the problem, set out the problem and identify what the solution needs to be. An unrepresented taxpayer generally writes a very long letter talking about all sorts of different issues, not really understanding what the issue is. They just know there is a problem and they need help with it. The Revenue is not very good at filtering that out and perhaps helping that person going through that process.

Q42 **Lord Leigh of Hurley:** I am moving on to Making Tax Digital, which, as you know, is the other area of our interest in this Finance Bill. Given there is a move to make tax digital mandatory, what is your view of this trend, and, in particular, what safeguards are needed for taxpayers who might be digitally excluded? I think we mean excluded by income or by ability to cope with technology rather than physically not being able to get broadband. It is probably more for you, Ms Todd.

Victoria Todd: We have been broadly supportive of HMRC's digital agenda but have been strongly against the mandation of digital. That includes Making Tax Digital and HMRC's wider programme. If a system is good and has benefits you would expect people to naturally want to use it, as is the case in the self-assessment system, filing online. We do not think it needs to be mandatory.

People who cannot access things digitally should get a similar level of service. In 2013, we supported a case through the First-tier Tribunal where some taxpayers were mandated to file their VAT returns on line. There was no exemption in the legislation at that time and, as a result of winning that case, some exemptions were put in place and have been taken through to Making Tax Digital.

Having exemptions in legislation is a really good safeguard, but those exemptions are only helpful if they work in practice. What we have found difficult, certainly with Making Tax Digital, is that we still do not know what form that exemption will take. During that case the tribunal was very critical of HMRC offering other options. In that case, it said, "Well, they

could file on the telephone. We can offer that and we will have met our human rights responsibilities". The judge said, "It is no good if you offer that and it is unpublished, it is a secret and nobody knows about it". Whatever exemptions are in place need to be made clear to people.

You can look at the targets that HMRC has set itself. If you fill in an iForm online, its target is to turn around 95% within seven days whereas the postal target is 80% in 15 days. You can see that it is giving a slightly better service to people who can do things online. We would like to see it do far more for people who are not just digitally excluded but people who need help with digital. A lot of people we deal with might well be able to update their Facebook status, but that is not the same thing as being able to transact and deal with their tax online.

Keith Gordon: I perceive that MTD has been introduced for HMRC's convenience. While they try to publicise the additional advantages, I am extremely dubious about that. It claims that it is going to reduce error. When it comes to putting records, which are quite easily and correctly put on the back of a piece of paper and given to one's accountant, if you were to force someone to do it electronically you are going to risk the introduction of error there.

There was a very interesting case—I think it was interesting—about a year ago in the First-tier Tribunal following the introduction of real-time information for PAYE. Five years ago, the Revenue introduced a similar obligation for PAYE. It started advertising all the advantages. If you look at the consultation document, it says, "HMRC will be able to help prevent and detect errors and fraud within the system. We will not have to wait until the year end to identify underpayments by employers and collect those debts".

There was a case called Champneys Tring Ltd, which had made a mistake. The Revenue picked it up at the year end. At the tribunal the taxpayer said, "Surely they should have been able to pick it up earlier in the year", and HMRC's response was, "The RTI system does not flag up incorrect codes. That is for the employer to decide; it is not for us". Despite all the promises made, and all the additional advantages that RTI could have brought, once the legislation was on the statute book, they just went.

I think there is a general assumption these days, and I know that there are former Revenue people in the building, that HMRC sometimes forgets that businesses are there to make money and thinks that businesses are there to provide HMRC with information.

The Chairman: And money. Lord Hanworth, do you want to have the last question?

Viscount Hanworth: I will pass on that.

The Chairman: Thank you very much indeed; it has been very helpful. You may not be able to do this, but you have given some quite powerful examples of real cases, and if it were possible in some way to anonymise

them, it would be very helpful to the Committee to have them.

Graham Webber: We have a dossier of 100 personal stories and I would gladly make that available to you.

The Chairman: You would not mind if we drew on these in our report.

Graham Webber: They have been made available to your colleagues in the Commons and to the media.

The Chairman: The second thing was that you said that the Treasury Minister had made this comment. Do you have the *Hansard* reference for that? If you have, perhaps you could make it available to the Committee.

Graham Webber: I can find it. It was also mentioned in a document placed in the Commons Library on 10 October.

The Chairman: If you could liaise with our clerk.

Baroness Drake: And it was on the radio.

Graham Webber: And it was on the radio, yes, you are right.

The Chairman: I am not sure we would rely on everything that was on the radio.

Graham Webber: Yes, I will make it available.

The Chairman: Thank you very much indeed. That concludes our session.