Time to reboot

Management of taxes



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Jeremy Mindell asks if we should change the mandate of the Office of Tax Simplification for the next ten years

The OTS celebrates its 10th birthday on 20 July. It was set up by the Coalition government with the express purpose of trying to simplify the UK tax system. Watching ‘Fantasia, The Sorcerer’s Apprentice’ in lockdown with my children reminded me of the efforts of the OTS.
As Mickey Mouse draws out one barrel of water, 100 brooms chuck in a barrel of water each, overwhelming Mickey. The comparison to the OTS is apposite.

The OTS tries to simplify parts of the tax system but it appears to be overwhelmed by a deluge of legislation and complexity with every Finance Act. The weight of legislation has grown during the past decade with relatively few successes for real simplification. Few, if any, commentators would assert that the tax system in 2020 is

simpler than that in 2010.

Increasing length and complexity This is not to criticise either of the first two leaders of the OTS or their staff, who have undertaken this difficult task with both enthusiasm and perception. The problem appears to me as being the basis on which the OTS was formed; its terms of reference and its power. It concentrates on specific aspects of the tax system, whilst ignoring the welter of new legislation. The remorseless addition to the weight of the UK tax code shows no sign of diminishing and it really is time for this to be tackled.

I would go further and suggest that a rethink of tax simplification, its goals and objectives need to be undertaken. Simply totalling up of the size of the UK tax code in some form of league table would not be the ultimate goal, but you cannot avoid the fact that the very size of the legislation creates commercial issues which reflect on the UK's tax competitive position.

Not simplification but certainty Fundamentally, it is not simplification that one should look for but certainty. In essence, the more uncertain the tax system is in its treatment of relatively similar transactions, the more unsatisfactory it is. Moreover, uncertainty correlates with newness of the legislation.

Take, for example, the treatment of employee benefits and expenses. These have remained very similar for the past two decades and therefore practitioners and taxpayers have confidence in dealing with the end of year procedures.

Whilst doing an overdue clear out as a result of lockdown, I came across an old course on the completion of P11Ds that was two decades old. The rules were relatively similar to the ones today. This area is complex but, because it has not been subject to substantial changes in the past 20 years, the complexity is less of a problem.

I would always argue that certainty is crucial. Where the principles of tax have changed very little, practitioners can live with the complexity because most of the difficult questions have been asked and answered over the years. Additionally, there are not a myriad of updates and changes that practitioners must remember and relearn over the years. Constant changes may be good news for lecturers but not for anyone else!

Another example would be share schemes, where the share incentive plan SAYE (Sharesave) CSOP and EMI schemes have changed very little for the last two decades. This is a source of encouragement to people embarking on these types of long-term remuneration plans.

The source of greatest complexity now is the introduction of large amounts of legislation. This legislation has three undesirable features:

1. It is often rushed in its introduction, requiring amendments where it has either been badly drafted or its consequences have not been properly thought through.
2. The legislation often replicates provisions which are already in the tax code. A good example of this is the new profit fragmentation rules, whereby the ‘avoidance’ which is being countered appears to be counteracted by a number of pieces of legislation, including the transfer of assets abroad, transfer pricing, diverted profits tax, controlled foreign company and indeed the normal principles for obtaining a corporate tax deduction.
3. The degree of complexity introduced with some of these provisions is disproportionate to the issue at stake or could be dealt with in a different way. For example, to deal with the alleged abuses regarding employee benefit trust and loans that were not repaid did not require the full panoply of the disguised remuneration legislation. Likewise, the corporate interest relief provisions, with its numerous elections and different methods of calculation, is over-engineered. The draftsman has taken what was a relatively simple principle from the OECD BEPS process and turned it into something of unbelievable complexity.

Resetting the objectives and powers

In the first ten years, the OTS did some valuable work but I am not sure that a ‘duck shoot’ on existing tax allowances and reliefs should have been a priority. I would suggest that for the next ten years the OTS should turn its attention from the measures and practices which are on the statute book to the proposals that the government makes. The OTS should be empowered to audit new measures for six elements:

1. What is the amount of tax at stake?
2. How complex are the new measures, and how long would it take an average professional to understand them?
3. Are these measures duplicating previous legislation which is underutilised by

HMRC?
4. What is a realistic assessment of the compliance time for these measures?The corporate interest relief group ratio calculations are an extreme example, requiring earnings before interest, tax, depreciation and amortisation (EBITDA) on a global basis to provide an alternative calculation on an interest restriction.
5. Does the new legislation overturn an area where the law and settled practice was clear?
6. Will the proposed law create uncertainty which had not been present before?

A new example of complexity is the Structures and Buildings Allowance (SBA). It still takes 33 years to fully use the allowance, and does lead you to ask whether it really makes a difference to decision making in this area.

Redundant or duplicated legislation

Finally, if the OTS wishes to look at existing legislation, I believe it should focus on those areas which continuously cause significant difficulties to taxpayers.

First, this calls for a review of issues that regularly come before the courts so as to identify complexities which could be reduced by unambiguous legislation.

Secondly, there is plenty of redundant legislation which probably brings in miniscule amounts of revenue to the Treasury. For example, in the light of the case of FRC 2012 Plc [2017] UKSC 45 (the Rangers case), you might ask whether the disguised remuneration legislation is actually required in its current format.

Finally, there is a problem with HMRC being slow to use the legislation it already has in an effective manner. For example, from 9 December 2010 the anti-forestalling legislation became effective in respect to loans; however, it took the passage of the loan charge legislation, seven years later, to bring this issue to the fore.

Process, procedure and the law

The OTS has done some sterling work in trying to simplify tax procedures and, in the words of a former head of the OTS, ‘to make the user experience better and simpler for the majority of taxpayers – the greatest good for the greatest number’. This, however, leaves the issues of the more complex areas unresolved, making it difficult for those who advise larger businesses. This surely has an effect on the UK’s competitiveness.

Conclusion

The last chancellor genuinely interested in tax reform was Nigel Lawson, who left office three decades ago. His combination of reducing allowances but also reducing tax rates worked successfully. Most of his successors have, however, proceeded in the opposite direction. If the OTS is to have a more successful second decade, then it needs to be given powers to review and challenge the legislation at an early stage. This will need both political will and perhaps, as in the conclusion to the Sorcerer’s Apprentice, a bit of wizardry.