tax planning, of examining not only the abstruse and sophisticated parts of the arrangements, but also the simplest and most fundamental points. The little boy who dared to question the emperor's new clothes has grown up – and he now works for HMRC. ■

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IR35: an unsatisfactory trend

Proper financial management for you, unacceptable tax avoidance for me?

It will not have escaped anybody's attention that HMRC is seeking to crack down on the use of personal service companies and to extend the reach of the well-known IR35 rules.

HMRC has had mixed success in the courts in seeking to apply these rules against people in the media, particularly TV presenters. The cases of Christa Ackroyd ([2018] UKFTT 69 (TC); the decision of the Upper Tribunal is awaited) and Lorraine Kelly ([2019] UKFTT 195 (TC)) spring immediately to mind (among others) – and in the latest decision, *Kickabout Productions Ltd v HMRC* [2019] UKFTT 415 involving a Mr Paul Hawksbee who broadcasted on TalkSport, the arrangements were found not to be within IR35.

We are now all trying to get to grips with the draft legislation intended to be introduced next year which proposes to switch the responsibility on to the client for determining whether the hypothetical contract with the contractor would have been a contract of employment if the individual had been engaged directly and not by a personal service company. This is a difficult judgment, as is clearly demonstrated by the courts, and the penalty for getting it wrong (or it seems, somebody else getting it wrong) will be pretty serious.

This is not a satisfactory trend. There is surely something not quite right for the government to say that it is not very keen on the bona fide contract you have entered into with an independent third party, so it will pretend that you have entered into a different contract and charge you (more) tax on that basis. (For anybody who thinks this is an overstatement, this is already what happens with stamp duty land tax. You just have to look at FA 2003 s 75A, and the litigation to which it has given rise, to see that it operates exactly in this way.)

It is clear that HMRC regards personal service companies as some kind of abuse which deserves draconian counteraction because the people who are involved with them are clearly Very Bad People, or at least they are doing a Very Bad Thing.

With this mind, I could not help laughing at the recent announcement that some NHS trusts are planning to arrange for their consultants to be paid via LLPs to get around the tax issues arising on their pay and pensions (see page 2).

I cannot imagine they will ever be allowed to do this, but it is instructive that the NHS is even thinking that it would be a good idea. I suppose it is a classic example of if we do something it is 'proper financial management', which is entirely sensible, but if you do it, then it is 'unacceptable tax avoidance' and completely repugnant.

Once upon a time, we had a rule of law which applied to everybody, and attempts by the state (i.e. the Crown) to suspend or dispense with laws in its own interests caused a bit of a problem before it was put right in 1689. I hope we don't have to go through all that again before we get our rule of law back. ■

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Tax and the rule of law

If governments fail to respect the rule of law, might taxpayers do the same?

Cabinet minister Michael Gove's refusal to confirm that the government would abide by legislation designed to stop the UK leaving the EU without a deal has raised the spectre that the government regards itself as above the law. This threat to erode the rule of law at the highest level horrified voters and no doubt bolstered the 1.7m signatures on the petition not to prorogue or dissolve Parliament unless and until the article 50 period has been sufficiently extended or the UK's intention to withdraw from the EU has been cancelled.

The rule of law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials and judges. As soon as the rule of law breaks down, mutual trust and cooperation are lost.

When it comes to taxes, mutual trust and cooperation are vital. An IFS report (*Dimensions of tax design*, see bit.ly/2jWtnY0) noted that, just as large companies increasingly consider tax issues as part of corporate governance, so too must tax administrations consider governance and reporting issues. One of the key reasons for this is if there is to be mutual trust and co-operation on the part of taxpayer, tax agent, and tax official, then tax administrations must act and report in a transparent manner. It is not a one-way street.

This mutuality of trust is even more important when it comes to dealings between HMRC and individual taxpayers. And yes, you've guessed, it's not been a good month there either.

The First-tier Tribunal published its decision in the case of *S Cussens v HMRC* [2019] UKFTT 0543 (TC) in which the tribunal had to consider the use by HMRC of its statutory power to make assessments using its 'best judgement' when accurate figures are not available.

While the tribunal recorded that Mr Cussens 'behaved ostrich-like and buried his head in the sand rather than engaging with the issues', it was also recognised that he received benefits from the Department of Work and Pensions for at least some of the 12 tax years in question because he was unfit to work because of physical or mental impairments.

> Imagine what would happen if taxpayers en masse chose which tax demands to pay and which to ignore

Looking at the assessments made by HMRC, with tax and penalties totalling more than £340,000, the tribunal accused HMRC of trying to frighten the taxpayer: 'if any judgement whatsoever was brought to bear upon this issue, it certainly cannot be described as "best". It smacks of being a situation where, because the appellant had been uncooperative and was sticking his head in the sand, the respondents decided to issue assessments almost 'in terrorem', in a bid to persuade the appellant to engage properly in the matters under review… In conclusion, we have formed the opinion that the assessments raised on the appellant are so wild, extravagant and unreasonable that they were not raised for the purpose of making good to the Crown a loss of tax and so were not authorised by [the relevant legislation]'. The tribunal then quashed all the assessments and the associated penalties.

There are no winners here. The government and HMRC must act quickly and decisively to restore public confidence that they will uphold the rule of law. Imagine what would happen if taxpayers en masse chose which tax demands to pay and which to ignore. Fiscal and economic chaos would overwhelm the country. ■

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Correction: Some text was inadvertently omitted from last week's article '*Dundas*: the curious case of the capital allowances claim'. We apologise for the error. A corrected version is available at taxjournal.com.