

# STRATEGIC TAX PLANNING

International & UK Tax Consultants

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## **GIFT HORSE FROM THE UK HMRC?**

On 13<sup>th</sup> October 2011 the UK HMRC made a very unusual announcement on its website.

The announcement was that they would shortly begin writing to UK Residents and Organisations holding Bank Accounts with HSBC in Geneva who may not have reported all their income and gains.

Whilst many of you may be aware of the background to this situation, in that a disgruntled former employee of HSBC (Herve Falciani) stole data and then fled Switzerland to France. It was actually the French Tax Authorities who (under the UK/French double taxation treaty) passed the names and account data to the UK HMRC.

500 people are already under investigation with several criminal prosecutions supposedly underway on these 500. The actual total number of names given to the UK HMRC was approximately 6,600.

The announcement of letters going out is therefore a very unusual tactic, especially when some people are already under investigation and prosecution!

There has been speculation as to why the UK HMRC has taken this rather unusual course. Some are speculating that they simply do not have the resources to open 6,000 investigation cases and conduct the Enquiries. This is particularly so in view of the fact that the letter states that the work will be led by the new Offshore Co-ordination Unit, which will only become fully operational next month i.e. November.

Since there is information that the Unit has only 25 personnel within it, this has buoyed the speculation that the reasons for the letters, are that the Unit cannot launch the Enquiries.

Let me de-bunk this incorrect analysis from the start.

HMRC are giving the Taxpayers 30 days from the date of the letter to come forward and make a disclosure of their undisclosed income and gains in the HSBC accounts. Once those 30 days has expired, to open an Enquiry it only takes a second letter to formally launch the Enquiry under the relevant statutory provisions. In this case (and rightly this time), the speculation has been that most of the Enquiries will be under the UK HMRC Code of Practice 9 known as "COP9" which gives them the choice between pursuing a criminal prosecution or making a financial settlement.

1

# STRATEGIC TAX PLANNING

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What those speculating don't fully understand is that firstly, recruitment has only just begun to the Offshore Co-ordination Unit; secondly, it is likely that the Unit's job would be to send out the initial Enquiry opening letters and then cases will be allocated to the various Specialist Compliance Investigation Teams ("SCI") teams around the Country. There are other Units which they could call upon including the High Net Worth Unit, the Civil Investigation of Fraud Units and the Criminal Investigation Directorate.

All in all, it is a mistake to conclude, as many commentators have, that the issue of these letters is a sign of weakness.

I believe that it is the opposite. HMRC are taking a very pragmatic approach. Their Disclosure Facilities and in particular the Liechtenstein Disclosure Facility ("LDF") , has proved very successful in terms of raising money quickly for the UK HMRC.

Since their objective is to raise money for the Government as fast as possible, they are basically trying to encourage those 6,000 to make Voluntary Disclosures rapidly, rather than undergo lengthy investigation. The obvious method by which they would do this is the LDF, as this can offer them penalties capped at 10% or 20% and interest for only 10 years.

There are further nuances of the LDF such as the ability to use a Composite tax rate that can further enhance the scheme and make the sums payable under the LDF, probably the most palatable to any of the account holders.

My conclusion therefore, which differs radically from many of the commentators, is that the unusual **Gift Horse** offered in these letters is not a sign of weakness but a pragmatic approach by the UK HMRC to maximise their revenue raising potential, as quickly as possible.

It would be remiss of me in an Article not to look at the other side of the coin: Why so few of these 6,000 have come forward to date when the Falciani material has been in the hands of the UK HMRC for a number of years?

One reason is that tax evasion is only the tip of the iceberg i.e. the money in the accounts are derived by either organised tax evasion or criminal activity. That may apply to some, but not many of the 6,000.

The real problem the UK HMRC face is that those who commit tax evasion are convinced (on a statistical basis) that they are more likely to get away with it, than be caught! Otherwise, they would never do it in the first place!

There are simply not enough high profile cases of tax evaders being prosecuted and getting lengthy prison sentences. That doesn't mean that there aren't any prosecutions, but the prosecutions tend to be small in number and to take too long to come to fruition.

2

# STRATEGIC TAX PLANNING

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The average time for a case to come to Court and to be concluded appears to be something like 2-3 years. Only if the UK HMRC could improve first of all, on the number of prosecutions (and this would need to be approximately ten-fold) and could speed up the time it takes to conclude a prosecution, could they create a sufficient deterrent effect to alter, or at least a meliorate the statistical advantage that promotes evasion.

Only when a tax evader knows of close friends or business colleagues, who have been prosecuted or had to pay an enormous settlement that has brought them close to bankruptcy, will there be a sufficient deterrent to tax evasion.

This remains the challenge for the UK HMRC and in particular, their Criminal Investigation Directorate.

Ironically, therefore even if this unusual **Gift Horse** from the UK HMRC proves successful, it is actually likely to reinforce the perception amongst tax evaders that the worst thing that could happen to them is that they would have to pay up some money many years later possibly under a deal, like the LDF.

Where does that leave the Professional Adviser?

In respect of the 6,000 HSBC clients who are about to receive letters, there can only be one practical piece of advice. First of all, it is necessary to obtain full and specific advice relating to the individual client's personal situation, to map out clearly what their options are and then to guide them to the best and most pragmatic option for them, which will resolve their situation with the UK HMRC.

There will only be 30 days from the date of receipt of the letter, to get such specific advice and to reach a decision and how best to proceed.

Strategic Tax Planning have a dedicated team who can offer an immediate response and quick turnaround of advice to Clients to ensure that they meet the UK HMRC deadline and if appropriate, make a disclosure that will resolve their outstanding issues.

Daniel Feingold  
Senior Partner  
Strategic Tax Planning