

In brief

Views on recent developments in tax

Amazon branches out

Amazon is now booking sales through several branches in Europe. What led to this change and what impact might it have?

Before clicking 'buy now', we are still advised that our internet purchases are 'sold by Amazon EU S.a.r.L.'. Eagle eyed readers of *amazon.co.uk*'s latest conditions of sale and use will, however, spot a new reference to a UK branch of that company, located at 60 Holborn Viaduct. Amazon has reportedly confirmed that this reflects a shift to booking sales through new branches which have been set up in the UK, Germany, Spain and Italy.

What has led to this change? Amazon says that the process of establishing branches began more than two years ago, which would long pre-date the diverted profits tax. More likely it is part of a broader reaction to public opinion and the BEPS project, in particular the work on the avoidance of permanent establishment status, and the focus on the transfer pricing of Amazon's arrangements with its local 'fulfilment centres' (these are the huge warehouse operations which enable speedy delivery – and which, whilst operated through locally resident companies, have recorded only very modest profits).

Minds will no doubt have been focused by the \$250m assessment on Amazon by the French tax authorities (Amazon says that it is also working on opening a branch for France), and the European Commission's state aid investigation into Luxembourg tax rulings. Perhaps Amazon's grilling by Margaret Hodge had some effect. Recent VAT changes may also have been a factor. Since 1 January 2015, business to consumer supplies of telecoms, broadcasting and electronic services have been treated as made in the place where the consumer belongs, with the effect that sales of MP3s and e-books to UK customers from Luxembourg no longer benefit from Luxembourg's old VAT rates of 15% and 3%, respectively.

How much of a difference will the change make? Amazon has emphasised that e-commerce is a low-margin business, and the global business continues to make losses. The size of Amazon's UK tax bill is likely to depend upon the amounts of the royalty payments which it is assumed will be attributed to the UK branch of Amazon EU S.a.r.L. Bear in mind that Amazon's Luxembourg

advance pricing agreement, approving large royalty payments from that company to Amazon Europe Holding Technologies SCS, is the focus of the ongoing state aid investigation. A consequence of Amazon's new branch structure seems to be a shift in the competence for overseeing the transfer pricing of these royalty arrangements from the Luxembourg tax authorities to those in the UK, Germany, Spain and Italy.

Will the new arrangements apply to transactions described as 'fulfilled by Amazon', whereby goods are stored in and dispatched from Amazon's UK 'fulfilment centres', but are, in fact, owned by other companies? (An item recently purchased by one of the authors and delivered the next day was, it transpired, actually sold by a company based in Greece.) It is also not clear whether a similar branch structure will operate for digital sales, which are effected through a separate Luxembourg entity, Amazon Media EU S.a.r.L.

The truth, of course, is that it is unlikely we will ever know how much UK tax is paid under the new arrangements, as the choice of a branch structure, rather than using local subsidiaries, means that separate entity accounts will not be published. One wonders whether this might, over time, add to the existing pressure for the publication of country by country reporting information. ■

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What amnesty?

HMRC is taking a light touch to penalties for late self-assessment tax returns.

Much was made in the press at the end of May of the fact that HMRC was writing off penalties for late self-assessment tax returns. While some described it as an amnesty, the only penalties being cancelled were those where a return had been lodged late and where an appeal had been made on the grounds that the taxpayer had a reasonable excuse. The instruction to staff was simply to employ a very light touch in challenging such claims. While the amnesty headlines were misleading, several points struck me.

Firstly, we have yet another example of staff being redeployed to deal with a

pressing issue. The press reported that staff were redeployed from call centres to deal with the appeals. You might say that this was an example of agile deployment of resource (unless you were trying to get through on the phone). Alternatively you might say it suggested once again that HMRC now lacks sufficient resource to deliver basic services.

Secondly, we have the question of the penalty regime itself. In its current consultation on penalties, HMRC seems to have accepted that the way that late filing penalties are levied needs to be changed. I agree. The old late filing penalty was much fairer than the current regime. Daily penalties can in my experience trigger rabbit in the headlights syndrome for some people (generally those who owe little or no tax): instead of making them want to stop the situation getting worse, the ever increasing penalty creates a problem they blank out. HMRC is very sensibly proposing a new regime designed to deliver its stated objective of securing returns rather than penalties in a more proportionate way. I wonder if acceptance of the fact that the current regime needs changing in part drove the view that the backlog needed clearing with a light touch.

Thirdly, there is the question of who should be asked to file a return. I hope HMRC will take the opportunity to reflect on the need to keep so many people within the self-assessment regime in the first place. As I noted in *Tax Journal* earlier this year ('Rethinking penalties', *Tax Journal*, 26 February 2015), the Office of Tax Simplification has reported that 16% of ITSA returns show nil liability and a further 8% show a liability of less than £50. That means that around 1.5m returns are being processed to collect not one penny of tax and a further three quarters of a million returns disclose relatively trivial amounts. Remove these cases from self-assessment and the scale of the late penalty processing problem shrinks significantly.

An amnesty triggered by a desire to clear a backlog (arising through insufficiency of resource and an excess of penalty notices) would not be fair on those who took the trouble to file on time. A light touch approach to appeals, while taking the opportunity to rethink the penalty regime and removing unnecessary cases from self-assessment, would make considerable sense: that I think is the real story. ■

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Reader feedback: Tackling avoidance

Many contractors are being unfairly treated by the APN regime.

The excellent article by Graham Aaronson QC and Steve Bousher ('Tackling avoidance: the coalition's end of term report', *Tax Journal*, 1 May 2015) proves how the battle won for the hearts and minds of public opinion was converted into tough anti-avoidance measures with little or no adverse comment. I would generally agree with their marking of the coalition's efforts, including the black mark.

The ground over which the hearts and minds campaign was staged was the activities of multinational companies and the high net worth community. Their indulging in avoidance projects (some still sub judice) is used as the *raison d'être* for the measures. HMRC is painted as valiantly holding the breach against the well resourced, would be pillagers, of Treasury coffers.

There is, though, a larger group of people that are caught in the blast radius of these new rules (and possibly a larger amount of tax) – and I'm left wondering if the high scoring end of term report might need revising when these are considered as a valid part of the equation.

HMRC wants to treat contractors as employees. Neither individuals in this area, nor their customers wish them to be employees. It is unsurprising then that preserving the flexibility of contractors to work for the best day rate and for those engaging them to squeeze costs has attracted a lot of attention

from providers of 'solutions'. These started as relatively simple ways to preserve self-employment status with its favourable treatment of expenses. They morphed into administrative umbrellas for one man limited companies. With the advent of arrangements including employment benefit trust and offshore intermediary employers, the providers evolved their offerings to reduce the largest overhead – tax.

HMRC began enquiries around 2004. From that date, a seemingly random selection of users began to receive COP 8 notices, s 9A enquiry letters or, sometimes, 'discovery' assessments. Next came a long silence. Very long. In fact, years of silence.

The providers of the arrangements advised their clients that this was part of a normal process. Their schemes were '100% HMRC compliant', backed by a QC opinion and, in one case my firm has seen, was said to be immune from enquiry because it had been disclosed under DOTAS!

Cases began to appear. In 2013, nine years from the first COP 8s, HMRC won the *Boyle* case [2013] UKFTT 723 (TC). This case concerned a scheme that involved offshore companies and loans in soft currencies in a carefully orchestrated manner. This was thought to be a forerunner of more success and Spotlight proclaimed that such cases were considered avoidance. It is hard to see why not.

Subsequent cases (*UBS and Deutsche Bank* [2014] EWCA Civ 452, *Murray Group* [2014] UKUT 0292 (TCC)) were setbacks. These remain sub judice, and the jury is literally still out on whether HMRC's view is correct for contractor EBT arrangements.

In all this period of time, individual contractors heard nothing from HMRC. Many assumed that the lack of follow-up meant that enquiries were dropped. This was tacitly encouraged by scheme providers who had not closed up shop (only to phoenix elsewhere).

Then the accelerated payment notices (APNs) arrived. These are landing on people who have heard nothing since the COP 8, which was ten or more years ago. As can be imagined, this came as a very nasty shock. I have many stories of contractors being pushed into bankruptcy and I do fear that some will suffer health problems.

Many tens of thousands of contractors used these schemes, often unwittingly, and were largely ignored by HMRC after initial contact. They are now being judged by new principles on anti-avoidance. They are subjected to the retrospective effect of the APN regime. They face some exceedingly hard choices, with no recognition being given or allowance made for the dilatory behaviour of HMRC, which has undoubtedly increased interest liabilities.

What might be considered an appropriate response for a few tens of multinational companies and a few thousand high net worth individuals, is causing collateral damage to tens of thousands of people.

Perhaps a greater focus on HMRC resources to close out existing enquiries and less on headline grabbing new measures would have prevented this situation?

My end of term report would have said, well done in chasing the rich, but you must do better for everybody else. ■
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