

Tax Talk: 2. Taxation Legislation - Temporary Taxation Orders (TTOs)

Written by Mark Solly

Sunday, 19 November 2017 15:24



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PRACTICE NOTE

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BUDGET 2016 - INCOME TAX AND NATIONAL INSURANCE PROP

I sincerely hope that Members of Tynwald will shortly adopt a New Year's Resolution to the effect that they 'resolve to cease the introduction of major changes to the Income Tax Acts by means of Temporary Taxation Orders.'

The introduction, amendment or repeal of provisions relating to income tax in the Isle of Man are generally accepted as being matters for primary legislation. The enactment of primary legislation is, of course, usually the subject of an elaborate and rigorous process involving the drafting, printing and publication of a Bill, followed by three readings, including a detailed examination of clauses, in the House of Keys, the same in the Legislative Council, signature by Members of Tynwald and finally the grant of Royal Assent. The wording of primary legislation should be clear and unambiguous. It should not be open to interpretation and reinterpretation to suit the whims of the bureaucracy which operates it. However, while income tax continues to be generally accepted as being a matter for primary legislation in the Island, the usual processes leading to its introduction, amendment or repeal are now easily circumvented by means of Temporary Taxation Orders. Such an Order is likely to be drafted behind closed doors in the Treasury and, in all probability, reviewed by the Attorney General. The Order is then presented to Tynwald for approval. (The Members of Tynwald may have already been briefed in private by interested parties). The Order cannot be amended. Members are simply invited to vote for it or against it, If, as expected, the Members vote for the Order, its provisions become a part of the primary law.

Much later, when an Income Tax Bill comes along, the provisions of the Order are featured in a Schedule whose contents are there simply to be 'confirmed'.

Section 2PA of the Income Tax Act 1970, which was introduced by the Income Tax (Corporate Taxpayers) (Temporary Taxation) Order 2006, is a good example of such primary legislation and the likely shortcomings of its wording. Even the Assessor of the time does not seem to have understood its purpose when he issued his Practice Note 174/12 dated 21

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February, 2012.

In this Practice Note, the Assessor claimed that 'There appears to be some misunderstanding about the meaning of the term "distribution"' and went on to claim that the term "'income

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distribution" ... is defined unambiguously in subsection (5)' of Section 2PA of the Act. In his attempt to correct the 'misunderstanding', he declared certain 'distributions', whether of capital or of income, to be liable to income tax in the hands of the Manx resident individuals who received or benefited from them. How wrong, it appears, he was! The issue of this Practice Note PN 174/12 caused outrage in that part of the finance sector that received it and that understood it. The Practice Note PN 174/12 was quickly withdrawn and new spins devised for the meanings of Section 2PA of the Act.

These new spins are now contained in -

- the 'new' Practice Note PN 174/12 dated 22nd June, 2012, which comprises four pages; and
- Guidance Notes GN 49 dated 6th April, 2017, which comprise fifty-three pages,

..which are both authored by 'the Assessor' (i.e. Assessor made law). These documents describe the various ways in which the Assessor is now likely to treat 'distributions', some of which are not to be found within the provisions of Section 2PA. The provisions of Section 2PA are serious business. They form part of the primary legislation relating to the Tax Free Facility for individuals residing in the Island who own companies.

Administrative procedures introduced to implement such primary legislation may well be the subjects of Practice Notes issued by the Assessor, but they should not override the provisions of the primary legislation. The rewriting of the primary legislation should be left to Tynwald.

Exceptionally, a minor unintended consequence of a provision in an Income Tax Act may quite properly be the subject of an Extra Statutory Concession made by the Assessor. It follows, however, that any such 'minor unintended consequence' should be corrected in another Act of Tynwald as soon as possible thereafter.

The rewriting of any primary legislation (however enacted) by means of voluminous Practice Notes and Guidance Notes by an officer of the government should never be the answer!

The Isle of Man Government prides itself upon being nimble in its responses to the market. The use of Temporary Taxation Orders hastily drafted behind closed doors and 'enacted' subject only to a single vote in Tynwald illustrates just how nimble! But is it transparent? The absence of public disclosure and proper debate in Tynwald is surely the main reason for the Tax Free Facility having been kept out of the public domain for so long!

Hopefully, in his next Budget statement to Tynwald, the Treasury Minister will explain the

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current Treasury policy in respect of the use of Temporary Taxation Orders. In the meantime, I have to recognise that it may prove to be expedient to use a Temporary Taxation Order to bring an early end or modification to the Tax Free Facility!