# Trusts taxation reform: not today please!

COMMENTARY BY MICHAEL ASHDOWN, 29TH APRIL 2021

What are the principles underpinning the taxation of trusts, and does the law as it stands align with them? These were the two broad questions asked by the HMRC consultation document on the taxation of trusts, published back in November 2018, and following from the government's commitment at the autumn 2017 budget to consult on *"how to make the taxation of trusts simpler, fairer, and more transparent"*. The consultation developed these ideas, asking a mixture of very general questions (e.g. about possible measures to "enhance transparency", and the use of non-resident trusts), and very specific ones (e.g. on the income tax treatment of trust management expenses, the consequences of transactions being declared void, and the simplification of vulnerable beneficiary trusts).

Although the consultation closed in January 2019, HMRC's summary of consultation responses was only recently made available. The consultees were primarily tax advisers (mostly accountants and solicitors), umbrella groups for such advisers (e.g. the Chancery Bar Association) or their clients (e.g. Historic Houses) but also included campaigning organisations (e.g. Church Action for Tax Justice).

At the highest level of generality, there was broad support for the principles of transparency, fairness and neutrality, and simplicity. Whilst doubtless gratifying for HMRC to be told that tax and trusts practitioners and others endorse their approach, I do wonder whether they really expected anyone in 2019 to respond that they were looking for unfair advantages for their clients and therefore would prefer a complex and opaque system? Some respondents did at least point out that the long-term use of trusts across generations also requires a focus on certainty and stability, though it is hard to imagine this being popular with any government which enjoys the ability to tinker with the tax system from year to year.

On transparency, HMRC was careful to ask about appetite for further measures, rather than about the popularity of the burdens imposed by the current regime (including the Trust Registration Service, and the DOTAS requirements). Although practitioner respondents were of the firm view that enough is enough, HMRC are surely more likely to invoke in future the views of *"respondents outside of the trust and taxation professions"* who were more concerned that *"trusts used for illicit purposes can sometimes prove too elusive to track down and prosecute those behind them"*.

A similar split was seen in relation to the use of non-UK trusts. HMRC asked about the use of non-resident trusts *"for avoidance and evasion".* Practitioners thought that existing money laundering and professional conduct rules made this rare – presumably they had unlawful evasion primarily in mind, rather than the kind of lawful mitigation that HMRC might seek to stigmatise as "avoidance". Non-practitioner respondents were apparently more concerned with high-profile cases where investigations *"were said to have been hampered because of the inclusion of a trust within wider complex structures"*. Again, it is easy to imagine HMRC keeping this response in its pocket to wheel out when a justification for future legislation is needed.

On points of detail, there were no surprises: the IHT regime treats lifetime transfers into trust (which are immediately chargeable) unfairly by comparison with outright gifts (which are PETs), but 6% is about right for the ten-year anniversary charge for "relevant property". The existing rules on private residence relief, trust management expenses, and transactions declared void were broadly supported. However, the special regimes for disabled person trusts and bereaved minor trusts were considered too complex, and capable of producing unfairness.

HMRC's stated conclusion – that *"responses did not indicate a desire for comprehensive reform of trusts at this stage"* – is arguably correct as far as it goes, but incomplete. After all, the tenor of the practitioner responses on transparency appears to have been that most would welcome a rolling back of existing regulation – but HMRC was only consulting on appetite for further measures. On the technical detail, HMRC was primarily consulting on aspects of the law where they might take the view that trusts are treated too generously – so maintaining the status quo is about as good a result as practitioner consultees could hope for. If HMRC had asked whether the Finance Act 2006 should be repealed they might have received rather more radical responses! As it is, this consultation can now be filed for no further action, and the law governing the taxation of trusts will continue to develop piecemeal though Finance Acts and judicial decisions.

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