

LOCKDOWN THOUGHTS

By David Goldberg QC

Most people will have asked questions of themselves in lockdown, not questions of the “Who invented liquid soap and why?” kind, but deeper, self searching questions like “Is my life worth living?” That is certainly not a question I intend to answer here, but I might attempt an answer to a slightly shallower question: “What am I doing?”.

Well, what I am doing during lockdown is to carry on working, only mainly from home rather than from Chambers, and I have covered a largeish area of work in the roughly three quarters of a year or so that has passed since the pandemic more or less closed our offices. There have been issues about the difference between income and capital, mainly from non-UK jurisdictions; there have been questions from both home and abroad about the deductibility of certain payments; there has been a domicile question with a story so fascinating it would be hard to believe if written in a book, but which is, nonetheless, true; there have been questions about intangible property and there have been more usual questions about loan relationships, about unallowable purpose and about hybrids. There has been a surprising amount of work involving the transfer of assets abroad legislation; there has been a case about whether damages for discrimination are taxable as employment income. (Who, apart from employment lawyers, knew how much employment law there is!) And there have been several cases about how to manage enquiries being made by HMRC.

Does anything in particular stand out from this *pot pourri*?

Well, two cases do. In one, HMRC made a contract promising not to impose certain possible charges to tax on the taxpayer: it falls within certain express powers of HMRC,

it is terms are clear and it is not a future agreement. HMRC have threatened to breach it – are, perhaps, breaching it already: they seem content to dishonour their promises and, by doing that, themselves. In the other, HMRC have expressed disagreement with the taxpayer’s self-assessment (which, by the way, is certainly right) and have immediately started talking about penalties. The day before I wrote this passage, there was a headline in the newspaper which read “Tax enforcers threaten families left penniless by the pandemic” and, on the day I write it, the headlines say “HMRC debt collectors linked to tax haven and payday loan lenders” and “I got the letter, went upstairs and cried”. This is happening when, more or less everyday, I receive an email from HMRC which is headed “HMRC help and support to you”, which reminds me of what President Reagan said: “The eight most frightening words in the English language are, “I am from the government, I am here to help”.

When the publisher, Hamish Hamilton asked Lord Radcliffe if he would allow the publication of a book of his essays, he is supposed to have attempted to persuade him to say yes by adding “it will help to show the flow of your thought”. Whatever the reason, the book was published: it is called “Not in Feather Beds” which is part of a quotation, “We may not look to go at our pleasure to heaven in feather beds. It is not the way”. I am doing this from memory, so I may not have the quotation exactly right, but it is near enough so, and I hope I am also right in remembering that, in the preface to the book, Lord Radcliffe said that he was surprised to learn from Hamish Hamilton that there was a flow to his thought.

Lord Radcliffe is, of course, remembered by history as the man who decided where the boundary between India and Pakistan was to be, and is well known to tax lawyers because, as “our Right Honourable Trusty and Well-Beloved Cyril Radcliffe”, he was Chairman of the Royal Commission on the

Taxation of Profits and Income, whose reports, published in the 1950s, remain influential today.

For some reason I have always had a great affection for Not in Feather Beds and the idea of the flow of thought: perhaps, in the tangle of my mind, it links to the concept of the river of time and the idea that we draw the means of survival from the wellspring of suffering itself – a thought which is, perhaps, apt in a time of pandemic. No matter whether that is why I like Not in Feather Beds or not, I have always hoped that I would have a flow of thought, if not in relation to brain surgery or quantum mechanics at least in relation to my work as a tax barrister. I have been doing that job for some time now, time enough to develop a flow, but, if I look back for a moment – I generally spend my time looking forward – I find that, in relation to a central feature of our tax system, my thoughts have stayed the same.

Quite early in my career it became apparent that HMRC or their predecessors had too much power; that they did not always use their power wisely and well; that, in part, the power came from a lack of clarity in the tax system; and that the concatenation of complexity and power made the tax system burdensome for those subject to it, or, at least, for those who are not taxed by PAYE. A fair society is not created by providing for the poor or relatively poor while over-burdening the rich: it is created by balancing rights and obligations, by ensuring that those made subject to State power have remedies if those powers are over-used. It is important to recognise that when the State gives, it is performing an entirely different function from that it performs when it takes, and that, while the giving must not be grudging, equally the taking must not feel like extortion. Because that is so, it can often be necessary to limit, or to attempt the limit, the use of power; and experience taught me that, with sufficient energy, with sufficient will and with sufficient imagination, it is often possible to control the

Revenue's excess. Those, then, were the views which I formed some years ago.

What has happened since then? The tax system has become more and more complicated: the legislation governing it has grown from under 500 pages in 1952 to tens of thousands of pages today. HMRC have been given more and more powers – so many powers that the thought of enumerating them makes me weary – and the width of the powers, both in relation to substantive law and in relation to administration, makes it harder (though not impossible) to control what is done with them. It is claimed that many of these new powers have been introduced in accordance with thinking derived from the relatively new discipline of behavioural economics. If that is right, it involves a considerable misunderstanding and misapplication of the thinking.

The central idea of behavioural economics is that people respond more willingly to nudges than to threats, and that is why so many new penalties have been introduced into our tax code: they are supposed to nudge taxpayers into paying more tax. But a threat remains a threat even if called a nudge and these new penalties threaten and are intended to threaten. It is, no doubt, possible to give these threats fancy names, to call them nudges, but it does not change what they really are, nor does it change their character which is unpleasant and nasty. At the same time, the general political climate is unfavourable to many taxpayers and the inclement weather is often reflected in the judicial approach to these matters.

Now, of course, HMRC need powers. I was recently told by a reliable source that there were still something like 3000 organisations selling arrangements which involved EBTs and loans, on the hopeless basis that the purchasers of these schemes would lawfully save tax. It is because of that scale of thing that we had the miserable suicide-inducing experience of the loan charge largely corrected by the loan charge review.

The continued and continuing sale – or, more accurately, misselling – of bad tax schemes brought forth a mix, embedded within our tax law, of administrative and substantive legislation, when the problem should have been addressed by the criminal law. Indeed, the misselling of bad tax schemes is trebly criminal: it is criminal in the act; it is criminal in the effect it has on the innocent purchaser and it is criminal because of the affect it has had on all of those subject to the tax system.

What has wholly disappeared from our tax system is any sense of balance: legislators endow administrators with huge powers, no doubt in the deeply held view that, here in the United Kingdom, they will be used reasonably; but administrators, who have been given these powers, then use them to the full; Courts which were once willing to control administrative excesses too often feel compelled to hold that it has been sanctioned by Parliament.

The tax system should leave us (to borrow from Kipling) with
“Ancient right unnoticed as the breath we draw – Leave
to live by no man’s leave underneath the law”

Instead, we live in a culture in which

“He shall mark our goings, question whence we came
Set his guards about us as in Freedom’s name.

He shall take a tribute toll of all our ware;

He shall change our gold for arms – arms we may not bear”

So here I am, stuck with exactly the same thoughts I developed several decades ago: taxpayers are facing substantially the same problems as they faced all those decades ago, but now HMRC has even greater power to enforce their will.

What am I doing?

The answer seems to be “Not enough”.

But, by the living God, tomorrow we shall try the game again.