TAXREP 5/00

SERIOUS TAX FRAUD

Memorandum submitted in January 2000 to the Revenue by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to a technical note issued in November 1999

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POWERS TO COMBAT SERIOUS TAX FRAUD

GENERAL COMMENTS

Introduction

1. We welcome the opportunity to comment on the proposals in the Revenue technical note issued on 29 November 1999. We are disappointed that the period for comments was relatively short, bearing in mind not only the importance of the subject but in particular the fact that December and January are a very busy time for accountants as the deadline for income tax self assessment approaches. This may well have prevented some of our members being able to consider the paper in depth.

2. We have for a long time been concerned at the increasing use by the Inland Revenue of Taxes Management Act ('TMA') 1970, section 20C against firms of professional advisors where the firm has been an innocent third party and the Revenue has mounted a raid on the advisor with the attendant adverse publicity on the innocent firm. We accordingly would very much welcome an intermediate power that overcomes the necessary stages that have been built into the section 20 procedure in order to protect compliant taxpayers and, at the same time, avoids the damage on innocent third parties that result from a high profile 'raid'.

3. Nevertheless, we are concerned that the proposals are too widely drawn and could impose unreasonable burdens on innocent third parties.

Required documents

4. In particular, we feel that the reference in the proposed section 20BA(1)(b) to 'documents which … may assist in the detection or investigation of the offence' is too wide. Virtually any document would assist in the investigation of a suspected offence. It is wrong to place such an open-ended burden on innocent third parties without there being strong evidence that an offence has probably been committed.

5. Paragraph 13 of the discussion document states that what is envisaged would be very similar to the power under paragraph 11 of Schedule 11 of the VAT Act 1994. We would have no problem with that, but would point out that the section 11 power applies only where 'there are reasonable grounds for believing that an offence … is being, has been or is about to be committed'. If the information power is to extend beyond situations where there is other evidence of an offence to situation where there is a mere suspicion, we feel it important that the Revenue should have to identify with a high

degree of precision the documents it requires. We would, of course, prefer that the power followed the equivalent VAT provision.

Nature of offence

6. The precise nature of the offence should require to be specified in the order. A third party who is required to carry out what may be substantial work is entitled to have the opportunity to challenge whether the information required would in fact assist in the detection or investigation of the offence.

Right to be heard

7. Bearing in mind that the proposed power is targeted at innocent third parties, not the suspected criminal, we believe that in most cases the application should be inter partes so that the third party has an opportunity to make representations to the judicial authority as to the amount of work in which he will be involved, as this ought to influence the scope of the order.

8. We accept that in some cases the inter partes hearing might prejudice the investigation and feel it reasonable that either the judicial authority should have power to dispense with the requirement for the hearing to be inter partes or there should be a prohibition on the third party disclosing to the suspected criminal the existence of the hearing. An alternative would be to give the third party a right to ask the judicial authority to vary the order once it has been made with the Revenue being entitled to make representations as to why the order should not be varied.

9. Our concern is that, with an ex parte application, the judicial authority has no way of assessing the burden that it is imposing on an innocent third party, and we feel that such a burden is a relevant matter to be taken into account in determining whether or not to make an order in the terms proposed.

Time limit for complying

10. The minimum period allowed for the delivery of the information should be seven days. Even the production of a single specified letter may require work by the third party in tracing where it is held: this could be burdensome if the order is made at a time when the third party is particularly busy. For example, we think it would be unreasonable to expect an accountant to drop what he is doing in the last week of January, when many are overwhelmed with work on personal tax returns, in order to devote time to complying with an order for immediate production of a document.

11. It is also important that the third party should have an opportunity to take legal advice as to his responsibilities, bearing in mind that in

the case of a professional person the order will conflict with the innocent party's ethical duty of confidentiality, which virtually automatically imposes a burden on the third party to satisfy himself that the document sought falls squarely within the statutory power. It is important that an Inland Revenue official cannot turn up at a third party's premises and demand that that person hands over a document on the spot.

Penalty for non-compliance

12. We believe that the sanction for non-compliance should be a monetary penalty, not the risk of imprisonment for contempt of court.

Privilege

13. The exclusion for legally privileged documents needs to extend to documents held by the third party where that third party is an agent of a lawyer and the documents would be legally privileged in the hands of the lawyer.

14. We believe also that the protection for audit papers and relevant communications of a tax advisor contained in sub-section 9 of section 20B should also apply to section 20BA.

PROBLEMS WITH CURRENT POWERS AND PROPOSED SOLUTION

Introduction

15. The powers currently available to the Revenue are summarised in the Annex. The Revenue cites various problems with sections 20C and 20(3), TMA 1970.

16. As regards section 20C, it is intrusive (paragraph 5 of the technical note) and highly resource intensive (paragraph 7 of the technical note), for example, problems arise where documents are held at premises different from those specified in the initial warrant (paragraph 8 of the technical note), and perceived to be considered heavy handed by those subject to the searches (paragraph 7 of the technical note). As regards s20(3), the process is protracted and prevents cases from being brought to trial as expeditiously as possible (because a period of 30 days is allowed for voluntary delivery, and the formal notice itself will allow 30 days for delivery (paragraph 10 of the technical note)), and the power cannot be used to require the production of original documents rather than copies (paragraph 11 of the technical note).

17. Regarding section 20(3) we accept that difficulties can arise if there is no power to require the production of original documents. This could be remedied by amending section 20B(4) so a judge can agree in particular cases that originals must be supplied. As to delays, our members' experience suggests that factors other than section 20(3) give rise to extended timescales for mounting prosecutions. Be that as it may, section 20B(1) could be amended to enable a judge to agree in particular cases that prior notice need not be given.

18. Turning to section 20C, whilst we can accept the Revenue's stated problems with the legislation, we question how the operation of the proposed new provision in practice might solve those problems.

Present Revenue practice

19. At present, when a section 20C warrant is executed against an unsuspected third party (typically, an accountancy practice) the warrant is executed by at least two officers of the Board who turn up at the premises concerned and try to persuade those on the premises that they should collaborate in identifying the material being sought in order to minimise the disruption to the business being carried out on the premises. The warrant will be executed simultaneously with other warrants typically relating to the business and domestic premises of the suspect and the premises of other advisers and business associates. The organisation of the execution of multiple warrants in this way is carefully orchestrated and planned by the Revenue and, on the day, those executing the warrants will be able to take immediate legal advice from the Inland Revenue Solicitor's Office, a facility which has grown in importance following the Revenue's failure to observe an injunction halting a search: *R v CIR & Others ex parte Kingston Smith* 70 TC 264.

20. Where the warrant is executed against an accountancy practice, it may or may not be the case that cooperation will be afforded in identifying the location of the material being sought. Where no such cooperation is offered, the officers executing the warrant are then faced with the task of searching the entire premises in order to find what they are after, a daunting task when one considers the volume of client material held in most accountancy practices. Even where cooperation is afforded, and specific client files are identified, the warrant only permits the seizure and removal of material which is evidence of a suspected serious fraud. Thus, if properly executed, the warrant does not permit the wholesale uplift of client working paper files.

21. It is apparent from the above that the execution of a s20C warrant is intrusive, is resource intensive for the Revenue, and is ineffective where papers are stored at a location other than the premises specified in the warrant. Beyond that, there are clearly problems for the Revenue in terms of wading through a mass of paperwork, even if the relevant files are identified.

Practical application of Revenue's proposed solution

22. We do not see how the proposed new provisions would alleviate whatever problems there are with s20C other than by requiring the accountant to undertake the search on behalf of the Inland Revenue. The Revenue's technical note does not indicate how precisely the new power will be operated by the Revenue.

23. However, there exists a not dissimilar power at section 20(2). This provision allows the Board (and only the Board) to serve a notice on a taxpayer (not a third party) to deliver relevant documents and furnish relevant particulars to a named officer. The provision specifies no time limit for the notice. Notices under section 20(2) are rarely used, but when they are used the notice will generally specify that the information must be delivered or furnished "forthwith".

24. In practical terms, two officers of the Board turn up at the taxpayer's premises, hand the taxpayer the notice and point out its terms, particularly the requirement to deliver the material forthwith. The power confers no right of entry or search. The officers serving the notice will typically suggest to the addressee that they should be allowed to come in and wait while the addressee searches for the material. We are aware of instances where the officers took the lead in going through the addressee's premises, offering to help him by looking in every drawer, cupboard and safe which could be identified. Such action is of course completely outside the scope of section 20(2).

25. Given this type of action on the part of the Revenue, and given the understandable need for coordination and simultaneity in the type of exercise typically mounted against suspected serious fraud, we wonder how frequently the Revenue will seek orders where the specified period is a matter of hours or minutes.

26. The draft legislation does not specify how the order is to be served. We again refer to section 20(2) where notices are served by hand by two or more officers of the Board. We can envisage a situation where an order under the proposed legislation specifying delivery to the named officer almost immediately is served by that named officer appearing at the premises of the addressee. The officers concerned might offer to assist the addressee in going through the material concerned once the addressee had identified it.

27. This would be only marginally less intrusive and less disruptive than the manner in which a section 20C warrant is executed at present where the occupier of the premises offers to collaborate.

28. Whilst our concerns in this regard may be unfounded, we would prefer to have them rendered completely unfounded by the legislation specifying precisely how the order is to be served and specifying a reasonable minimum period for the production of the material specified in the order.

Extent of information demanded under the order

29. In order to be effective, any order under the proposed new provisions would have to be fairly widely drawn. At present, officers executing warrants under section 20C on the premises of an accountant will typically identify all the client files and papers concerned and suggest initially that they should be allowed to remove the lot. Those who understand the terms of the legislation and the warrant issued under it, and those who are properly advised, will insist that papers are removed only to the extent that they are evidence of a suspected serious fraud.

30. It may be, for example, that within an audit working paper file only the stock section is relevant to the Revenue's investigation, or that copies are held of particular invoices which are material to the Revenue's enquiries. If these papers can be removed from the working paper file, then it is only those papers that are within the scope of the warrant, not the whole of the working paper file itself.

31. The proposed legislation would enable the Revenue to seek, and possibly obtain, orders which specify delivery of all documents held by an accountant relating to a particular named client.

32. Audit papers which are not "link" papers are specifically protected from section 20(3) by section 20B(9)-(14) and the Ely Report accepted "the case put forward on behalf of tax accountants that in this context confidentiality is a duty and not an option. It cannot be surrendered voluntarily by the tax accountant save under compulsion of law" (paragraph 16 of the report). Whilst the Revenue's technical note nods in the direction of confidentiality as a concern, the terms of the draft legislation do not preclude orders being issued which effectively say: "Deliver to the named officer all of your working papers and other papers relating to this named client".

33. Orders drawn in such general terms could be avoided if the legislation specified that all applications for orders would be *inter partes*. Alternatively, the orders might be made the subject of appeal.

Interaction with section 20C

34. We return to the question of how the new provision would be operated in practice by the Inland Revenue. Clearly, orders under these new provisions would not be served before the execution of a warrant under section 20C in respect of the suspect's own premises. If they were not served simultaneously, there is nothing to prevent the suspect contacting the third party and ordering the third party to destroy relevant material. The order would presumably have to be served simultaneously and most likely personally by an officer of the Board. This would hardly be less intrusive or less resource intensive than the execution of a warrant under section 20C.

PRIVILEGE

Introduction

35. We consider that the manner in which privilege is dealt with under the proposals is unsatisfactory. The safeguards in sections 20, 20B and 20C are inadequate and the unfairness in the present legislation should not be compounded in the new legislation. It ought to be a general principle that anyone can take legal advice with that advice being protected in the hands of the person receiving the advice as well as in the hands of the lawyer and protection applicable to advice from lawyers should be extended to advice from and in the hands of tax accountants.

Extension of privilege to tax accountants

36. The draft provisions are intended specifically for use in cases where the person who holds the documents is not suspected of complicity in the fraud. That being so, whatever considerations led to the decision not to include the privilege for relevant communications from a tax adviser in section 20C probably do not apply. It is hard, in any case, to see what those considerations might have been.

37. We can see that the fact that a serious fraud is suspected might have justified the removal of the protection from certain sensitive types of document such as journalistic material. However professional advice is a different matter. Here the basis for the privilege is that it is in the public interest for a person to be able to obtain legal, or in this case tax, advice in the knowledge that it will not be disclosed to his opponent in any litigation which may ensue. That applies equally no matter what the nature of the

suspected offence: in fact, if anything, it applies more strongly when the offence is a serious one.

38. The professional services market has changed since section 20C was enacted, and will continue to develop as acceptance of true multidisciplinary practices comes closer. It is now common practice for the larger firms of Chartered Accountants to give advice on tax law which is of the same nature and quality as that which would be given by a solicitor. So now, even if not before, there is the same public interest in preserving the confidentiality of tax advice given by a Chartered Accountant as that given by a lawyer.

39. One specific development in recent years has been the introduction of the direct access arrangements for *inter alia* Chartered Accountants who consult members of the Revenue Bar on their clients' behalf. These arrangements mean that even smaller accountancy firms, with Counsel behind them, are now able to give their clients legal advice in exactly the same way as a non-specialist firm of solicitors.

40. Following on from that, since Counsel rarely keep any paperwork a Chartered Accountant who uses the direct access arrangement will commonly have custody of Counsel's advice, the instructions, and other associated documentation, which clearly ought to be protected from disclosure as they would be in the hands of a solicitor, by reason of Counsel's status if not the accountant's.

41. Another relevant recent development is the enactment of the Human Rights Act. Legal professional privilege is recognised as a fundamental human right (see for example the judgment of Moses J in *R v IRC ex parte Tamosius and Partners* [1999] STC 1077), and even if UK practice has for historical reasons confined the privilege to advice from barristers, advocates and solicitors (and in the case of section 20C has further confined it to documents in the hands of such persons) it is unlikely that a similar artificial distinction could be maintained under the Human Rights Convention.

42. More generally, allowing protection to documents held by solicitors but not those held by accountants who are doing essentially the same job gives the solicitors an unfair competitive advantage and distorts the market. There have been regular reports of solicitors trying to obtain work by claiming that they have the protection of professional privilege and accountants do not, and of course the clients seldom inquire closely enough to discover that the difference is only material in the context of a serious fraud investigation.

Identifying documents subject to privilege

43. As alluded to on page 13 of the technical note, recent cases have certainly demonstrated the need for a procedure which will allow privileged documents to be identified and withheld from the investigators. However the problem is rather less severe in the case of a production order than in a section 20C case, where one has somehow to prevent the privileged material from being read by an investigator who may already have it physically in his hands. All that seems to be necessary is a procedure whereby the recipient of the production order is required to give the Revenue a list of the documents which would otherwise be covered by it but which he

considers to be privileged (sufficient to identify the documents, but without revealing their contents), and a procedure for them to contest his view if they wish.

44. As was confirmed by Moses J in the Tamosius case, whether a document is privileged is a matter for the court to decide. It is certainly not something which could be regulated by any code of practice. However there is no reason why the parties should not agree to resolve the matter by a quicker and simpler procedure if they wish, for example by having the contested documents examined by an independent counsel nominated by the Attorney-General. The Revenue could publish a procedure of this sort which they would normally be willing to accept, and since it would be voluntary, publication of the procedure in a code of practice would be sufficient formality.

CODES OF PRACTICE

45. Under the Police and Criminal Evidence Act ('PACE') 1984 , codes of practice are used mainly to set down standards of conduct to be observed by the police in areas such as physical search of a suspect or of premises, where decisions have to be taken in the heat of the moment, and the relevant standards may be difficult to define with sufficient precision for legislation. They are much less relevant to an information power such as is proposed here, where there should be no difficulty in defining the basic rules in the primary legislation (in particular what information may be demanded, and at what level in the Revenue the application must be authorised), and where the order itself will be subject to the scrutiny of the judicial authority before it is made. We are not aware that a code of practice has been found necessary to back up the equivalent production power in Schedule 1 of PACE.

46. Having said that, it might be convenient to use a code of practice to cover certain peripheral matters, such as an undertaking by the Revenue to take all reasonable steps to verify any information received by it before using it to justify an application for a production order (as in the Searching of Premises Code). But above all, whatever it contains, any code of practice which concerns the conduct of a serious criminal investigation should be based on an enabling power within the primary legislation, as the PACE codes are, which would define its contents in outline and would also provide sanctions against any Revenue official who breaches it. The non-statutory approach of the existing Revenue codes of practice is insufficient in this context.

"OTHER PROPOSAL": DOCUMENTS HELD ON A COMPUTER

47. The powers in section 20C are for the officer to enter premises and to physically seize documents or other things which he finds there. This is something he can do without the assistance of anyone on the premises. A power to require someone else to do something, such as finding and printing information held in a computer system, is of a completely different nature. For one thing it is meaningless unless there are sanctions for non-compliance. But on the other hand it would be wrong for sanctions to be imposed, presumably for contempt of court, against someone who has failed to comply with an order given by a Revenue officer in the heat of the moment and on his own authority. (Since the power of seizure under section 20C is not limited to particular items identified in the warrant, it appears that the scope of any demand by the Revenue officer under section 20C(3A) would not be subject to any sort of prior review by the judicial authority.)

48. It is in any case unclear how the officer would know that there is relevant information in the computer system unless the people on the premises have given him a good deal of voluntary assistance first.

49. If the Revenue does need someone to extract information from a computer for it, the only proper and the only effective route is for it to get an order from the judicial authority for that specific thing to be done. Since the proposed section 20BA(5) already provides for that, there is no need to try to put the relevant power into section 20C as well.

50. Admittedly the production order procedure has serious weaknesses if the person who holds the information is the suspect, but duplicating the section 20BA(5) power in section 20C, without the proper judicial safeguards, will not avoid the problems. Even if the officer gets an order for the data to be printed out on the spot, he cannot know whether the recipient of the order has actually printed off all the relevant documents, and the officer cannot prevent the recipient from taking the opportunity to delete a few. We would not suggest that the Revenue should not be able to get at data from a computer system in appropriate circumstances, but extending s20C is not the answer.

51. The fundamental distinction between a power to search and a power to require production is recognised in Schedule 1 of PACE, which provides separately for the two things. The part dealing with production orders does include a paragraph corresponding to the proposed section 20C(3A); that dealing with search warrants does not. The same is true of the similar powers under sections 93H and 93I respectively of the Criminal Justice Act 1988 (which, having been inserted only in 1995, cannot be said to predate the relevant technology). We suggest that the Revenue could try to coordinate its approach with the other prosecuting authorities, rather than trying to invent a new solution.

SPECIFIC COMMENTS ON THE DRAFT LEGISLATION

52. In the light of all the above, we have the following comments on the draft clauses.

The new production power

Proposed section 20BA(1)

53. The second of the two circumstances which permit an order to be issued is: "(b) that documents which are evidence of or may assist in the detection or investigation of the offence are or may be in the power or possession of any person".

54. The technical note stresses the similarity of the proposed power to that available to Customs under paragraph 11, Schedule 11, VAT Act 1994. The equivalent wording there is: "(b) that any recorded information (including any document of any nature whatsoever) which may be required as evidence for the purpose of any proceedings in respect of such an offence is in the possession of any person". We consider that proposed section 20BA(1)(b) should be amended accordingly.

55. The Revenue says in the commentary in this regard that the order may encompass a rather wider range of documents than those that may be seized under section 20C

because it will not be possible to examine the documents to decide whether they fit the definition without being seen. It goes on to say that documents will nevertheless still have to be described carefully, and that only those likely to be relevant to the criminal investigation may be sought.

56. It is difficult to decide the scope of documents covered by a section 20C warrant and this may be dealt with many months after the "raid". It can also be difficult to decide the scope of a notice under section 20(3) and frequently legal advice is required by the person on whom the warrant is served, but at least under section 20(3) there is at least 30 days to obtain and consider such advice. The recipient of any third party notice is in a difficult position because of the possibility of penalties (or imprisonment under the proposed new power) for failing to supply what should be supplied, but equally might be on the receiving end of proceedings from a client for supplying information that need not have been supplied because it is not strictly within the scope of the notice.

57. It is hard to see how obtaining access only to those documents likely to be relevant to the criminal investigation might be achieved without specifying the nature of the offence. The legislation should therefore be amended to require that the nature of the offence should be specified in the order.

58. More generally, the application for the order should be made *inter partes.* On page 8 of the technical note it is suggested that following VAT case-law it would be for the judicial authority to decide whether the holder of the information would be entitled to attend the hearing and make representations and that the onus would be on the Revenue to persuade the authority that he should not. This is an inadequate safeguard. One cannot rely on case law relating to different legislation, which might or might not be followed by the Courts in this new context. The subsequent suggestion that the matter should be regulated by a (presumably non-statutory) Revenue code of practice is unacceptable.

59. The policy clearly must be that the person who intended to be the subject of the order has a right to be heard. That is the case under Schedule 1 of PACE, and there is no reason why these proposals should be any different. The only possible reason for not giving notice to the person concerned would be if he were suspected of complicity in the offence, and it is conceded that the production order would not be suitable for use in such cases anyway.

60. In general, the Revenue is putting forward these proposals as a means of rectifying defects rather than widening their powers. Rectifying defects should be the limit of what is contemplated.

Proposed section 20BA(2)

61. The order will require a person appearing to have in his "possession or power" the documents specified or described in the order to deliver them to an authorised officer within a specified period.

62. This goes beyond the equivalent VAT provision at paragraph 11, Schedule 11, VATA 1994, in that the VAT provision refers only to the material in the possession of the addressee. The Revenue legislation should be cut down accordingly.

63. Nothing is said about the method of serving the order, and if the impression is not to be given that the order is a "poor man's section 20C warrant" then the legislation should specify that the order must be served by post or, if the order is served personally by an officer, that the person serving the order and anyone with him should serve the order and withdraw forthwith from the premises of the addressee.

64. The "specified period" is defined as the period of seven days beginning with the day on which the order is made, or such shorter or longer period as may be specified in the order. The VAT provision at paragraph 11, Sshedule 11, VATA 1994, requires compliance: "not later than the end of the period of seven days beginning on the date of the order or the end of such longer period as the order may specify". The option for a shorter period must be removed from these provisions.

Proposed section 20BA(3)

65. The level of the appropriate judicial authority has been set at a lower level than that for section 20C. The justification given is that the new power is far less intrusive and disturbing, and that the lowering of the level of authority required will enable orders to be obtained more quickly and conveniently without imposing additional burdens on the judiciary. An overall reduction in the period before criminal proceedings are instigated is pleaded in aid.

66. We consider that this would have no effect in terms of reducing burdens on the judiciary: it simply moves the responsibility to a different level. Frauds are often complex and the down grading of the judicial review in the interests of speed may not be in the best interests of justice. Given the importance of these provisions the level of authority applicable to section 20C itself should be adopted.

Proposed section 20BA(4)

67. The term "an authorised officer" is defined as meaning an officer of the Board authorised by the Board for purposes of the section. For the purposes of section 20C the officer seeking the warrant must satisfy the judicial authority that he or she acts with the approval of the Board in respect of the particular matter. Again, the move away from the full rigor of section 20C is justified in the technical note on the basis that the new power is not as intrusive or disruptive. As discussed above, this remains to be seen, and given the seriousness of these matters generally we consider that it would be equally appropriate for the Board to authorise an individual officer for each specific occasion when the new power is used.

Proposed section 20BA(5)

68. This subsection provides that information held in electronic or magnetic form shall be delivered in a form which is visible and legible. This appears merely to enable the provision to operate in the context of current technology.

Proposed section 20BA(6)

69. This subsection specifies that orders are valid beyond their immediate locality. We refer to our earlier comments concerning the appropriate level of judicial authority, but find little to object to this subsection in its present context.

Proposed section 20BA(7)

70. The sanction for failing to comply with an order is that the person concerned may be dealt with as if he had committed a contempt of court. Given that the nature of the order is more akin to sections 20(1) to (3) the same sanctions should apply, namely exposure to penalties under section 98, TMA 1970.

71. The harsh level of sanction presently contemplated would certainly require the initial application for the order to be *inter partes* and for the specified period to be not less than seven days.

Proposed section 20BA(8)

72. The current rule in section 20C applying to legal professional privilege is repeated in these provisions. Accountants should be in little doubt that it is they who are being targeted by this provision. As discussed above, given the changes that have taken place in the professional services market, for the purpose of these provisions legal professional privilege should be extended to documents, including advice documents, in the power or possession of tax accountants.

Supplementary measures

Proposed section 20CC(10)

73. It appears to us that the whole of section 20CC needs to apply in relation to orders under the proposed new powers.

Amendments to section 20C

Proposed section 20C(3A)

74. As discussed above under "Other Proposal", we consider that proposed section 20C(3A) is misconceived and that it does not "clarify the position". Proposed section 20BA(5) already provides for what the proposed amended to section 20C is aiming to achieve so there is no need to try to put the relevant power into section 20C as well.

ANNEX

CURRENT POWERS

Listed below are the main information powers currently available to the Revenue in increasing order of severity. All of these provisions, except paragraph 27, Schedule 18, Finance Act 1998, are contained in Taxes Management Act 1970.

Section 19A, TMA 1970 and paragraph 27, Schedule 18, Finance Act 1998

These are self-assessment enquiry powers available only where a formal enquiry notice has been issued, and enabling an officer to gain access to documents, accounts and particulars relevant to the particular enquiry. Their scope is limited documents, etc., in the power or possession of the taxpayer. The notices are subject to appeal and cannot be used against third parties.

Section 20(1)

This is a general investigatory power available to inspectors enabling them to require the delivery of documents and particulars in the power or possession of the taxpayer and which might reasonably be considered to have a bearing on the taxpayer's tax affairs. This power (like the rest of the section 20 powers) is not dependant on the issuing or making of a return, the issuing of an assessment, the making of an appeal, or on any other prior process. It is not capable of appeal. Before a notice is issued, the taxpayer must be given the opportunity of voluntary delivery of the information concerned, and the inspector (who must be duly authorised) must apply to a Commissioner for consent to the issue of a notice: this latter application is *ex parte* (the taxpayer is not allowed to be present or to be heard).

Section 20(3)

This is the third party equivalent of section 20(1). It is limited to documents (as opposed to documents and particulars), and is further restricted to documents originating wholly or partly within the last six years, although this last condition can be set aside if the Commissioner hearing the application is persuaded that fraud is present. There is limited protection from the power in respect of tax advice communications and audit working papers.

Section 20(2)

This power is available only to the Board (as opposed to their inspectors) and repeats the provisions of section 20(1) but without the preconditions of the opportunity being given for voluntary delivery and the application to a Commissioner for consent. It is available only against the taxpayer, and not against a third party.

Section 20A

This provision enables an Inspector authorised by the Board to require a tax accountant to deliver up client papers, but only where the accountant has, within the previous twelve months, been convicted of a tax offence before a UK court, or has

had a penalty imposed under section 99 (knowingly assisting in or inducing the submission of incorrect returns, etc). This power is clearly aimed at the accountant who is corrupt as opposed to the client who is corrupt.

Section 20C

This power enables an officer of the Board, having satisfied the appropriate judicial authority, to enter premises with a warrant and to seize and remove any things which the officer reasonably believes to be required as evidence for the purposes of proceedings in respect of an offence involving serious fraud. For the purposes of section 20C the appropriate judicial authority is, in England and Wales, a Circuit Judge; in Scotland, a Sheriff; and in Northern Ireland, a County Court Judge. Section 20C is the only power listed here specifically designed for criminal investigations.