



TAXREP 34/12

(ICAEW REP 110/12)

ICAEW TAX REPRESENTATION

FINANCE (No 4) BILL 2012 - BRIEFING

TAX AGENTS: DISHONEST CONDUCT - CLAUSE 221 AND SCHEDULE 37

Briefing submitted in June 2012 by ICAEW Tax Faculty in relation to the above provisions in Finance (No 4) Bill 2012

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INTRODUCTION

1. ICAEW submitted Briefings to the Public Bill Committee on various clauses in Finance (No 4) Bill 2012. The present TAXREP reproduces the content of the Briefing on the provisions in clause 221 and Schedule 37 re Tax Agents: Dishonest Conduct.

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

BRIEFING

TAX AGENTS: DISHONEST CONDUCT (Clause 221 and Schedule 37)

Clause 221 and Schedule 37

Clause 221 and Schedule 37 introduce new and updated rules to address dishonest conduct by tax agents. These provisions, which arise out of the review of HMRC's powers project, have been subject to an extensive consultation process which began in 2009.

The Finance Bill provisions are based on draft clauses which were published for comment on 6 December 2011. The provisions are aimed at updating and strengthening some existing provisions in the Taxes Acts (in particular sections 20A and 99, Taxes Management Act 1970) that are aimed at tackling dishonest conduct by tax agents but which have not been used by HMRC for many years due to practical difficulties in using them. Further, these rules do not have satisfactory appeal rights.

In summary these new provisions make the following changes:

- Where a tax agent has been determined as dishonest, HMRC can issue a file access notice which allows it to request access **all** the files of the dishonest tax agent;
- A dishonest tax agent can be fined up to £50,000;
- HMRC may publish the name of the dishonest tax agent (in other words 'named and shamed'); and
- There are now clear rights of appeal.

We would like to place on record our appreciation of the open and constructive way in which the consultation process on these changes was carried out by HMRC. Subject to the points below we

believe that in principle these provisions now provide a reasonable framework for tackling tax agents who engage in dishonest conduct.

We would be happy to provide further information or meet to discuss these issues in more detail. For further information please contact Tax Faculty head [Frank Haskew](#) on 020 7920 8618 or [Sarah Buckley](#), Public Affairs Manager, on 020 7920 8694.

KEY POINTS

- We would welcome clarification from the Minister as to how the Finance Bill provisions will interact with the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003.
- These are potentially draconian provisions and we would welcome confirmation from the Minister that these provisions will only be used in cases of clear dishonesty and have been authorised at a very senior level within HMRC.
- We also welcome confirmation that this measure will be kept under review and its operation will be considered by the Implementation Oversight Forum.
- We would welcome confirmation that HMRC will be consulting further with tax agents about how these provisions will apply in practice, and publish agreed guidance.
- We remain concerned about the proposal in para 28 to publish ('name and shame') the names of tax agents engaged in dishonest conduct and recommend that the FA 2009 publication rules for taxpayers should be allowed to bed down first before any decision is taken to extend them to tax agents.

DETAILED COMMENTS ON SCHEDULE 37

We submitted our detailed comments on the draft legislation published on 6 December 2011 in [TAXREP 10/12](#).

Dishonest conduct in relation to tax would appear to constitute an offence of tax evasion and be, likewise, caught under the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003. We would welcome clarification from the Minister as to how the Finance Bill provisions will interact with these other provisions designed to deter dishonest behaviour.

In order to retain the support of the tax profession, it is essential that these provisions are only invoked against agents who are clearly dishonest and not threatened against honest agents who make mistakes. We recognise that under these provisions the Tribunal need to be satisfied that there has been dishonest conduct, but there is a danger that HMRC staff on the ground might seek to try and use these provisions routinely in inappropriate cases, thus bringing them into disrepute. The need for HMRC staff to have evidence of dishonesty is crucial to the success of these provisions and this point needs to be emphasised in any guidance and in HMRC's internal manuals. We would welcome confirmation from the Minister that these provisions will only be used in cases of clear dishonesty and that they will only be invoked by prior authorisation at a very high level within HMRC.

Clearly, systemic mistakes and poor work standards need to be addressed but there are a number of channels through which this can be done.

We also welcome confirmation from the Minister that as previously noted this measure will be kept under review and its operation will be considered by the Implementation Oversight Forum.

SPECIFIC COMMENTS

Conduct notice

Para 4(4) states *For the effect of notifying the individual, see paragraphs 7(2) and 29(2)*, ie, what are the consequences of publishing a conduct notice. On the face we cannot see that paragraphs 7(2) and 29(2) do set out 'the effect of notifying an individual'. We would welcome clarification that para 4(4) is correct and how paras 7(2) and 29(2) tie into it.

Content of notice

Para 10(1)(b) states that a file access notice may require the provision of all relevant documents in the document-holder's possession or power. This may be difficult to determine where, as will usually be the case, the documents will not be in the possession or power of the tax agent but will be with a third party, such as a firm for whom the tax agent works. The third party may not know what are and are not relevant documents.

More generally, the third party notice provisions will be of crucial importance in many situations and it remains to be seen how these rules will work in practice. HMRC will be consulting further with tax agents about how these provisions will apply in practice and publish agreed guidance about the procedures and practicalities of such notices. We would welcome a Ministerial commitment to this process.

Power to publish details

We remain concerned about the proposal in para 28 to publish ('name and shame') the names of tax agents engaged in dishonest conduct who have incurred a penalty under para 26 of more than £5,000. The existing power to publish the names of tax defaulters (in s 94, FA 2009) will be extended to include tax agents. However, we do not know how in practice the FA 2009 provisions will work because so far no lists have been published and the earliest date of publication will be 2013.

We agree that there is no place in the tax system for dishonest agents. However, these are very serious and potentially draconian provisions that could destroy a business, so they need to be introduced with great care and properly targeted. We note that in Ireland, which has had 'naming and shaming' rules for taxpayers for many years and upon which the UK's FA 2009 provision is based, has never extended its rules to include tax agents.

We recognise that currently there is not a level playing field between tax agents who are members of a professional body and tax agents who are not. Tax agents who engage in dishonest conduct and who are members of a professional body are likely to face disciplinary hearings. They are, therefore, already subject to rules that can lead to public naming. In contrast, unaffiliated agents are not subject to such measures unless of course HMRC pursue a criminal prosecution. Under this proposal all agents engaged in dishonest conduct, whether or not they are members of a professional body, will be published. Members of a professional body may therefore be published twice.

Given these general concerns about this proposal we recommend that the FA 2009 publication rules for taxpayers should be allowed to bed down first before any decision is taken to extend them to tax agents. Given that publication of tax defaulters will start in April 2013, we recommend that publishing the names of dishonest tax agents should not start until at April 2014 at the earliest.

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ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)