



ICAEW TAX REPRESENTATION

TAX AGENTS: DISHONEST CONDUCT FINANCE BILL 2012 – DRAFT LEGISLATION

Comments submitted on 10 February 2012 by ICAEW Tax Faculty in response to draft Finance Bill legislation *Tax agents: Dishonest conduct* published on 6 December 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the draft Finance Bill 2012 legislation *Tax agents: dishonest conduct* published by HM Treasury on 6 December 2011 at http://www.hm-treasury.gov.uk/d/tax_agents_dishonest_conduct.pdf.
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system.

WHO WE ARE

4. 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.
5. 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.
6. 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.

GENERAL COMMENTS

7. We welcome the consultation process on these provisions. HMRC are to be congratulated for having taken on board so many of the concerns expressed by us and others. We have contributed to this consultation since it first started in 2009 and most recently we responded to the draft legislation published on 14 July 2011 (which was published as TAXREP 53/11).
8. We also welcome the publication on 6 December 2011 of HMRC's response to the July 2011 consultation which has helped to clarify a number of our concerns. Subject to the points below, we believe that the draft legislation should now work and is much better targeted and proportionate than earlier drafts. We look forward to participating in the consultation on the proposed guidance on these rules as set out in Chapter 3 of the response document.
9. As a professional body with a public interest remit to promote high standards amongst our members, we support HMRC's aim of tackling dishonesty, wherever it arises in the tax system. We should want to know if any of our members come within these provisions so that we can consider what action to take and we trust that HMRC will notify our professional conduct department in appropriate cases. We reiterate our previous comment that if the reporting gateway in s 20 Revenue & Customs Management Act 2005 does not provide the necessary powers for HMRC to do this, then that provision needs to be amended so that works as intended.

10. 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. Clearly mistakes and poor work standards need to be addressed but there is a danger that HMRC staff on the ground might seek to use these provisions routinely in inappropriate cases.
11. We therefore welcome the clear rights of appeal which should help to minimise any risk that these provisions might be used inappropriately. Further, we welcome confirmation in para 2.9 of the response document that HMRC considers that the enhanced safeguards will ensure that the legislation is targeted only at those agents where HMRC has evidence that they have acted dishonestly (our emphasis). 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.
12. We also welcome the statement in the notes accompanying the draft provisions that the measure will be kept under review and will be considered by the Implementation Oversight Forum.

SPECIFIC COMMENTS

Conduct notice

13. 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. While we can see that the ref to para 29(2) is probably correct (liability to a penalty), we not convinced that the reference to para 7(2) is correct. Should the reference to para 7(2) instead be to para 8 (file access notice)?

Content of notice

14. 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.
15. Para 2.32 of the summary of responses document published on 6 December states that
The third party or the agent can make representations, so there is already a channel to discuss in advance any issues with the notice.
16. We are concerned about the way this operates in respect of third parties who were not involved in the dishonest conduct. For example, suppose a firm employs someone who introduces a client to the firm. Subsequently the employee dishonestly colludes with the client to evade tax. When the firm discovers this the employee is sacked. The firm asks the client for permission to tell HMRC what has happened but the client refuses. The firm writes to HMRC to say that it no longer has confidence in the accounts submitted on the client's behalf and tell the client the firm can no longer act (as required by the ethical rules). HMRC launch an investigation into the client and discover the dishonesty. They issue a conduct notice to the ex-employee. By that time he has left the country and either does not receive the notice or ignores it. HMRC ask the tribunal to issue a file access notice against the firm. Although the firm can make representations, it is still not entirely clear from the draft what actual rights the firm has to attend any Tribunal hearing and raise objections.
17. It is our understanding that in the above example the firm will have such a right, but this needs to be made clearer. We suggest it should be backed up by a Ministerial statement and confirmed in HMRC guidance.

18. 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. We recommend that HMRC consult further with the tax agents about how these provisions will apply in practice and publish agreed guidance about the procedures and practicalities of such notices.

Power to publish details

19. We remain concerned about the proposal in para 28 to publish names of those who have incurred a penalty under para 26 of more than £5,000. We agree that there is no place in the tax system for dishonest agents. However, these are very serious provisions that could destroy a business, so they need to be introduced with care.
20. We recognise that currently there is not a level playing field between affiliated and unaffiliated agents and that this proposal will ensure that the names of unaffiliated agents engaged in dishonest conduct will be published. Nevertheless we are concerned that under these proposals the FA 2009 provisions will be extended to agents when we do not know how these provisions will work in practice. We would also note that Ireland, which has had similar rules for taxpayers for many years and upon which the UK provision is based, has never extended the rules to include tax agents.
21. We appreciate the policy intention but believe that there is a case for this to be limited to unaffiliated agents, or cases where the professional body does not publish the name of members found guilty of dishonest conduct. Currently, tax agents who engage in dishonest conduct and who are members of a professional body to whom a complaint has been made are likely to face disciplinary hearings. They are, therefore, already subject to rules that can lead to public naming.
22. In contrast, unaffiliated agents are not subject to such measures unless of course HMRC pursue a criminal prosecution. There is a risk, which we accept may be small, that publishing a person's name may discourage membership of a professional body as it might result in that person being named twice, once by their professional body and once by HMRC. We therefore suggest that the behavioural impact of these measures is kept under review.
23. There is a case that the FA 2009 publication rules for taxpayers should be allowed to bed down for a period of time before any decision is taken to bring this particular paragraph into force. The intention is to bring the dishonest conduct provisions into force in April 2013, so we think it is reasonable to defer the start date for para 28 to, say, April 2014 while the file access notice and penalty provisions (and the FA 2009 taxpayer publication rules) are allowed to bed down and any practical problems in their operation highlighted. This should help ensure that the provision is properly targeted at dishonest agents.

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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 <http://www.icaew.com/~media/Files/Technical/Tax/Tax%20news/TaxGuides/taxguide-4-99-towards-a-better-tax-system.ashx>).