



TAX AGENTS: DISHONEST CONDUCT

Comments submitted on 16 September 2011 by ICAEW Tax Faculty in response to HM Revenue & Customs modernising powers, deterrents and safeguards discussion document **Working with Tax Agents: Dishonest Conduct** published on 14 July 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the discussion document Working with Tax Agents: Dishonest Conduct published on 14 July 2011 by HM Revenue & Customs modernising powers, deterrents and safeguards team at http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_geLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_03
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. We responded on 23 March 2010 in TAXREP 19/10 (published at <http://www.icaew.com/en/technical/tax/tax-faculty/tax-faculty-representations/~media/Files/Tecfaculty/TAXREPs/2010/taxrep-19-10-working-with-tax-agents-to-HMRCs-initiation-to-comment-on-draft-legislation-published-on-8-February-2010>). Since then have been in discussions and attended many meetings with HMRC which has resulted in the draft legislation which is the subject of this public consultation.
4. 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

5. 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 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
6. 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.
7. 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.

KEY POINT SUMMARY

8. This draft legislation is a vast improvement on that published for comment in February 2010. Subject to relatively minor points, we think that the draft legislation will work, in no small part because when drawing it up HMRC has involved us and other representative bodies and taken account of our comments and concerns. 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.

MAJOR POINTS

9. We welcome the fact that the policy underlying the revised draft legislation, as described in Chapters 2-4, appears to take into account many of our concerns expressed when

commenting in TAXREEP 19/10 on the previous version of the legislation and our comments made at numerous meetings in the meantime. Overall, we consider that this legislation will achieve HMRC's objectives, and think that HMRC are to be congratulated for having taken on board so many of the concerns expressed by us and others. We should welcome consultation on guidance for agents.

10. As noted below, we consider that hearings before the tribunal should be inter partes and have received assurances from HMRC that they will be. However, given the potential impact of these provisions and the importance of getting 'buy in' we believe that inter partes hearings should be provided for in the legislation, failing which confirmed by ministerial statement.
11. As a professional body, 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. If the reporting gateway in section 20 Revenue & Customs Management Act 2005 does not provide vires for HMRC to do this, then we recommend that the opportunity be taken to amend it.
12. We should welcome clarification of whether dishonest conduct engaged in before the legislation commencement date will be within the ambit of these provisions.

SPECIFIC POINTS NOT COVERED IN QUESTIONS

Schedule 1, Part 3: Power to obtain tax agent's files etc

13. In para 7(4)(b) Circumstances in which power is exercised ~~subp~~ question why the individual need not be a tax agent, ie acting as a tax agent in business, when the offence was committed. This would seem to catch both 'friends and family' advisers, ie someone helping their relative on an unpaid basis, and 'golf club advice'. If someone gives informal advice it is not fair to penalise him where he later becomes a paid agent in other matters.
14. In para 9 Relevant documents ~~we~~ should welcome clarification of which papers HMRC will call for, eg those relating to a problem client or all papers worked on by an individual under suspicion. We suggest that there is a need for further consultation on this point. The Vantis case suggests that HMRC would be interested in all clients sold a particular scheme or all clients managed by those individuals.

Schedule 1, Part 2: Establishing dishonest conduct, Part 3: Power to obtain tax agent's files, and Part 5: Penalties under this Schedule: assessment etc

15. We consider that hearings before the tribunal (para 5 Appeal against determination, para 13 Approval by tribunal, para 20 Appeal against file access notice and para 31 Appeal against penalty) should be specified as being inter partes. We have received assurance from HMRC that they will be inter partes (in short, because the draft legislation does not specify otherwise) but because it is of fundamental importance to the acceptability of the proposals as the individual could lose his livelihood we think that it would be better to spell it out in the legislation. If the government is not prepared to do this then we feel that there should be a ministerial statement, perhaps during the passage of the Bill through Parliament, to confirm that all tribunal hearings will be inter partes.
16. In the case of access to working papers (para 20 Appeal against file access notice) ~~both~~ the tax agent and his employer or partners (as the owner of the documents) need a right to attend the hearing and be heard. Again we consider that the legislation should incorporate this right.

Schedule 1, Part 4: Sanctions for dishonest conduct

17. The proposal in para 28 Power to publish details was first discussed at a workshop on 6 October 2009 where the attendees identified a number of problems with this specific proposal. However, the 'naming and shaming' provisions were not included in the first draft of the deliberate wrongdoing legislation which was published on 8 February 2010.
18. While we do not object to the policy purpose per se, we set out some concerns with the proposal in our response to the earlier Working with Tax Agents consultation paper, these were published as paragraphs 68 to 71 of TAXREP 11/10
http://www.icaew.com/en/technical/tax/tax-faculty/tax-faculty-representations/~/_media/Files/Tec/faculty/TAXREPs/2010/taxrep-11-10-working-with-Tax-agents-11-10-2010.pdf
 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.
19. 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 deliberate wrongdoing 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 which can lead to public naming. In contrast, unaffiliated agents are not subject to such measures unless of course HMRC pursue a criminal prosecution. There is therefore a danger that any naming and shaming 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.
20. Naming and shaming has only recently been introduced for taxpayers and the first lists have not yet been published. We are concerned that the FA 2009 provisions are to be extended to agents when we do not know how the FA 2009 provisions will work in practice. We would also note that Ireland, which has had naming and shaming rules for taxpayers for many years and upon which the UK provision is based, has never extended the provision to include tax agents. There is a case that the FA 2009 rules should be allowed to bed down first before any decision is taken to bring this particular paragraph into force. This suggests that the start date for this measure should not be until, say, 2013 at the earliest.

RESPONSES TO QUESTIONS

Schedule 1, Part 1: Introduction

Q1: HMRC welcomes views on the revised definition of a tax agent.

21. On the assumption that 'in the course of business' refers to any tax agent business and is not restricted to a business owned by the individual under consideration, we believe that the definition of 'tax agent' in para 2 will fulfil HMRC's intentions
22. We should welcome clarification of whether pro bono work is included. Many of our members carry out work for charities and the like as part of their businesses, with formal appointments to assist in tax and other matters, but do not charge a fee. We note that the explanatory material at paragraph 5.1 of the discussion document ('disdoc') says that pro bono work by tax agents in the course of business is not caught. At paragraph 3.8 of the disdoc there is a comment that pro bono work will not be caught 'depending on the particular circumstances'. Proposed paragraph 2 of the new Schedule does not exclude, or mention, pro bono work and the absence of a reference suggests to us that it is included. We see no reason in principle to exclude pro bono work and feel that the position should be made clear in any published guidance.

Q2: HMRC welcomes views on moving away from the terminology of “deliberate wrongdoing” to “dishonest conduct”.

23. We should welcome clarification of whether the standard of proof that HMRC will apply will be civil (balance of probabilities) or criminal (beyond reasonable doubt). Given the impact on the individual's livelihood that, for example, removal of client papers will have, we should welcome confirmation that the standard of proof will tend towards the criminal even though the offence is civil. Subject to that, we consider that 'dishonest conduct' as defined will fulfil HMRC's objectives.
24. For the avoidance of doubt we should welcome confirmation that the selling of a disclosed tax avoidance scheme will not be regarded as dishonest conduct.

Q3: HMRC welcomes views on the revised definition of “loss of tax”.

25. We are content with the revised definition; it seems to us that the point is not so much whether there has been a loss of tax but whether tax was lost as a result of an individual engaging in dishonest conduct, for which see the previous question.

Schedule 1, Part 4: Sanctions for dishonest conduct

Q4: HMRC welcomes views on any issues about moving to a “not exceeding” penalty, including the level of the penalty.

26. We suggest that the penalty be capped at the figure of £50,000 proposed in the draft legislation but kept under review in the light of experience.
27. In para 27 Special reductions we should welcome clarification of the meaning of 'special circumstances'.
28. Bearing in mind that we have been told that the special reduction provision in para 27 is likely to be used sparingly, we consider that the range of the penalty of £5,000 to 50,000 is harsh for where the 'tax agent' is but a junior employee, who may have, say, backdated something because he knew that he would be in trouble for having missed a time limit.
29. We question whether para 27(3)(b) should apply where the two persons are husband and wife/civil partners where a loss in tax revenue is more likely to have arisen through inaction rather than something deliberate.

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APPENDIX 1

THE 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_towards-a-better-tax-system.ashx)