ICAEW
REPRESENTATION 42/21

FINANCE (NO.2) BILL 2019-21 CLAUSE 122: FINANCIAL INSTITUTION NOTICES

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Text of ICAEW briefing for MPs on Finance (No.2) Bill 2019-21 Clause 122: Financial institution notices published by government on 11 March 2021.

This briefing submitted on 22 April 2021, has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's *Ten Tenets for a Better Tax System* are summarised in the appendix

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EXECUTIVE SUMMARY

1. This provision will give HMRC the power to obtain information and documents about taxpayers from financial institutions by way of a financial institution notice (FIN) without the prior approval of a tribunal or the taxpayer.

2. We support the need for taxpayer transparency and to comply with international obligations but are concerned that the absence of any requirement for HMRC to obtain prior approval from a tribunal or the taxpayer overrides established self-assessment safeguards for taxpayers. The new rules in clause 122 will enable HMRC to obtain bank statements and credit card statements without any time restriction and challenge taxpayers to justify transactions many years after the event, by which time they may not be able to remember details about the transactions.

3. Current legislation supported by case law provides that HMRC cannot request information that is not reasonably required, for example an individual taxpayer's personal expenditure. However, recent case law demonstrates that HMRC officers routinely request such information, and it is only the intervention of the tribunal that ensures that the statutory limits are observed. By by-passing the tribunal's oversight, the risk of excessive information being provided to HMRC is inevitable.

4. We therefore recommend that the provision should be restricted to FINs issued as a result of a request from overseas tax authorities. This would comply with the UK's international tax obligations because the new rules would apply where there is an information request from a tax authority in a jurisdiction with whom the UK either has a DTA that does not contain a non-discrimination clause, or does not have a DTA (which is largely tax havens and the like which would cover most requests where tax evasion or tax avoidance is in point). For requests that are domestic, or from a jurisdiction with whom the UK has a DTA containing a non-discrimination clause, the current self-assessment taxpayer safeguards would apply.

5. In view of the lack of taxpayer safeguards, the undertaking in HMRC's consultation response dated 21 July 2020 at para 3.17 that an experienced officer trained in the application of civil information powers and not personally involved in the cases review must approve all notices needs to be included in the legislation.

6. The legislation should also state that the names of the jurisdictions whose tax authorities have made information requests leading to the issue of a FIN (clause 122) and third-party information notices (existing rules), and FINs and third-party information notices in the process of being issued, and numbers of requests from each, must be listed. This would enable the FIN regime to be assessed alongside the existing third-party notices system.

THE MEASURE

7. This clause introduces new provisions into HMRC's civil information powers in Schedule 36 Finance Act 2008 under which a FIN can be issued to a financial institution to obtain third-party information or documents about taxpayers. HMRC will not be required to obtain prior approval from the tribunal or taxpayer before it issues a FIN.

8. The clause will apply from Royal Assent.

OUR CONCERN

9. This provision will give HMRC the power to obtain information and documents about taxpayers from financial institutions by way of a financial institution notice (FIN). We support the need for taxpayer transparency and to comply with international obligations but are concerned that the absence of any requirement for HMRC to obtain prior approval

from a tribunal or the taxpayer means that established self-assessment taxpayer safeguards are overridden.

10. Under clause 122, HMRC will in practice be able to obtain bank statements and credit card statements without any time restriction and challenge taxpayers to justify the transactions described many years after the event.

11. Although current legislation provides that HMRC cannot request information which is not reasonably required, recent case law demonstrates that HMRC officers routinely request such information, and it is only the intervention of the tribunal that ensures that the statutory limits are observed. By by-passing the tribunal's oversight, there is a serious risk that HMRC will routinely request information which would not be reasonably required under the safeguards in the existing law. Indeed, and to cite just one example of the problems that the proposals will create, case law makes it clear that details of an individual taxpayer's personal expenditure will almost never be reasonably required (*Taylor v Bratherton (HM Inspector of Taxes*) [2004] UKSC SPC00448), yet most requests under the proposed power will lead to such personal information being available to HMRC.

12. As stated in the House of Lords Economic Affairs Committee 4th Report of Session 2019 21 *New Powers for HMRC: Fair and Proportionate?*:

> 'The civil information powers proposals are poorly targeted, disproportionate in their effect on UK taxpayers and lacking necessary safeguards and rights of appeal. They remove safeguards for taxpayers and financial institutions which prevent arbitrary use of the information powers, and are not supported by the evidence.'

13. The stated policy purpose of the changes is to facilitate speedier exchanges of information with overseas tax authorities which will, apparently, bring the UK into line with the approach in all other G20 countries. However, we are concerned that the measure will also extend to UK requests, in effect removing a major safeguard in Schedule 36 FA 2008 that third-party information notices require tribunal approval. We are concerned that, if the existing Schedule 36 safeguard for a third-party information notice to have tax tribunal approval is removed, this power would be used routinely as a way of obtaining information, so that the number of domestic information requests will far exceed the number of times they are used for international information exchanges.

14. The impression in HMRC's consultation response is that there is some principle of domestic and international law that requires parity of information powers. We are aware that many double tax agreements (DTAs) contain non-discrimination clauses, but we do not believe that a contractual provision in DTAs justifies the sweeping away of self-assessment safeguards for all taxpayers.

15. One point that became clear in the House of Lords review was that although the tribunal process can take 2 months at most, in practice HMRC were taking about 6 months longer than was necessary to process overseas applications. In other words, the tribunal process need not take that long and given that it is a powerful taxpayer safeguard this fact should not be used as a reason change the rules.

16. The existing Schedule 36 powers and associated safeguards were agreed after extensive scrutiny which involved detailed discussions with the tax community. The result was a proportionate and fair set of provisions. We do not think that a robust case has been made for amending the Schedule 36 safeguards to extend this provision to include domestic information requests.

17. The proposed safeguards in clause 122 are insufficient. One of the conditions is that a notice can be issued if the reasonable opinion of the officer giving the notice is that it would not be onerous for the institution to provide or produce. This is a very low bar and there appears to be no right of appeal against it or, even, the ability to make representations to HMRC. The financial institution would only be able to argue the point following the imposition of a penalty for non-production. This is far too late in the process.

18. We welcome the proposal that HMRC will be required to produce an annual report on this measure, but it needs to include more information about the sources of information requests and notices issued.

19. Another internal safeguard could be that, when HMRC wants to use these powers for a domestic matter, they must get sign off from HMRC's tax dispute resolution board.

20. We think that the case has not been been made for this measure to be extended to include domestic requests for information and that this aspect should be removed from the provisions.

OUR RECOMMENDATIONS

21. The provision should be restricted to FINs issued pursuant to an information request from an overseas tax authority. This would mean that the new rules would apply where there is an information request from a tax authority in a jurisdiction with whom the UK either has a DTA that does not contain a non-discrimination clause, or does not have a DTA (which is largely tax havens and the like which would cover most requests where tax evasion or tax avoidance is in point). For requests that are domestic, or from a jurisdiction with whom the UK has a DTA containing a non-discrimination clause, the current rules, including self-assessment taxpayer safeguards, would apply.

22. In view of the lack of safeguards for taxpayers, the following need to be included in the legislation:

    (a) The annual report from HMRC to parliament should name the jurisdictions (including in the UK) whose tax authorities have made information requests for which FINs (clause 122) and third-party information notices (existing legislation) have been and are in the process of being issued respectively and cite the number of requests for each. This would enable the FIN regime to be assessed alongside the existing regime.

    (b) The undertaking in HMRC's consultation response at para 3.17 that an experienced officer trained in the application of civil information powers and not personally involved in the cases they review must approve all notices needs to be codified.

SUGGESTED AMENDMENTS

23. Our suggested amendments are in the same order as our foregoing recommendations.

24. Clause 122, page 70, line 34, for 'A and B' substitute 'A, B and C'

    and

    Clause 122, page 71, after line 3 insert – '(3A) Condition C is that the notice referred to in subsection (1) is being issued pursuant to a request from a non-UK tax authority.'

    Suggested note for Amendment list: As the financial institution notice regime will override established self-assessment taxpayer safeguards, but bearing in mind the that the UK

must comply with overseas information agreements, the provision should be restricted to financial institution notices issued pursuant to a request from overseas tax authorities. This will meet the UK's international obligations because the new rules would apply to requests from jurisdictions where the double tax treaty (DTA) does not contain a non-discrimination clause, or there is no double tax treaty (which is largely tax havens and the like which would cover most requests where tax evasion or tax avoidance is in point), and the current rules, including established self-assessment taxpayer information safeguards, will apply where the request is domestic or from a jurisdiction with whom the UK has a DTA containing a non-discrimination clause.

25. Clause 122, page 72, line 5, after 'year' and before ',' insert 'listing the jurisdictions including in the UK whose tax authorities have made information requests and for each the number of FINs and third-party information notices issued and in the process of being issued respectively'.

    Suggested note for Amendment list: The annual report from HMRC to parliament citing how many financial information notices (FINs) have been issued needs to list the jurisdictions (including the UK) whose tax authorities have made information requests and for each the number of FINs and third-party information notices issued and in the process of being issued respectively. This would enable the FIN regime to be assessed alongside the existing regime for third-party notices.

26. Clause 122, page 70, line 30, before 'officer' insert 'experienced' and after 'Customs' insert 'trained in the application of civil information powers and not personally involved in the case'.

    Suggested note for Amendments list: This amendment gives statutory effect to the undertaking in HMRC's consultation response that an experienced officer trained in the application of civil information powers and not personally involved in the cases they review must approve all notices.

FURTHER INFORMATION

As part of our Royal Charter, we have a duty to inform policy in the public interest.

APPENDIX

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 https://goo.gl/x6UjJ5).