

# Tax Representation



**TAXREP 38/09**

**Finance Bill 2009: Clause 93**

**Publishing details of deliberate tax defaulters**

*Parliamentary Briefing submitted on 18 June 2009 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales setting out concerns with the proposed clause which will allow HM Revenue & Customs to publish the names of deliberate tax defaulters.*

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## Finance Bill 2009: Clause 93

### Publishing details of deliberate tax defaulters

#### Introduction

1 Clause 93 introduces a power for HMRC to publish the names and other information about taxpayers who have incurred penalties and where the tax lost exceeds £25,000. The objective is to deter tax evasion, reassure those who are compliant, and encourage defaulters to come forward.

2 The ICAEW supports efforts to combat tax evasion and it is right that Government considers a variety of policy options. However, the proposal raises a number of serious issues and we are disappointed that there was no prior consultation on this proposal. We would prefer the clause to be dropped from the Bill to allow time for public consultation and for research into the success of similar schemes in other countries such as Ireland.

#### Rights of appeal – Clause 93(6)

3 Clause 93(6)(b) says that HMRC must give the taxpayer ‘reasonable opportunity to make representations’ about whether details should be published. However, there is no right of appeal against publication, although the taxpayer can appeal against a penalty.

4 Appealing against a penalty provides recourse for a taxpayer who feels he or she does not fall into the category of deliberate default, or should have been given maximum penalty mitigation (which provides protection from publication). However, there may be other reasonable grounds on which a taxpayer would not want his or her name and details being published. For example:

- A risk to personal safety – especially if addresses are published.
- An unacceptable impact on the safety or privacy of the taxpayer’s family – again, especially if addresses are published.
- A likely adverse effect on the taxpayer’s business, which could put jobs at risk.

#### ICAEW recommendation

5 We therefore consider that there should be a right of appeal against the exercise of Clause 93 to the independent tribunal.

#### Proposed amendments

6 On page 46, line 16, delete subsection (6) and insert in its place:

‘(6) (a) Before publishing any information the Commissioners must inform the person that they are considering doing so and afford the taxpayer a reasonable opportunity to make representations about whether it should be published.

(b) A taxpayer may appeal against any decision by the Commissioners to publish their name on one or more of the following grounds:

(i) That the taxpayer’s personal safety or that of his family will be put at risk.

(ii) That publication of the taxpayer’s name will have an adverse effect on the taxpayer’s business and that this is likely to have

economic consequences (including but not limited to the impact upon employees, suppliers and customers) out of proportion to the naming of the person.

(iii) That in all the circumstances of the case publication would be unreasonable.

(c) An appeal will be heard in private by the First-tier Tribunal who may affirm or cancel HMRC's decision. Any decision of the First-tier Tribunal shall be final.'

7 On page 46, line 20, add at the end of that sentence 'or, if later, after the taxpayer has been given reasonable opportunity to make representations under section 6(a) above or the date when any appeal becomes final under section 6(b) above.'

### **Certainty for those who make disclosure – Clause 93(11)**

8 We recognise that measures to counter tax evasion need to strike a balance between providing an effective deterrent while also encouraging errant taxpayers to come forward and regularise their affairs. The danger is that the greater the deterrent element, the greater the chance that errant taxpayers will be unwilling to approach HMRC. We are concerned that the balance of this measure is tilted too much towards the deterrent element rather than encouraging taxpayers to come forward, and therefore that it might prove counter-productive. The risk of being named may merely discourage people from coming forward, unless they can be certain that cooperating with HMRC will protect them from publication. We do not think the draft legislation gives sufficient certainty on this point.

9 The provisions are linked to the new regime for penalties for incorrect tax returns in Sch 24, Finance Act (FA) 2007 and for failure to notify liability in Sch 41, FA 2008. Publication will only apply to failures in the 'deliberate' and 'deliberate and concealed' categories, and will not be done if the person has made full disclosure and in consequence obtained the **maximum** (our emphasis) possible penalty mitigation, as provided in Clause 93(11).

10 The problem with the clause as drafted is that unless the penalty mitigation is 100%, then the test will not be met. Thus, even if penalties are mitigated by 99% the taxpayer would still be within these provisions. The interpretation of what is meant by 'disclosure' and the criteria for mitigating penalties are set out in HMRC guidance, not in legislation. The guidance is applied by HMRC who have to form a view about the nature of the taxpayer's behaviour, based on the quality of the taxpayers' disclosure.

11 This test therefore introduces considerable uncertainty as to whether a full reduction would be achieved and is likely in practice to be a very hard criterion for taxpayers to meet. Further, the FA 2007 penalty regime has only recently been introduced and there is little experience of whether full mitigation of penalties will be achievable in practice. This uncertainty leaves taxpayers exposed to being named even where they have sought (even if not as well as they could have done) to put their affairs in order.

### **ICAEW recommendation**

12 We therefore propose that to give taxpayers greater certainty this test should be eased. We also think it would be reasonable to allow greater leeway where the disclosure was unprompted.

### **Proposed amendments**

- 13 On page 46, line 29, delete 'full' and insert 'by not less than 50% of the potential penalty mitigation that could be applied.'
- 14 On page 46, line 33, delete 'full' and insert 'by not less than 75% of the potential penalty mitigation that could be applied.'

**Further contact**

- 15 For any further enquiries please contact:

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