

Tax Representation



TAXREP 10/09

COMPLIANCE CHECKS: THE NEXT STAGE

Comments submitted in February 2009 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales in response to the consultation document 'Modernising Powers, Deterrents and Safeguards - Compliance Checks: The Next Stage' published by HM Revenue & Customs on 24 November 2008.

Contents	Paragraphs
Introduction	1 – 3
Key point summary	4
General comments	5 – 9
Responses to the questions posed in the Consultation Document	10 – 40
Who we are	Annex A
The Tax Faculty's ten tenets for a better tax system	Annex B

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

1 of 1

COMPLIANCE CHECKS: THE NEXT STAGE

INTRODUCTION

- 1 In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the consultation document *Modernising Powers, Deterrents and Safeguards - Compliance Checks: The Next Stage* published by HM Revenue & Customs (HMRC) on 24 November 2008 at http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_029057.
- 2 We are pleased to have the opportunity to respond to this consultation. As mentioned in our responses to the other consultations, we welcome the opportunity to discuss the proposals with HMRC staff and look forward to continuing discussions on these proposals as part of the powers review. In the meantime, we would be happy to discuss any aspect of our comments and to take part in all further consultations on this subject.
- 3 Information about the Tax Faculty and the ICAEW is given in Annex A. We have also set out, in Annex B, the Tax Faculty's ten tenets for a better tax system, by which we benchmark benchmark proposals to change the tax system.

KEY POINT SUMMARY

- 4 Our key points are set out below.
- We agree that there should be a coherent set of powers that apply to all taxes but this needs to be balanced against reasonableness and the principle should not become an end in itself.
 - We do not object to the principle of extending Schedule 36 to other taxes. However, Schedule 36 has a number of provisions that remain controversial. It seems to us premature to extend the rules to other taxes before the current provisions have actually been used in practice. We would prefer that the provisions are given chance to bed down properly before any decision is taken to extend them further.
 - We remain concerned at the considerable volume of material that is being produced by the powers review and that there is insufficient time to ensure that the material is given a thorough and considered review.
 - We are concerned that extending many of these provisions to inheritance tax (IHT) requires much more thought and consultation over a longer time period than is envisaged, and we think that a working party should be set up to examine the issues.
 - We would welcome clarification as to what 'statutory records' means for these purposes, in particular for IHT.
 - We welcome the proposals in respect of visits to private premises.
 - We would welcome clarification that the 'involved third parties' provisions will not be extended beyond the limited circumstances set out in the draft legislation.

Deleted: 10

The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

2 of 2

- The proposal to have a consistent set of time limits is reasonable but there needs to be proper transitional arrangements so as to ensure that taxpayers' legitimate expectations are protected.
- We appreciate the need for a penalty where the taxpayer carelessly or deliberately provides incorrect information but it is essential that any penalty is a reasonable and proportionate response to the incorrect information provided.

GENERAL COMMENTS

- 5 We agree with the underlying principle that a coherent set of powers should apply to all taxes, although this principle needs to take account of the different nature of each tax and that alignment should not be at the expense of a reasonable and proportionate approach for each tax.
- 6 We remain concerned at the pace of this review and that its outcomes are now being extended to other taxes when the new rules have not been given a chance to bed down.
- 7 It needs to be remembered that Schedule 36 was controversial and that bodies such as ourselves raised a number of major concerns about the proposals during the Finance Bill debates. Some of the concerns we raised were addressed, for example visits to third parties and the notice period for visits. Whilst these changes were welcome, by no means all of the concerns about Schedule 36 were addressed. This consultation proposes some extensions to the powers to Schedule 36, for example the power to enter premises of 'involved third parties', which could be seen as reopening the door to a wider power to visit third parties. For these reasons we remain concerned about extending Schedule 36 when we do not know for certain that HMRC will operate the provisions in a reasonable and proportionate manner. We consider that the concerns raised during the Finance Bill 2008 debates need to be taken into account for Finance Bill 2009.
- 8 Aside from the fact that the powers review contains a number of controversial developments, it has also generated a considerable volume of material, including a number of formal and informal consultation documents and now a considerable volume of guidance material. Whilst we welcome HMRC's commitment to consult, we remain concerned at the volume of material that is being produced with relatively little time to reflect and consider. In particular, we are concerned as to whether anyone can do it justice in the time and, equally importantly, whether in the time frame in which the law is being developed important factors are being missed that may prove to be problematic in the future.
- 9 As mentioned above, the implementation of HMRC's powers is crucial and it is essential that the powers are implemented properly and that HMRC's approach is reasonable and proportionate. The less commonly-encountered taxes that are covered by this consultation, eg IHT, should be subject to a lighter touch than mainstream taxes. With these points in mind, we think it is important that HMRC regards much of this material as 'work in progress' and that it will continue to take comments and refine its approach and guidance in the light of experience.

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

3 of 3

RESPONSES TO THE QUESTIONS POSED IN THE CONSULTATION DOCUMENT

Question 1: HMRC would welcome views on the approach that HMRC is taking in its review of specialist legislation and the proposed repeals in Annex A.

- 10 The approach adopted looks reasonable given the wide ranging nature of the information powers in Schedule 36.

Question 2: HMRC would welcome views on other areas where it may be appropriate to repeal provisions following the introduction of Schedule 36.

- 11 We have not identified any further areas for repeal but suggest that the position is subject to more detailed review as part of the powers consultation process.

Question 3: HMRC would welcome views on whether applying the compliance checking framework legislated in FA 2008 and described in Chapter 4 to other taxes would be appropriate.

- 12 Most of the 'other taxes' listed are of a specialist nature and not ones that most of our members will deal with on a regular basis (with the major exception of IHT and to a limited extent stamp duty land tax). Given that the new regime has not yet come into force, with the consequence that we do not yet know how it will work 'on the ground', we are not in a position to say whether the extension of the FA 2008 framework will be appropriate to these other taxes.

- 13 In relation to IHT, the provisions of Schedule 36 are broadly analogous to the provisions in s 219 et seq, IHTA 1984 so we would have thought it relatively straightforward to expand the FA 2008 provisions to include IHT. One point that will need to be addressed is that appeals are to the Special Commissioners rather than the General Commissioners (and a decision will have to be made about how these are handled under the new Tribunals system).

Question 4: HMRC would welcome views on the safeguards which would apply when checking other taxes. Are there specific safeguards which should be considered for certain taxes?

- 14 We remain of the view that taxpayers should have a right of appeal against all decisions made by HMRC. We therefore remain concerned that, for example, an appeal cannot be made against an inspection power. We appreciate that there is no right of appeal currently so to that extent the new position will be no worse than the existing position, but nevertheless we disagree with that principle.
- 15 The Schedule 36 rules do not allow for an appeal against an information notice where the information or document forms part of the taxpayer's statutory records. The precise meaning of what are 'statutory records' is far from clear. We are unsure how this provision would be carried over into, say, IHT and what exactly would be statutory records for this purpose and we would welcome clarification.
- 16 We consider that sanctions against non-compliance for IHT on death should take into account the fact that non-professional personal representatives cannot be expected to have the same legal knowledge as professionals, coupled with when they are closely related to the deceased then their grief and likely age should be taken into

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account. Even professionals face difficulties in obtaining all the necessary information from those who are recently bereaved, especially where the deceased dealt alone with their family's finances.

Question 5: HMRC would welcome views on where the current record-keeping requirements for these taxes could be improved.

17 We agree that there should be a common requirement to preserve information which is sufficient to accurately meet, quantify and report obligations.

18 Beyond that, the key requirement must be that businesses keep records that are appropriate to their needs and that no record-keeping burdens are placed on taxpayers that are not absolutely necessary. We expressed concerns last year during the Finance Bill debates about the wide-ranging nature of Schedule 37 to the FA 2008 and that any additional record-keeping requirements should only imposed in relation to known risk areas such as MTIC fraud. We remain of this view.

Question 6: HMRC would welcome views on whether it is appropriate or helpful to set out details of records which it is helpful to keep after an IHT chargeable event. If so would this advice be best placed in regulations or guidance and are there records which should or should not be specified?

19 The proposals set out in the document seem to us a reasonable basis for further discussion and consultation.

20 IHT presents particular challenges in terms of record-keeping for the estate of a deceased person (unless of course it is the relatively unusual event of a lifetime chargeable transfer). The executors' role in establishing the value of the estate can be like fitting together pieces in a jig saw when you do not know what the picture looks like nor whether you have all the pieces. It would be better to focus efforts on support and guidance for executors so that they can complete returns etc with the minimum of difficulty rather than try and frame sets of regulations which may never be able to be applied in the real world.

21 We therefore agree with HMRC's conclusion in paragraph 5.17 that detailed record-keeping requirements would not be appropriate in these circumstances.

Question 7: HMRC would welcome views on whether it is appropriate or helpful to set out details of such IHT records; whether these would be best placed in regulations or guidance; and what records should or should not be specified.

22 As noted in our answers to Questions 5 and 6 above, we do not think that further statutory record-keeping requirements would be helpful. Rather, we think that efforts should be directed towards producing guidance as to what sort of records would usually be appropriate and reasonable in given circumstances. Any guidance should be practical, be based upon examples and prepared in consultation with professional bodies.

23 Such guidance would then provide a reasonable benchmark, at least in those cases where a professional adviser is acting. We would expect professional firms that deal with IHT to have in place systems so as to enable their clients to comply with the IHT rules (eg the ten-year charge etc) and the necessity to keep records and calculations for the future.

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

5 of 5

- 24 If there is no professional acting then guidance and standards aimed at professionals are not likely to be appropriate.

Question 8: HMRC would welcome views on whether a record-keeping requirement should be introduced for PRT and SDRT.

- 25 We have no views on this but would have expected that any such requirements would have already been discussed at some length with the respective trade and professional bodies that deal regularly with these areas.

Question 9: HMRC would welcome views on replacing the powers described above with the new compliance checking framework. Are there particular reasons why certain taxes should not be brought into the new framework?

- 26 We support the principle of a coherent and consistent set of powers and that there should be as far as possible a single compliance checking framework. Many of the particular taxes under review in this consultation document are rather outside the scope of our members' usual work but we see no reason why these taxes should not be subject to similar rules.

- 27 As will be apparent from our comments above, we remain very concerned about IHT powers, particularly in relation to cases where no professional adviser is acting. We also recognise that the existing powers in the IHTA 1984 are broadly similar to the proposals under consideration. Nevertheless, IHT presents particular challenges that merit careful consideration. We think that further work and consultation is needed on the IHT issues and that a working group should be set up with the professional bodies to consider the issues in more detail before changes are made to the rules.

Question 10: HMRC would welcome views on applying powers to involved third parties and on the draft legislation.

- 28 We are concerned to see further changes being made to Schedule 36 when the existing rules have not been given chance to bed down. For the sake of certainty and clarity, we counsel against making major changes to Schedule 36 until it has been given chance to operate in practice.

- 29 We expressed a number of concerns about the third party information requirements set out in Schedule 36 and welcomed a number of changes that were made to tighten the circumstances when they might apply. In principle we are concerned about the extension of powers against third parties. We appreciate that the 'involved third parties' set out in the Schedule appear to be a tightly defined group and then only in relation to specific tax issues, but we remain concerned that a convincing case for these wider powers has not been made.

- 30 We would welcome confirmation that there is no intention to widen out the list of involved third parties other than those to set out in the proposed new paragraph 61A.

Question 11: HMRC would welcome views on what documents HMRC should be able to inspect at business premises for SDRT and PRT.

- 31 We do not have any particular views on this. In respect of PRT, we would have expected that the documents would fall within the usual business records.

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Question 12: HMRC would welcome views on introducing a requirement for the taxpayer's or Tribunal's approval before exercising a power to enter private premises for the purposes of valuation for IT, CGT, CT, IPT, SDLT and SDRT. Would other safeguards be appropriate in addition to or instead of this?

32 The document recognises the difficulty in visiting private premises and the right of taxpayers to privacy. We agree that that HMRC should continue to work with taxpayers and their advisers to reach agreement without the need to exercise any formal powers. Formal powers should only be considered if HMRC has offered the taxpayer every reasonable chance to reach an agreement and there is no other obvious way to reach an agreement.

33 We have always been of the view that taxpayers should have a right of appeal against any decision by HMRC and therefore we welcome the proposals set out in the consultation.

Question 13: HMRC would welcome views on the options for applying the aligned time limits in FA 2008 to the other taxes.
HMRC would also welcome views on whether there are circumstances where the change in time limits could disadvantage vulnerable taxpayers, and how could this risk best be addressed?

34 We support the principle of aligning time limits – we are not aware of any specific issues with these other taxes that might justify a departure from the normal rule.

35 If existing time limits are changed, it is important to ensure that there are proper transitional arrangements to any new rules. We stated in Finance Bill Committee stage briefing (see TAXREP 43/08 in relation to Schedule 39) that EU law is clear that legitimate expectations ought to be preserved and that a transitional period is required.

36 Provided that there are proper transitional rules and proper publicity, then this should provide sufficient protection to vulnerable taxpayers.

Question 14: HMRC would welcome views on retaining a penalty where a person fraudulently or negligently provides incorrect information or documents by including it in Schedule 36 to FA 2008.

37 The proposal to include the penalty provision in Schedule 36 looks reasonable enough. However, we are not convinced that the importation of the Schedule 24 FA 2007 provisions is entirely satisfactory, for the reasons set out below:

38 The existing provisions in s 98(2), TMA 1970 apply where there has been fraudulent or negligent conduct. The proposed provision is by reference to whether the person took reasonable care or was deliberate. A penalty could therefore be levied under this provision for the provision of incorrect information which made little or no difference to the actual tax risk. Whilst we have no doubt that HMRC will seek to exercise the provision reasonably, it seems a potentially draconian power that could be used to intimidate taxpayers.

39 The Schedule 24 penalty provisions are by reference to a percentage of the tax lost and provide for mitigation in certain circumstances. Whilst this may not be entirely

Deleted: 10

The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

7 of 7

appropriate to the provision of wrong information outside of a return, the Schedule 24 penalty is geared to the tax risk and the action of the taxpayer and this might be a much more equitable model where, say, the taxpayer made a careless mistake but it had little or no impact on the amount of tax due.

- 40 The maximum £3,000 penalty has not changed for many years. Whilst we are not suggesting it should be increased, we are not convinced that it would act as a deterrent to a multi-national business whereas such a penalty could be catastrophic for a small business. More consideration should be given the level of any penalty (or penalties) so as to ensure that it is reasonable and appropriate to the circumstances of the taxpayer and the gravity of the offence.

FJH
18 February 2009

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

8 of 8

ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 130,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

9 of 9

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.co.uk/index.cfm?route=128518>.

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

TAXREP 10/09

Compliance checks: the next stage

10 of 10