TAXREP 3/01

CRIMINAL JUSTICE AND POLICE BILL: TAX ISSUES IN CLAUSES 45-69

Text of a letter submitted in March 2001 to the Minister of State, Home Office by the Tax Faculty of the Institute of Chartered Accountants in England and Wales

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1. We at the Tax Faculty of the Institute of Chartered Accountants in England and Wales have been watching the passage of this Bill with interest. We expressed our views following the publication in March 2000 of the report by Lord Grabiner and in June 2000 of the Cabinet Office PIU report "Recovering the Proceeds of Crime" and have a number of concerns in relation to Clauses 45-69 of the Bill which we would like to raise with you.

2. Clearly it is in everyone's interest to combat criminal activity. At the same time it needs to be appreciated that in comparison with many other countries there is a very high degree of compliance with tax obligations in the UK. There is also a significant amount of voluntary disclosure of past tax evasion.

3. We believe that one of the most significant factors driving this climate of compliance is the Inland Revenue's obligation of confidentiality. There are some countries where people will not disclose tax matters because evasion of tax has been coupled with, for example, evasion of exchange controls. Where a citizen would otherwise be prepared to sort out his tax position he is disinclined to do so because of a worry about the penalties for his exchange control evasion.

4. In the UK, even where tax evasion is coupled with another offence, individuals are currently able to sort out their tax position without fear that information disclosed to the Inland Revenue will be referred on to other prosecuting authorities. We would stress that this is not necessarily because a person wants to sort out his tax position but not the other offence. It may well be that he wishes to determine the most appropriate way to disclose the other offence before he does so, or there may be real doubt as to whether his conduct constitutes a criminal offence.

5. We accept that those who commit serious criminal offences should not be able to hide behind the Inland Revenue's duty of confidentiality. However, although there may be a handful of cases where a burglar, a pornographer or a confidence trickster declares to the Inland Revenue the income that he generates from his criminal activity, we doubt that there are many instances. If this is right the Bill risks diluting the current high tax compliance level without achieving any significant public benefit.

6. We would welcome an assurance that the Inland Revenue and Customs will agree with representative bodies and publish Codes of Conduct explaining how the powers in the Bill will be exercised.

7. Our specific concerns are set out below.

CLAUSES 45-48: DISCLOSURE OF INFORMATION

General comments

8. We are worried about the very wide scope of the disclosure provisions. They apply not only to the investigation of a crime but also to the investigation of an alleged or suspected crime. We can see some merit in the police being entitled to approach the Inland Revenue to obtain the additional evidence in order to prosecute the criminal

where there is significant evidence of a crime. At the same time alleged or suspected crime seems to enable the Revenue to volunteer information in order to initiate a police investigation where there is little or no evidence to support a Revenue officer's view that a crime may have been committed.

9. There is likely to be a fear that a maverick tax Inspector might use the threat of passing information to the police to seek to persuade taxpayers either to pay tax that is not due or to forego their statutory rights in relation to their tax affairs. We are not suggesting that this is likely to occur. However, what matters for the integrity of the tax system is not what is likely to occur but rather taxpayers' perceptions as to what might occur.

Independent safeguards and transparency

10. Clause 47(3) provides that information is not to be disclosed by the Revenue or Customs except by or with the authority of their respective Boards. There has been no indication as to how the tax authorities intend to operate their powers under the Act. We are a little concerned that, prima facie, Clause 47(3) gives the Board power to delegate to any of their staff the power to pass information to foreign governments, the police or other prosecuting authorities.

11. In view of our concern that the provisions are likely to seriously damage the climate of compliance, we believe that this potential damage would be minimised if the power to delegate were limited. We would expect that the number of cases in which the tax authorities possess information that will assist in criminal proceedings (other than for tax evasion where the tax authorities themselves are normally the prosecuting authority) would be fairly small. It would therefore not be unduly onerous to require a decision to pass on information to be made by the Board itself.

12. Although we would prefer that the power were exercisable only by the Board, a possible alternative would be to limit the level to which the Board could delegate responsibility. For example section 149 of Finance Act 2000, which introduced the new disclosure power of "orders for the delivery of documents", limits the number of Inland Revenue staff who can invoke that power to members of the Senior Civil Service, who perform specified functions within the Inland Revenue.

13. We are particularly concerned about the ability to pass information to foreign prosecuting authorities. We are obviously aware that Clause 46 gives the Secretary of State power to override the disclosure obligation. However, this power is very limited and it is in any event unclear how it will operate in practice. The Minister could issue a list of countries which the UK will not assist under this power. However, any such list would undoubtedly be extremely short, as inclusion on the list would clearly cause offence to the countries concerned. The Minister could also prohibit disclosure in relation to a specific overseas action. Again we suspect that by the time that he becomes aware of the existence of such an action the exchange would have already taken place.

14. We believe that the Act should specifically prohibit disclosure to overseas tax authorities unless:

- the foreign authority provides credible evidence that the person concerned is reasonably suspected of a serious offence;
- the "offence" would be criminal under UK law;
- the maximum penalty for the offence in the overseas jurisdiction is no more severe than it would be in the UK, at least qualitatively (e.g. death or imprisonment where the UK would only impose a fine);
- procedures for investigation and trial of crimes in the foreign country comply with the European Human Rights Convention (we understand that it may be a breach of the Human Rights Act for the UK authorities to disclose information if this condition is not satisfied); and
- the foreign authority provides an undertaking that it will comply with the prohibition in Clause 47(4) against further disclosure, and the UK authority reasonably believes that they will comply with that undertaking.

15. Whenever possible the person concerned should also be entitled to be given the opportunity to make representations before the information is disclosed. For example in the case of a proposed disclosure to an overseas jurisdiction, the UK revenue department will not necessarily be aware of the human rights record of the country concerned. Inevitably there will be cases where the taxpayer cannot be consulted because of the risk of tipping off an unsuspecting criminal, but there will be many others where no harm would be done, for example because the taxpayer is already well aware because he is being investigated in this country.

"Alleged or suspected" crimes

16. As indicated earlier we have no conceptual problem with the tax authorities providing information that will assist in the conviction of criminals. Our concern is that clause 45(2)(a) enables information to be provided for the purposes of a criminal investigation and Clause 48 defines a criminal investigation as including an investigation of any "alleged or suspected" crime.

17. To an extent this is a question of degree. We can see the public interest in the tax authorities assisting the investigation of a probable crime where the police already have strong evidence that a criminal offence has been committed. On the other hand it appears to allow the tax authorities to pass on information where there is little real evidence that a crime has been committed.

18. The problem is where the line should be drawn. If the disclosure can only be made following a decision by the appropriate Board this is probably not a significant worry as consideration by the Board is probably a sufficient safeguard. Our real worry is that the Bill, as drafted, gives a wide power of delegation.

19. A possible solution might be for the legislation to prevent the tax authorities volunteering information to another prosecuting authority except where the Board believes this to be in the public interest. The Board could delegate to a fairly senior level of staff the power to pass information to another prosecuting authority in response to a request by that authority, provided that such a request specifies the name of the taxpayer and the nature of the alleged offence. This would need to be subject to a limitation that the tax authority would not pass on information that did not seem to them to be relevant to that alleged offence.

Retrospection

20. We are concerned that Clauses 45(1) and 47(1) specifically authorise the disclosure of information obtained by the tax authorities before the Act comes into force. We accept that in the past where powers to disclose information have been enacted in the tax legislation, the legislation is normally silent about existing information and there is an inference that the power extends to such information. Accordingly Clauses 45(1) and 47(1) at least give Parliament a specific opportunity to consider whether the provision should be retrospective.

21. However, we do not think that the power under Clauses 45 and 47 are comparable with past disclosure powers. For example, passing information between the Inland Revenue and the DSS is unlikely to be detrimental to taxpayers except where fraud has clearly been committed. We think it would significantly enhance the public acceptability of these new powers if they did not extend to existing information held by the tax authorities.

22. An obvious example is information previously passed to the Revenue on a confidential basis in relation to transfer pricing enquiries. A company may have been prepared to give commercially-sensitive information to the Revenue on the basis that it was not passed to authorities in another country in which a major competitor was based. To allow such an agreement to be overridden by statute would undoubtedly make businesses think twice about what information they provide to the Revenue in the future.

CLAUSES 49-69: SEIZURE

Applications and duty to secure

23. We agree that in principle it is sensible to clarify the position where a prosecuting authority in execution of a search warrant cannot readily identify privileged material. We are however a little concerned about some of the details of the legislation.

24. Clause 59(1) imposes a duty to secure where an application has been made under Clause 58. We have two concerns here. The first is that it is not clear when such an application is made. Common sense suggests that the duty does not arise until notice is served on the tax authorities that an application has been made. However the law does not impose an obligation to give such notification.

25. Our second concern is that there will inevitably be a period of time between the seizure and the application. We believe that in this period it is wrong for the Inland Revenue or Customs to be able to peruse the documents. We accept that if they copy the documents, at the end of the day they will have to hand over those copies as well as the documents. However, in most cases the protection for legally privileged material is not that the letter as such might be used in evidence but rather that the advice contained therein could well assist the tax authorities in building up their case against the taxpayer. Accordingly we think it crucial that the material is not looked at between seizure and application.

26. We could accept the provisions if at the time of the seizure the responsible person was entitled to indicate that he believes that the documents seized might contain privileged information, with the duty to secure then arising immediately such a claim was made. Nor would we have a problem with the legislation providing that, for example, the duty to secure then ceased after say three days unless within that period the taxpayer served on the tax authority a copy of the application made to the Court under Clause 58.

27. We are similarly a little concerned about Clause 52(4), which requires an initial examination to be carried out speedily. We believe that the tax authorities should also be required to take into account the desirability of allowing the person with an interest in the property to take legal advice and, if appropriate, make an application under Clause 58. This is probably not necessary if the above suggestion of a three-day moratorium is accepted.

Return of seized property

28. We have a different concern in relation to Clause 57(2). If a person is in possession of property when it was seized and someone else claims ownership, we do not believe it right that it should be left to the discretion of the tax authorities to determine who has the prior right to the documents. There may well be a dispute. In particular, we think it wrong that the Inland Revenue should have power to, in effect, overturn a lien by passing the documents to the person who is entitled to them subject to discharging the lien. We feel it would be preferable in the event of a dispute for the tax authorities to have to refer to the court the question of the identity of the person entitled to the documents unless all of the claimants jointly agree to whom the documents should be returned.

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