

## TAXREP 42/08

### Finance Bill 2008: Committee Stage Briefing on Clause 108 and Schedule 36, Information and inspection powers

*Parliamentary Briefing submitted on 2 June 2008 by the ICAEW setting out our comments and concerns on the proposed HMRC information and inspection powers in Schedule 36 of the Finance Bill 2008.*

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# **Finance Bill 2008: Committee Stage Briefing, Clause 108, Schedule 36, Information and inspection powers**

## **1 Key ICAEW issue**

The Schedule, if enacted in its current form, will drastically alter the balance between the taxpayer and the HMRC authorities. In short, the Schedule will provide HMRC with considerable new powers but does not introduce compensating rights for taxpayers who will be subject to them. In addition, the Schedule does not include sufficient judicial checks on the new powers being given to HMRC.

Whilst it is acknowledged that most HMRC officers will use these powers responsibly, there is a real risk that they and the powers themselves could be brought into disrepute if they are not matched with appropriate statutory safeguards. The powers are widely drawn and consequently give taxpayers and their advisers little room to challenge their use in the Courts.

It is not sufficient for taxpayers to be told that there will be safeguards in guidance notes. These cannot be relied on in Court and can be changed without Parliamentary scrutiny. These safeguards must be enshrined in statute.

## **2 Full comments on Schedule 36**

### ***Paragraph 1, Power to obtain information and documents from taxpayer***

This paragraph provides officers of HM Revenue & Customs to require taxpayers to provide information or to produce documents so that the officer can check the taxpayer's tax position. The only statutory restriction on the use of this power is that the information or document must be reasonably required by the officer for the purposes of checking the taxpayer's tax position.

A taxpayer may appeal against the notice (paragraph 27(1)). However, no appeal is available in respect of any requirement to provide information or to produce any document that forms part of the taxpayer's statutory records (paragraph 27(2)). Statutory records are defined in paragraph 60. The taxpayer's tax position is defined in 62.

#### *Recommendation*

We think paragraphs one and two are drawn unreasonably widely, but that does not matter unduly provided that there is a full right of appeal to the Tribunal. Amendments to paragraph 3, see below, are designed to ensure that there is such a right to appeal.

### ***Paragraph 2, Power to obtain information and documents from third party***

This paragraph provides officers of HM Revenue & Customs to require third parties to provide information or to produce documents so that the officer can check another person's tax position.

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### **Paragraph 3, *Approval etc of taxpayer notices and third party notices***

This paragraph provides the framework for some notices under paragraphs 1 and 2 to be sanctioned by the First-Tier Tribunal. Sub-paragraph (2) provides that the Tribunal **may** give the approval for the giving of a taxpayer notice or third party notice.

If such approval has been given, paragraph 27 provides that a taxpayer may not appeal against the notice and thus, without resorting to judicial review, has no way of challenging the validity of the notice.

Sub-paragraph (3) provides that, in some circumstances, the taxpayer (or third party) may make representations against a proposed notice and, where this is done, the HMRC officer must give a summary of the representations to the Tribunal.

However, that requirement can be waived in certain circumstances (paragraph 3(4)).

Even where the requirement is not waived, there can be no assurance that in practice the Tribunal is given a fair summary of the taxpayer's representations. Given that the taxpayer or third party will be aware of the impending notice, the taxpayer or third party should have the full right of audience before the First-tier Tribunal rather than rely upon the HMRC officer's summary.

Nor is it explicitly provided that the taxpayer or third party is to be advised of the right to make representations against the notice and the fact that these representations will (albeit in summary form) be presented to the First-tier Tribunal which will rule on the matter.

The general rule should be that:

1. taxpayers and third parties should be given the opportunity to comply voluntarily with any reasonable request
2. if such requests are to be challenged then the matter should be referred to the First-tier Tribunal with all relevant parties entitled to make representations

Such references to the Tribunal could be either as an appeal mechanism against a formal request or as a pre-requisite to a formal notice.

It is acknowledged that there will be cases where prior notice might be prejudicial to HMRC. In those exceptional cases then a unilateral (ex parte) application to the Tribunal would be appropriate. As with paragraphs 1 and 2, paragraph 3 proposes that applications to the Tribunal may be made by very junior officers, albeit with the agreement (which need not be in writing) of an authorised officer. To ensure that the Tribunal process is not compromised, the application should be made only by authorised officers.

### ***Proposed amendment***

Page 352:

- Line 40, after “notice is addressed” leave out “has been” and insert “and the taxpayer have been”

Page 353:

- Line 1, after “opportunity” insert “to produce the information or document and”
- Line 3, leave out “a summary of”
- Line 15, at end insert “(6)”. No notice shall be given by the First-tier Tribunal unless the person to whom the notice is addressed and the taxpayer have been given notice of a hearing at which the Tribunal is to consider the issue of the notice and has been given an opportunity to attend the hearing and make representations”.

### **Paragraph 6, *Notices***

This paragraph makes additional provision concerning taxpayer and third party notices under Part 1 of the Schedule.

Sub-paragraph (2) provides that such notices may specify or describe the information or documents to be provided or produced. However, given the need for certainty in this area, it is imperative that the notices should specify the information required.

#### ***Proposed amendments***

- On page 354, on line 13, for “may” substitute “must”.

### **Paragraph 7, *Complying with notices***

This paragraph makes provision concerning the compliance with taxpayer and third party notices under Part 1 of the Schedule. Sub-paragraph (1) provides that such notices must be complied with within the period specified or described in the notice. Whilst such specification and description must be “reasonable”, it can in theory require almost instantaneous compliance. Given the fact that the recipient of the notice might require professional advice concerning the notice and its legality and the potential consequences of failures to comply with notices, there needs to be statutory protection to ensure that compliance, where such compliance is not in fact strictly necessary, is not unduly hurried.

Such a breathing space will ensure that recipients do not unwittingly provide information that they are under no obligation to give. Equally, it can also increase the chances of recipients giving the information actually sought. Consequently, we propose that a minimum period of 30 days be given.

Sub-paragraph (3) provides that the place at which the information may be required to be supplied may not be a place that is used solely as a dwelling. However, that rule overlooks the modern lifestyle (which is in many cases encouraged by Government and policy makers) that sees people working from home. It is therefore proposed that the exclusion for dwellings be extended to premises that are used

substantially as dwellings. (The use of the word “substantially” ensures that compliance can be compelled at the base of businesses run from homes.)

#### ***Proposed amendments***

- On page 354, on line 22, at the end, insert “(such period to be at least 30 days)”.
- On page 354, on line 30, after “solely”, insert “or substantially”

#### **Paragraph 8, *Producing copies of documents***

This paragraph provides that, as a general rule, copies of documents may suffice, rather than the original.

Sub-paragraph (2), however, entitles an officer to require the original. Again, this power can in theory be exercised by any member of the HMRC staff and it is again proposed that the statute limit it to those officers duly authorised. As with paragraph 7, the current draft does not allow for a minimum compliance period. We propose that recipients be given at least 30 days to comply.

#### ***Proposed amendments***

- On page 355, on line 4, after “period”, insert “(such period to be at least 30 days)”.

#### **Paragraph 10, *Power to inspect business premises etc***

This paragraph provides officers of HM Revenue & Customs the power to inspect premises – sometimes without warning. Because the paragraph refers to an officer of Revenue & Customs, any member of the HMRC staff will, according to the statute, be permitted to issue a taxpayer notice.

Sub-paragraph (3)(a) purports to give taxpayers a minimum 24 hours’ notice before such a visit with no restrictions as to whether that notice is given during a weekend or at any other time when professional advice might be unavailable. Guidance has suggested that in practice ten days’ notice will in fact be given. The guidance is not clear whether this means ten working days (generally, two weeks) or ten calendar days. ***So that taxpayers can be given the protection that the guidance purports to offer, the statute should reflect unambiguously the intended practice.***

#### ***Recommendations***

Finally, we recognise that concessions have been made with regards to the location of such inspections. However, the current definition of business premises is still far too broad. Sub-paragraph (7) defines “business premises” to include any place which HMRC believe to be used in connection with carrying on a business. This is unacceptable for a number of reasons:

- i) HMRC belief (whether or not that belief is reasonable) should not determine whether or not a place may be subject to a visit. The test should focus on actual business use. Whilst, in practice, HMRC will act in accordance with their reasonable belief, taxpayers must be entitled to a full

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defence (and therefore right to end the inspection) if they can prove to a tribunal or Court that there is in fact no business use

ii) The draft does not take into account the realities of modern life. Many individuals take work home with them. Others use home computers to check up their e-mails. Some have mobile (Blackberry) devices and telephones that are used at home for work purposes. This is not just individuals in commerce but employees at all levels of an organisation. Furthermore, paragraph 58 makes it clear that the definition of business extends to the activities of a government department. Thus, whilst it is unclear whether constituency paperwork will count as business in accordance with this Schedule, any Minister who takes home a red box will find that their home has become a business premises and susceptible to a visit from HMRC

iii) The definition of “business documents” is widely drafted and will include any non-business documents that come within the definition of statutory records. It is suggested that this part of the definition be limited to records that relate to the carrying on of the business.

### ***Proposed amendments***

On page 355

- line 22, for “24 hours”, substitute “14 days”.

On page 356:

- on line 3, after “records” insert “so far as they relate to the business”.

On page 356:

- on line 7:  
before “in connection” insert “wholly or mainly”  
after “business” insert “or from which a business is substantially carried on”.

### ***Paragraph 20, Deceased persons***

This paragraph provides that deceased individuals’ tax papers may not be examined more than six years after the individual’s death.

However, there is no corresponding provision relating to former companies. (It is noted that paragraph 60(3)(a) makes it clear that such companies’ papers may be subject to the powers under the Schedule.

We suggest that a similar provision be included to ensure that the papers of companies may be safely disposed of after six years.

### ***Proposed amendments***

On page 358, after line 41 insert:

- “20A An information notice given for the purpose of checking the tax position of a company that has ceased to exist may not be given more than 6 years after the company ceased to exist.”

### **Paragraphs 21 to 25, *Privileged communications between professional legal advisers and clients***

Paragraph 21 provides explicit protection for documents that are subject to legal professional privilege.

Paragraphs 22 and 23 provide lesser protection for documents created in the course of an audit or in relation to tax advice given by non-legally qualified advisers. Furthermore, paragraph 24 restricts the protection offered in paragraphs 22 and 23.

Thus the provisions maintain the current ***distortion in the market*** that permits two individuals otherwise in the same situation to be given the same tax advice by two different professionals and one is subject to more protection than the other.

In order for the market to be rebalanced in the context of tax advice, it is imperative that paragraph 21 protection be extended to tax advisers who are not legally qualified.

### ***Proposed amendments***

On page 359:

- the words after “which” (on line 3) to form paragraph (a) and
- after line 6, insert:  
“or  
(b) such a claim could have been maintained if the information or document had been obtained in the course of correspondence between a lawyer and a client”.

### **Paragraphs 27 and 28, *Appeals against information notices***

Para 27 sets out a right of taxpayers to appeal against an information notice and para 28 sets out a corresponding right for third parties. However, the rights of appeal against a taxpayer or third party notice are removed where the information or documents form part of the taxpayer’s ‘statutory records’ (para 27(2) and 28(2) respectively).

We believe that there should be a right of appeal against the power to provide or produce a document that forms part of the taxpayer’s statutory records. Whilst we appreciate that taxpayers can appeal against any penalty imposed for non-production, we do not think that this is satisfactory protection. The definition of statutory records (set out in paragraph 60) lacks clarity and the taxpayer may wish to dispute whether the particular document required is part of the statutory records. Further, the absence of an appeal right also puts unfair pressure on the taxpayer to produce records even if he believes they are not relevant.

### ***Proposed amendments***

Page 360:

- Leave out lines 28 to 30

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- Leave out lines 38 to 40

#### ***Para 28***

In the case of third party notices, the only ground of appeal is the question of onerousness. That considerably narrows the scope of challenges from that under the current law where general unreasonableness of the request may be sufficient to set aside a third party notice. The current law encompasses the onerousness of a request but does not restrict challenges to such matters.

#### ***Proposed amendment***

- lines 35 to 37, omit the words from “on the” to the end

#### **Paragraph 30, *Procedure***

This paragraph deals with the procedures of appeals.

In sub-paragraph (6), it is provided that the provisions of Part 5 TMA 1970 (which deal with appeals against tax assessments) shall apply to appeals under the Schedule. Part 5 deals with appeals beyond the Tribunal (i.e. to the higher Courts) and also contain provision to allow appeals to be made outside the 30-day limit.

There is already a similar provision in section 19A (information notices in the course of Self Assessment enquiries) – see s19A(8). Therefore, under the current law, a section 19A notice may be appealed against outside the 30-day limit, provided that the conditions of section 49 are satisfied.

The current draft of paragraph 30(6) does not make this point clear. This is because the sub-paragraph opens with the words “Subject to this paragraph”. To maintain the current effect of the law, the qualifications to sub-paragraph (6) should be limited to sub-paragraph (4).

Should the tribunal dismiss the appeal, sub-paragraph (4) requires the person to comply with the notice within such period as is specified by the tribunal. If no period is so specified, the current draft allows an HMRC officer to specify a reasonable period. Given that the matter has already been heard by the tribunal it should be a requirement for the tribunal to specify a period in which to comply. In accordance with the rest of the paragraph, such a period should be at least 30 days.

#### ***Proposed amendments***

- On page 361, for lines 13 and 14 substitute “to the first-tier Tribunal”.
- On page 361, for lines 25 to 28, substitute “within such period as is specified by the Tribunal (such period to be at least 30 days starting with the day after the notification of the decision to the person to whom the information notice was given)”.

#### **Paragraph 32, *Supply of goods or services etc***

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This paragraph relates only to VAT. However, its limited scope is not immediately clear.

***Proposed amendment***

Page 362:

- Leave out lines 3 to 17

**Paragraph 33, *Groups of undertakings***

This paragraph relates to third party notices issued in relation to groups of companies.

As currently drafted it requires HMRC to name only the parent company and expects the third party to ascertain all the subsidiaries. This is clearly an unrealistic and unreasonable requirement.

***Proposed amendments***

Page 362:

- Line 24, add at the end “and of the company or companies that the Officer believes are subsidiary undertakings and the notice shall be taken as relating only to the companies so specified”.

**Paragraph 38, *Daily default penalties***

This paragraph provides for daily penalties to be imposed after a continuing failure to comply.

Thus, once a fixed penalty has been imposed, there is nothing to stop daily penalties from being levied.

However, that would be unfair, especially if the original fixed penalty is subject to an appeal under paragraph 45.

It is therefore suggested that paragraph 38 be explicitly stated to be subject to a moratorium so that it may not be invoked until:

- 30 days after the standard penalty is imposed or
- 30 days after any appeal against the standard penalty is determined, if later.

***Proposed amendments***

On page 364, after line 40 insert:

(3) A penalty may not be imposed under this paragraph until—

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- (a) 30 days after the penalty under paragraph 37 is imposed or
- (b) if later, 30 days after any appeal under paragraph 45 against that penalty is determined.

**Paragraph 42, *Failure to comply with time limit***

This permits an officer of HMRC to extend the time limits for compliance with a requirement under the Schedule.

We suggest that the first-Tier Tribunal should also be entitled to determine the period for compliance.

***Proposed amendments***

- On page 365, line 43, after “Customs” insert “or the First-tier Tribunal”.

**Paragraph 46, *Procedure on appeal against standard penalty or daily default penalty***

The current draft requires the appeal to be sent to HMRC. It should be made directly to the First-Tier Tribunal because the new tribunal system requires all appeals to be made direct to the tribunal.

***Proposed amendments***

- On page 367, line 1, for “HMRC” substitute “the first-tier Tribunal”

**Paragraph 48, *Tax related penalty***

This paragraph entitles HMRC to approach the Upper Tribunal and ask for an additional penalty where tax is likely to have been lost as a result of continued failures to comply.

Sub-paragraph (4) provides that the taxpayer must be notified of any penalty so determined by the Upper Tribunal. It is implicit from the paragraph, therefore, that the taxpayer is not privy to the proceedings.

Given the penal nature of the provision, Human Rights law requires any such penalty provisions to be conducted fairly and that would require the person who might be penalised to have the opportunity of being represented at the hearing.

***Proposed amendments***

- On page 367, for lines 42 and 43 substitute:  
“(4) The proceedings before the Upper Tribunal shall be conducted in the same way as an appeal against a tax assessment.  
  
(4A) In particular, the person shall be entitled—  
(a) to appear before and be heard by the Upper Tribunal, or  
(b) to make representations to the Tribunal in writing.”

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### **Paragraph 49, *Enforcement of tax-related penalty***

This paragraph requires penalties to be paid within 30 days of the date of issue. This would be most unfair in cases where there is a delay before issue, a delay in the post or the recipient is away at the time the penalty is sent. It is proposed that the penalty should fall due 30 days after service.

#### ***Proposed amendments***

- On page 368, for lines 11 and 12 substitute “30 days after the date on which the notification of the penalty is received”.

### **Paragraph 57, *Authorised officer of Revenue and Customs***

This paragraph defines what is meant by an authorised officer of Revenue and Customs. Such authorised officers have powers to carry out certain duties not available more generally.

Paragraph 57 makes it clear that different officers may be authorised to carry out different functions.

It is suggested elsewhere that most of the powers available under this Schedule be restricted only to those officials to whom the appropriate authority has been given.

However, for greater transparency, it is suggested that HMRC publish:

- (a) the criteria by which they determine who should be authorised for any particular function and
- (b) the names of all officers so authorised.

#### ***Proposed amendments***

On page 370:

- line 12: make the existing paragraph sub-paragraph (1)
- after that paragraph, insert:

“(2) The Commissioners shall publish—

(a) the criteria by which they determine who should be authorised for any particular provision and

(b) for each provision requiring an authorised officer, the names of all officers who are so authorised.

### **Paragraph 58, *Business***

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This paragraph defines what is meant by business.

However, sub-paragraph (3) permits HMRC to introduce its own definitions of what is and what is not a business. This means that the higher obligations relating to business activities can be extended without any real restriction to non-business activities with the possibility of a retrospective change in the record obligations that need to be observed.

Because of the severity of the consequences of non-compliance with the rules, it is imperative that Parliament and Parliament alone have the right to alter the definitions of what constitutes a business.

### ***Proposed amendments***

On page 370, omit lines 29 to 34.

### **Paragraph 62, *Tax Position***

This paragraph defines “tax position” the term that underlies many of the taxpayer obligations and HMRC powers in this Schedule.

It relates to any of the taxes set out in paragraph 61 and refers to the person’s position as regards:

- any **past, present** or **future** tax liability as well as
- any penalties or other amounts that **have been** or **might be** paid and
- any claims, elections, applications or notices that **have been** or **might be** made or given (paragraph 62(1)).

Thus, an officer of Revenue & Customs will, under paragraph 1, be able to demand documents and/or information concerning future tax liabilities – even in respect of events that have not yet occurred.

When considered with paragraph 61, it is clear that the Schedule will permit the Italian, Greek or Estonian authorities (say) to require HMRC to launch a raid on a UK-resident taxpayer merely to ensure that a transaction that has not yet occurred will, in a future year, be taxed appropriately.

### ***Proposed amendments***

Page 371:

- Line 45, leave out “present and future liability” and insert “or present liability or any future liability to the extent that it depends in whole or in part to any past or present transactions”

### **Further information**

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