Tax Representation

Tax Faculty

TAXREP 32/06

CRIMINAL INVESTIGATION POWERS

Response dated 8 November 2006 from the Tax Faculty of the Institute of Chartered Accountants in England & Wales to the consultation document 'Criminal Investigation Powers: A Technical Consultation Document' issued on 9 August 2006 by HM Revenue & Customs

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CRIMINAL INVESTIGATION POWERS

INTRODUCTION

1. This document sets out the comments of the Institute of Chartered Accountants in England and Wales (ICAEW) in response to the consultation document issued by HM Revenue and Customs (HMRC) on 9 August 2006 entitled *Criminal Investigation Powers: A Technical Consultation Document*. This is referred to below as 'the Condoc'.

2. Information about the ICAEW and the Tax Faculty, including our Tax Investigation Practitioners Group, is given in Appendix 1.

3. We are pleased to have the opportunity to respond to this consultation.

4. Although of course a substantial proportion of our members also work in the Scottish jurisdiction, the comments that we make in this document are restricted to the impact of the proposals in England and Wales.

KEY POINT SUMMARY

5. We are opposed to any extension of HMRC powers to investigate tax fraud formerly investigated by the Inland Revenue (IR), or the diminishing of safeguards in relation to the exercise of those powers, as there is no evidence that any such changes are necessary to police this type of fraud.

6. The only permissible justification under Article 8 of the European Convention on Human Rights (ECHR) for such an increase in powers or diminishing of safeguards is that this is 'necessary in a democratic society … for the prevention of disorder or crime'. We can see no such necessity.

7. We are therefore opposed to the introduction of a power of arrest for ex-IR matters, as well as the various powers under the Police and Criminal Evidence Act 1984 (PACE) which are ancillary to the power of arrest. These include a power to search, without warrant, the premises of an arrested person.

8. Further if a power of arrest is introduced, plainly, arrests of those suspected of serious tax fraud will in practice become more common. Criminal investigation involving arrest is far more likely to become public knowledge than criminal investigation without arrest. As there will inevitably be many occasions where people are arrested but not prosecuted, the increased risk of ensuing damage to the reputation of such persons is contrary to the duty of confidentiality owed by HMRC to taxpayers. If additional powers, including a power of arrest, are to be introduced we feel it essential that these should be accompanied by a suitable Code of Practice.

9. Whether or not a power of arrest is introduced, we recommend that there should be Code of Practice covering both ex-IR and ex-HM Customs and Excise (HMCE) matters and the use of criminal powers. This should state, among other things, that the use of powers in criminal investigations should only be permissible if the use of lesser, or less intrusive, powers would seriously prejudice the investigation. It should also emphasise the duty which HMRC have to protect a taxpayer's confidentiality.

DETAILED COMMENTS

Previous representations

10. We refer to our document TAXREP 17/06, which was the ICAEW's response dated 28 June 2006 to the consultation document *HM Revenue & Customs and the Taxpayer: Modernising powers, deterrents and safeguards. A consultation on the developing programme of work* issued by HMRC on 30 March 2006. Comments on serious non-compliance and criminal offences are at paragraphs 99 to 101 of our response.

11. Although the March 2006 consultation document was not focused on criminal investigation powers, paragraph 5.4 of the ICAEW's response stated our view that HMRC – tasked with administering the tax system in collecting revenue – cannot be in a position to decide impartially what powers and sanctions are needed to do that. The ICAEW strongly advocated that an independent body be set up to oversee the development of HMRC's powers and taxpayers' rights and consider submissions from all interested parties in an impartial manner. It was believed that this would have the advantage of promoting public trust in whatever proposals came out of the review. We are remain strongly of this opinion.

Historical framework and lack of 'necessity' to justify increasing powers

12. The former IR have traditionally been regarded by our members and the public at large as being a cautious and responsible prosecutor. When mistakes were made, the IR tended to carry out a thorough review as to why they were made, and new legislation as regards powers was passed after considerable thought. For example, the failures identified in *R v IRC ex parte Kingston Smith* [1996] STC 1210 led in part to the introduction of s 20BA, Taxes Management Act 1970 (TMA 1970) and the amendments to s 20C, and to the introduction of a number of internal safeguards.

13. In contrast, over recent years there has been considerable public disquiet over the conduct of criminal investigations and prosecutions by the former HMCE. In particular, the *London City Bond* cases in 2002 elicited heavy criticism of HMCE in the Court of Appeal, and the Crown effectively abandoned the retrials at Liverpool Crown Court. In the aftermath of these cases a review of HMCE's

criminal procedures was carried out by Mr Justice Butterfield. The Butterfield Report of July 2003, which contained trenchant criticism of HMCE, led to the creation of the Customs Prosecution Office (now the Revenue and Customs Prosecution Office (RCPO)) although it left criminal investigation within the remit of HMCE. Problems still persisted, however. In response to the serious misconduct identified by Mr Justice Crane in staying the criminal prosecution which resulted from Operation Venison, and his awarding costs against RCPO as a result of its improper acts and omissions, HMRC agreed to an investigation by the Independent Police Complaints Commission (IPCC). Legislation was introduced in the form of the Revenue and Customs (Complaints and Misconduct) Regulations 2005 (SI 2005/3311) to extend the remit of the IPCC to include HMRC from 28 December 2005.

14. While we are sure that lessons have been learnt from all of these cases, they have inevitably created a public perception – justified or otherwise – that HMRC investigators are prone to cut corners in their anxiety to secure convictions. In these circumstances we believe that an upgrading of HMRC investigatory powers at the current time is likely to damage the public confidence in HMRC unless a clear need for such enhanced powers is demonstrated. We do not think that the Condoc has made a convincing case for increased powers.

15. At the time of the merger of the IR and HMCE, it was recognised that the powers of HMCE as regards criminal investigation were more extensive than those of the IR, but comfort was given to the professional bodies that the integration of the two Departments would not necessitate an alignment of powers to the level of the most extensive powers exercisable by either Department. This assurance was particularly important following the abuses by HMCE identified in the judicial enquiries and Court judgments referred to earlier.

16. With this background, there is an understandable fear that the merger of the criminal investigation arms of the IR and HMCE could result in a lowering of standards of responsible criminal investigation and prosecution. In the circumstances, our view is that the new arrangements for the merger ought to be given time to bed down, and that this is not the time to be providing further powers to HMRC in carrying out its ex-IR functions as regards criminal investigation.

17. Further, the granting of further powers, including the power of arrest, could only be justified in such a case under Article 8 of the ECHR to the extent that this is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country [or] for the prevention of disorder or crime'. *Klass v Germany* [1978] ECHR 5029/71 makes it clear that the Article 8(2) exceptions to the general right in Article 8(1) are to be narrowly interpreted.

18. We have seen no evidence that an increase in powers or diminishing of safeguards in relation to their exercise is necessary to 'prevent' (or even police) tax fraud formerly prosecuted by the IR. Paragraph 50 of the Condoc merely points out that PACE is regularly scrutinised by Parliament and well understood; it is noticeably silent on whether any increase in powers is necessary to investigate or prosecute tax fraud. It is exactly this sort of situation with which the ECHR deals. It is specifically designed to prevent the infringement of rights and so prevent what might be described as creeping authoritarianism. To be consistent with Article 8, the relevant question should not be: 'Why *shouldn't* HMRC have new powers?' but rather: 'Why should HMRC have them?' Creating parity with the Police who investigate other sorts of crime, and with the former HMCE side of HMRC which needed wider powers to combat drug smuggling, is an impermissible justification under Article 8(2).

19. Merely pointing out, as paragraph 51 of the Condoc does, that the use of any increased powers would have to be proportionate and compliant with the Human Rights Act 1998 plainly does not deal with the point. This is because, in reality, as HMRC must appreciate, if the power of arrest is given, it will be intended that the power will be used, and in practice it will be used. Expecting individual arrestees to take action in respect of their arrests on the basis that they were unnecessary under Article 8(2) (in circumstances where, in that scenario, Parliament would already have provided a power of arrest) is wholly unrealistic. The primary time to consider Article 8 is at the consultation stage when powers are proposed. It is at that stage that it is incumbent on the State to demonstrate that such powers are necessary within the terms of Article 8.

20. We should point out that the investigatory powers have already, regrettably, been increased without proper consultation or parliamentary scrutiny by virtue of Part 2 of the Serious Organised Crime and Police Act 2005 (SOCPA 2005). These give RCPO new powers to issue a 'forthwith' disclosure notice in cases where there are reasonable grounds for suspecting that tax fraud is being committed and for believing that information to be provided by a recipient of a notice is likely to be of substantial value to the investigation. In practice therefore, it would appear that judicial scrutiny over the granting of a search warrant can now be bypassed simply by the mechanism of an officer of HMRC attending premises with a notice issued by RCPO requiring an individual to produce documents immediately. At the time of writing, we understand that no such notice has yet been issued, but we are concerned that so soon after these new provisions in SOCPA have been implemented, and before their use has been assessed in practice, HMRC should be seeking to increase powers where there is no evidence that such an increase is necessary (the only permissible justification under Article 8 of the ECHR).

Power of arrest

21. The most important power proposed by the Condoc is the power of arrest, which it is proposed will be given to HMRC investigators in carrying out ex-IR criminal investigation functions.

22. While we accept that on occasions HMRC investigators currently have to enlist the assistance of police officers to effect arrest, we strongly doubt that it is necessary for HMRC to have that power to enable ex-IR tax fraud to be investigated and prosecuted effectively. The Condoc does not make the case for this. In practice, in our experience, many suspected of serious tax fraud are interviewed under caution by arrangement, either under arrest or not so. As we have said, we are concerned that in practice, if investigators were given the power of arrest, they would use it where it would not be necessary. In the light of the concerns we have set out above, this is in principle objectionable.

23. This is particularly so in the light of the well-known protections of taxpayer confidentiality enshrined in Schedule 1, TMA 1970 (the oath of confidentiality), s 182, Finance Act 1989 (the criminal offence relating to breach of confidentiality), and now in s 18, Commissioners for Revenue and Customs Act 2005 (CRCA 2005).

24. All taxpayers have a right to confidentiality. It is also comprised within the right to privacy in Article 8 of the ECHR. Hence, even the affairs of taxpayers who commit serious fraud and settle their tax affairs by the civil procedure under Code of Practice 9 are kept confidential. *A fortiori* this should equally apply where an individual is suspected of tax fraud but then not prosecuted. Everyone knows that mud sticks; the reputation of someone known to have been investigated for serious tax fraud may never recover.

25. This problem will be exacerbated if a power of arrest is available. As we have said, if there were to be such a power, in practice we believe that substantially more people would be arrested on suspicion of serious tax fraud than would otherwise be the case.

26. However, arrests can rarely be kept confidential, and moreover the social and moral stigma of criminal investigation with arrest are greater than of criminal investigation without arrest. There is a public perception that if someone is arrested, he must be being criminally investigated, and even that he may have committed a criminal offence. This is not so if his premises are merely ‘visited’ or even ‘raided’. We understand that the mere fact of whether an individual has ever been arrested (irrespective of whether he is ever prosecuted) even has to be declared on standard US visa documentation, so an arrest can have far-reaching consequences.

27. While we fully accept that in order effectively to tackle tax fraud, individuals sometimes have to be investigated who are not ultimately prosecuted, HMRC have a duty to ensure that the damage to such individuals’ reputations is minimised. The use by HMRC of a power of arrest is likely to maximise such

damage. Given HMRC's well-known and well-understood duty of confidentiality (which is more extensive than that of the Police and moreover enshrined in statute), this is in itself a sufficiently compelling reason for HMRC not to be given a power of arrest regarding ex-IR matters.

28. Further, in reality, many criminal prosecutions in respect of ex-IR matters begin by way of summons rather than charge. We are concerned that the introduction of a power of arrest together with the proposed power to charge would inevitably lead to a reduction in the proportion of prosecutions begun by way of summons rather than charge. In general, we would expect that starting prosecutions by way of charge rather than summons is more expensive, as the charging procedure is more resource-intensive and in practice may lead to more non-effective court hearings. This would in principle be undesirable.

29. In summary, we believe that the power of arrest is unnecessary for the proper policing of crime in relation to ex-IR matters, and therefore that the granting to HMRC of a power of arrest in such circumstances is impermissible under Article 8(2) of the ECHR. We accept that this power is needed in relation to smuggling and similar matters where the identity and address of the alleged criminal may not be known to HMRC. However, this is very different to an investigation into alleged suppression of business profits where the taxpayer is a known person with an identified address.

30. We have considered whether our concerns about a proposed power of arrest might be dealt with by the introduction of a Code of Practice. We recommend that an appropriate Code of Practice as regards the proper use of powers in criminal investigations ought in any event to be introduced after proper consultation. The Code should apply for ex-HMCE matters as well as ex-IR matters. It should specifically state that the use of powers in criminal investigations should only be permissible if the use of lesser, or less intrusive, powers would seriously prejudice the investigation. Such a safeguard is already contained in s 20C(1AA), TMA 1970.

31. The Code of Practice should also specifically focus on the special duty of confidentiality owed by HMRC to individuals suspected of tax fraud over and above that owed by the Police to suspects generally.

32. By extension, the Code of Practice might also say that, wherever possible, HMRC will investigate in a manner that will minimise the risk of the name of the suspect, and the fact that he was being investigated for tax fraud, becoming public before a final decision is made to prosecute. If HMRC are given a power of arrest in relation to ex-IR matters, it should also state that the power of arrest will only be used where the criminal investigation would be seriously prejudiced if the power of arrest were not used.

33. The Code of Practice should ideally also make clear that the powers contained in SOCPA will not be used if the use of lesser powers would not seriously

prejudice the investigation, and in particular that SOCPA disclosure notices would not be used in circumstances where, were it not for the new powers, a search warrant would be sought.

34. On balance, we take the view that the concerns that we have about the introduction of a power of arrest would not be dealt with fully by the introduction of such a Code of Practice, and that it is better for the current statutory code to remain unchanged. However, if despite our representations, additional powers, including a power of arrest, are to be introduced we feel it essential that these should be accompanied by a Code of Practice along the lines we have indicated. And as we have said, we recommend that, whether or not additional powers are introduced, consideration should be given to introducing a Code of Practice.

35. Clearly, if a Code of Practice were introduced, careful consideration should be given to its contents, and there should be proper consultation as is appropriate to any increase in powers or reduction in taxpayer rights.

36. Finally, as indicated below, we feel strongly that fingerprinting and taking DNA samples are inappropriate in cases of suspected tax irregularities. The power of arrest of itself generates these consequences, which makes it even more important both that a convincing case needs to be made for the existence of such a power and, if such a power is to be bestowed on HMRC, it should be very sparingly used.

Power of search of property contained in PACE as regards arrested persons

37. Although not mentioned in the Condoc, the power of arrest in relation to an indictable offence carries with it a power under s 18 of PACE to enter and search any premises occupied or controlled by the arrested person if there are reasonable grounds for suspecting that there is on the premises evidence (other than items subject to legal privilege) that relates to that offence or some other indictable offence which is connected with or similar to that offence.

38. In addition, s 19 of PACE enables the officer, once lawfully in the premises, to seize anything which he has reasonable grounds for believing is evidence in relation to an offence. He can require any information (including that belonging to third parties) which is contained in a computer and is accessible from the premises, and which he reasonably believes is evidence, to be produced in a form in which it can be taken away. These powers appear to us to be broader than the equivalent powers in ss 20C and 20CC, TMA 1970.

39. It would clearly be easier for investigators to search premises occupied or controlled by suspects after arresting them than to apply for a search warrant under s 20C, TMA 1970. No judicial authority would have to be persuaded that there are reasonable grounds for either believing or suspecting that there is evidence of fraud on the premises to be searched, and there would be no need

for approval by the Board of HMRC under s 20C(1AA), or for the Board to have reasonable grounds for believing that the use of the production order procedure might seriously prejudice the investigation.

40. As we have said, we already have serious concerns that the safeguards contained in s 20C can effectively be circumvented by use of the powers contained in SOCPA.

41. We are concerned that the Condoc does not even seek to make a case for giving HMRC these PACE powers in addition to their powers to obtain a search warrant. We cannot see any reason to deny an occupier – be he a suspect or otherwise – the protection that Parliament has given him under s 20C.

Fingerprinting

42. Another consequence of arrest is the fact that the arrested person has to have his fingerprints taken. Even if he is not charged, or if he is charged and then acquitted, those fingerprints remain on central records 'for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution' (see s 64 of PACE as amended by s 82, Criminal Justice and Police Act 2001, and upheld by the House of Lords in *R (S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196). We have seen nothing to suggest that the routine taking of fingerprints of suspects will assist in the investigation of tax fraud.

43. We are puzzled by the statement at paragraph 54 of the Condoc that allowing appropriately trained officers of HMRC to take fingerprints would not mean more people being fingerprinted. It seems to us far more likely that giving to HMRC officers the power of arrest will result in people who are currently interviewed under caution without being arrested in future being arrested and thus compulsorily fingerprinted in circumstances whereby those prints are forever retained. We cannot see any justification for such an infringement of liberty.

DNA samples

44. Were HMRC to be given the power of arrest, it follows that they would also be given the power to take non-intimate DNA samples by virtue of s 63(2A)-(2C) of PACE which states that anyone arrested for a 'recordable offence' (basically any offence for which a person may receive a sentence of imprisonment) may have such a sample taken without consent. Such DNA evidence would then be added to the national DNA database where it would remain, whether or not the individual concerned is ultimately charged with any offence.

45. Quite apart from the indignity of having a mouth swab, hair or nail sample taken, the taking and retention of such personal data raises longer term concerns about issues of confidentiality where such information could be of interest to a

variety of interest groups, including life and medical insurance companies and potential employers. Such concerns are amplified when one considers the degree of cross-border co-operation between law enforcement agencies which nowadays takes place. Once such data is provided to overseas jurisdictions by way of mutual assistance, there is little that can be done to protect the privacy of the individual using domestic privacy legislation. We can see no justification for – and considerable dangers in – the further incursion into the right to individual privacy that such an extension of HMRC's powers would represent.

Search warrants

46. The issue of a search warrant is a serious infringement of a person's liberty and we can see no justification for reducing the level of judicial scrutiny currently required by s 20C, TMA 1970 before this can be done. The fact that a lower level of judicial scrutiny is applicable under PACE should not be a reason for reducing the level of judicial scrutiny as regards HMRC carrying out ex-IR functions.

47. This is particularly important as the current policy of the HMRC Criminal Investigations Directorate during ongoing criminal investigations seems to be to deny suspects sight of informations laid to justify the issue of search warrants under s 20C, TMA 1970. This is usually on the basis of the claim (which is impossible for the suspect to verify) that sight of such informations may prejudice the investigation. As a result, the suspect is rarely in a position to be able to scrutinise whether a warrant ought properly to have been granted, for example whether the material contained in the information was accurate.

48. As the suspect and his advisers cannot readily scrutinise the granting of the warrant, the need for a high level of judicial scrutiny is particularly important.

Requirement that search warrants should not be sought unless use of production order procedure might 'seriously prejudice the investigation'

49. The PACE search warrant procedure (under s 8) does not contain the equivalent protection to s 20C(1AA), TMA 1970. This section effectively provides that HMRC cannot apply for a search warrant unless the Board has reasonable grounds for believing that use of the production order power in s 20BA 'might seriously prejudice the investigation'. This is an important safeguard which was only introduced by the then IR after proper consultation six years ago, and it should be preserved.

50. While a similar safeguard (albeit one which does not require high level approval on the part of the investigating authority) applies under para 14(d), Schedule 1 of PACE as regards applications to a Judge for search warrants in respect of special procedure material, no such statutory safeguard is contained in s 8 of PACE in relation to other material. Furthermore, the s 20C requirement of Board approval of the reasonable grounds is an important safeguard, particularly

bearing in mind the disruption caused by the execution of a search warrant so eloquently set out in the consultation document *Powers to Combat Serious Fraud* published by the IR in 2000 (which led to the introduction of s 20BA, TMA 1970).

51. If PACE is to be adopted as regards the obtaining of search warrants, therefore, in our view an equivalent provision to s 20C(1AA), TMA 1970 ought to be included in the legislation as regards both ex-IR and ex-HMCE matters.

Production orders

52. We have seen no evidence that s 20BA, TMA 1970 has not worked well in practice and therefore that it would be more appropriate to resort to the more cumbersome procedures in s 8 and Schedule 1 of PACE.

Search warrants – search of persons

53. We cannot see that there is any justification whatsoever for a power to search individuals who are not reasonably suspected of having committed a criminal offence.

54. If HMRC officers are given the power of arrest in relation to ex-IR matters, we would support the provision of an independent power to search persons reasonably suspected of having committed an arrestable offence and therefore who could have been lawfully arrested. Otherwise, we would fear that persons who would not otherwise be arrested would be arrested simply so that the officer could make use of the power contained in s 32 of PACE (the power in certain circumstances to search an arrested person for evidence relating to an offence).

Search warrant before there are reasonable grounds for suspecting that an offence has been committed

55. Although it is already contained in s 20C TMA 1970, we can see no justification for such a power.

56. Therefore, if the section were abolished and PACE adopted instead, we can see no justification for amending PACE to include such a power.

57. The justification given in paragraph 61 of the Condoc is unconvincing. For example, even in the case of MTIC fraud, it is likely that an inchoate offence (such as attempt or conspiracy) will have been committed well before a VAT return is submitted (or not submitted as the case may be!).

Powers under the Regulation of Investigatory Powers Act 2000 (RIPA)

58. We note from paragraph 29 of the Condoc that potential changes to RIPA are outside the scope of the consultation. For the sake of completeness, we should add that we are opposed to any extension of the various surveillance powers contained in RIPA so that they could be used by HMRC in relation to ex-IR matters. Clearly, such powers constitute an important infringement of the right to privacy, are not necessary for the effective investigation and prosecution of tax fraud, and are therefore impermissible under Article 8(2) of the ECHR.

JMM
8 November 2006

ANNEX

WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 128,000 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 of Trade and Industry through the Accountancy Foundation. 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 (which includes 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 11,000 members who pay an additional subscription.

4. The Tax Faculty has a Tax Investigations Practitioners Group (TIPG), which is a working group that meets regularly to discuss current issues in serious tax investigations work. The TIPG comprises practitioners from all backgrounds (not just Tax Faculty or ICAEW members) including those with criminal law expertise, is therefore well placed to put forward the views of the profession.