# Tax Representation

**TAXREP 14/07**

**NEW MANAGEMENT ACT**

***Comments dated 26 February 2007 from the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the consultation document 'Developing a New Management Act' issued in November 2006.***

**Contents** **Paragraph**




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# NEW MANAGEMENT ACT

## INTRODUCTION

1. This document sets out the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) in response to the consultation document *Developing a new management* act and the draft clauses on the administration of taxes published in November 2006 by HM Revenue and Customs (HMRC).

2. We are pleased to have the opportunity to respond to this consultation. We would be happy to discuss any aspect of our comments further with HMRC.

3. Information about the Tax Faculty and the ICAEW is given in Appendix 1. We have also set out, in Appendix 2, the Tax Faculty's Ten Tenets for a Better Tax System, since these tenets are fundamental to any attempt to re-write or re-design the law on the administration of taxes.

4. Our submission starts by making some general comments about the principles employed in drafting the New Management Act (NMA) and the way the project is being carried out. We then comment in detail on the draft clauses, on a clause-by-clause basis and with reference to the paragraphs in the Condoc.

## 5. KEY POINT SUMMARY

- We strongly oppose the use of the Tax Law Rewrite (TLR) process for the introduction of an administration of taxes Bill based on these clauses. The clauses make substantive changes which are not in the taxpayer's favour, with the result that any Bill requires full Parliamentary scrutiny.

- We are not convinced that concentrating on the five core schemes, and bringing administrative rules for these different taxes together but without integrating or aligning them, will bring many benefits for taxpayers.

- The NMA could go much further in attempting to integrate and align the administrative rules for different taxes, and in resolving inconsistencies and known areas of uncertainty. Use of the TLR process would not allow for changes of this sort, but as we do not think that the TLR process should be used in any event, the opportunity could then be taken to make more innovative proposals and introduce real simplification into the NMA project.

- It is crucial that the NMA changes are not rushed through and that proper time is allowed to consider them. This is a once-in-a- generation opportunity to create a tax administration system fit for purpose for the next 20 years.

- The piecemeal approach to producing the NMA clauses, plus the impact of changes arising from all the other areas of work which HMRC is carrying out at the same time, make it very hard to identify all the changes the NMA is making compared to existing legislation, or to be certain that it is complete and coherent.

- We oppose the introduction of the new terms 'likely to be liable' (in the context of notification) and 'HMRC thinks' (in the context of assessments and discovery). In our view this is introducing subjective terminology in place of the existing objective terms, and it reduces the certainty and protection for the taxpayer which is afforded by the current legislation.

- We welcome the change to enable third parties to submit tax returns on behalf of the taxpayer, as this will provide increased flexibility for our members and their clients. However, the change is a substantive one which may bring risks for our members and which raises public policy issues; it requires careful consideration and debate.

## GENERAL COMMENTS

6. We have a number of general comments and concerns about the introduction of the NMA and its content.

### Use of the Tax Law Rewrite Process

7. We strongly oppose the proposal (paragraph 45 on page 11 of the Condoc) to use a procedure similar to that of the Tax Law Rewrite (TLR) project to introduce the new administration of taxes Bill.

8. We understand the intention in using a streamlined process similar to the TLR. HMRC consider that this may be the quickest and most effective way of getting the new legislation onto the statute book.

9. However, the TLR project is designed to re-write tax law in plain English and not to make policy changes or substantive changes to the law, particularly not changes which extend HMRC's powers. The NMA clauses we have seen are very different from TLR material. It is not true (contrary to the statement in paragraphs 38 on page 9) that all they do is 'rationalise and clarify existing statute without making substantive changes'. Changes of substance include the introduction of new terms such as 'HMRC thinks' and 'likely to be liable', and the new rules in clause 60 which enable agents to submit tax returns. Although some of the changes are minor or in favour of the taxpayer, many of them appear to us to reduce taxpayers' rights. Full Parliamentary scrutiny, with the opportunity for proper debate, is needed for these NMA clauses and use of the TLR procedure is completely inappropriate.

### Scope of the NMA project

10. We question the decision (paragraph 22 on page 7 of the Condoc) to focus the review on five core schemes only. Whilst this approach may appear superficially attractive, we are not convinced that the end result will bring many benefits for the businesses at which it is aimed. We also think there is an argument for an NMA which covers all taxes.

11. The NMA clauses simply pull together sections of the administrative rules which relate to these five core schemes, without much attempt to simplify or integrate the rules. It is highly unlikely that many small businesses or members of the

public would refer to the primary legislation; they are more likely to rely on HMRC guidance materials or their own advisers. Therefore, simply rearranging the rules in a new Act will make little difference – the different deadlines, numbers of forms, etc remain unchanged.

12. We also question the wisdom of leaving out other regimes, such as tax credits and National Insurance Contributions (NICs), which are also likely to affect the smaller business sector. For example, new businesses have to notify chargeability for Class 2 NICs as well as for income tax and (in some cases) VAT – it would make sense to include all these requirements in one place, but this has not been done.

13. The administrative provisions for insurance premium tax, land fill tax, aggregates levy and climate change levy are all based on the administrative rules that apply to VAT. Accordingly, changing the VAT administrative rules causes major extra burdens for those who have to deal with these taxes. We would not have thought it difficult for a single management act to also cover these taxes, on the basis that the areas on which they depart from VAT are few and could readily be accommodated in a combined Act. Similarly the administrative rules for Stamp Duty Land Tax (SDLT) are based on income tax self assessment, so we would expect the new management act to deal with SDLT as it should need little adaptation to do so.

14. We would also question whether it is sensible to have separate rules for the administration of inheritance tax, stamp duties on shares (which is the only remaining significant stamp duty) and stamp duty reserve tax. These are taxes triggered by a particular event or transaction, so it is difficult to see why the rules that apply to SDLT should not also apply to these taxes. Accordingly we would have thought that a comprehensive management act covering all of the taxes could be produced without a great deal of additional time and without unduly lengthening the size of the Act. It would have the overriding advantage that all of the rules would be in the same place in one consistent code.

**Methodology and timetable**

15. This project appears to be being pushed through far too quickly. It needs to be given proper time for consideration and it must not be rushed. Administrative rules tend to be revisited infrequently, which is only to be expected given that taxpayers need certainty and consistency. This is a major project which requires the investment of considerable time and resources from all stakeholders. It is a once-in-a-generation opportunity to give the UK a tax administration system that is fit for purpose for the next 20 years or more. We would have thought it essential that the necessary time is taken to get this right rather than to push through the changes to such a tight timetable that it is very difficult for taxpayers and their representatives to give adequate consideration to the changes which are being proposed.

16. The NMA project appears to be proceeding on a piecemeal basis, which makes it extremely difficult to understand the effect of changes. This causes extra work for consultees as the consultation paper does not highlight those areas in which something is being omitted of which HMRC are aware and intend to cover in a subsequent tranche of clauses. It also creates a significant risk that some

protections for taxpayers in the existing legislation might be overlooked completely, because the clauses contain parts only of some existing sections and schedules so it will be difficult to check that the other parts are picked up in later tranches.

17. Whilst the consultation document highlights the major changes being proposed, unlike the TLR project it does not highlight all the changes being proposed. In these circumstances it is very difficult for consultees to identify where the new clauses depart from existing law without performing an exhaustive audit of every single word.

18. We believe it important that at some stage before the drafting of the NMA is finalised, HMRC publish tables of definitions and derivations to reassure taxpayers and representative bodies that the new Act picks up all existing provisions that affect the rights and obligations of taxpayers.

**Interaction with other projects**

19. We remain concerned about the interaction between this project and the Powers review. The latter is likely to make substantive changes to many of the existing rules in this area, calling into question whether the NMA project will merely result in duplication and confusion.

20. The Condoc (at paragraph 44 on page 10) lists all the other projects currently in train, including the Powers review, whose outcomes could affect the NMA clauses. We noted above that the piecemeal basis of the NMA work makes it difficult to understand the effect of changes and causes extra work for all concerned. These problems are greatly exacerbated by the likely impact of all the other projects being undertaken, which could require radical changes to the NMA clauses. We would question whether there is any point in attempting to rewrite part of the administrative provisions in this way, when there are so many uncertainties and likely to be successive changes.

**Structure and content of the NMA**

21. We have no problem with the ordering of the clauses into Parts, as set out on page 14 of the Condoc. However, although it is logical to deal with notification, then with returns, and so on, a difficulty arises because the NMA makes no attempt to integrate or simplify the legislation. The rules on notification and registration, for example, remain different for the different taxes – they are simply grouped together.

22. With the present ordering it is difficult for a taxpayer to readily understand his obligations. For example, for the vast majority of people clauses 6 and 7 set out their liabilities to register for VAT. They then have to jump to clause 21 to learn when they have to register and to clause 36, to discover what is to be taken into account in determining liability to register. A person wants to know all three of these things simultaneously in order to register for VAT. It would in fact be far easier if all three things were in a single provision rather than expecting a person to search through the Act to discover the extent of what is in reality a single obligation.

**Nature of the changes**

23. We are concerned that many of the changes we have identified so far appear to reduce taxpayers' rights rather than increase them. This is a matter of grave concern, not just because of the public interest issues that it raises, but because it strikes at the very heart of the credibility of this project. We are also concerned that there may be other changes that we have not yet picked up, given our comments above about the selective nature of the changes being highlighted.

24. There is a tendency to introduce more subjective tests in new terminology, examples being the requirement to notify HMRC when a person is 'likely to be liable' rather than 'is chargeable' to tax, and the use of 'HMRC thinks' in the context of assessments and discovery. We are opposed to this. Terminology should be clear and tests should be objective.

25. On the other hand, the results of the NMA so far are disappointing in that they do not go far enough – there is no attempt to align or simplify administrative rules. We appreciate that the NMA project team have sought to avoid significant changes, partly with the aim of making the new clauses suitable for the TLR procedure and partly because other projects are developing new proposals. However, it would have been good to see the NMA become a little more adventurous and consider issues such as whether the tax year and financial year might be aligned so that both end on 31 March. As we have indicated, we do not consider that the TLR procedure is suitable for the NMA, and without this constraint the NMA project would have scope to consider more ambitious changes which could bring real simplification.

26. An example of where matters have not been clarified, when to do so would have been in the taxpayer's favour, is that the new rules on returns do not make clear that section 167(3) of the Customs & Excise Management Act 1979 does not apply to VAT. The applicability or otherwise of this provision to VAT has been raised with HMRC and its predecessor, HM Customs & Excise, on many occasions by all of the main professional bodies involved in tax. HMRC have never satisfactorily clarified whether or not they consider that it does so, although they have said that in practice they do not apply it to VAT. In these circumstances if the intention was to produce a balanced NMA we would have expected the opportunity to be taken to make clear that this provision cannot apply to VAT. The NMA ought to create a comprehensive administrative code for VAT and it should specifically be stated that nothing in the Customs & Excise Management Act 1979 applies to VAT.

27. Another issue we would like to see covered in the NMA, in the context of notification, is that ideally taxpayers should be required to provide information only once. At present a taxpayer may be required to provide the same information to different parts of HMRC for different purposes. The NMA would be the ideal place to define what is meant by notification and the respective obligations of HMRC and taxpayer.

**DETAILED COMMENTS ON THE DRAFT CLAUSES**

28. We set out below our detailed comments on the draft clauses. The paragraph numbers from hereon refer to the paragraphs in Part 3 of the Condoc (which

contains HMRC's detailed commentary on the draft clauses).

29. We note that in the Condoc, although the headings refer to clauses, the detailed commentary on each clause refers not to 'subclauses' but to 'subsections'. We have followed the terminology used in the Condoc.

**Clause 1**

6. We do not agree that 'likely to be liable' expresses the existing obligation in plain English. The existing obligation is 'is chargeable to' and its meaning is precise and clear. The new wording is potentially far wider, less clear and more subjective.

For example, if a person receives money on a regular basis from a parent, that is not chargeable to tax. However many people may worry that it is, and that it is 'likely to be liable' to tax. If the fabled man on the Clapham omnibus takes such a view, not notifying would render the person liable to penalties even though in fact no tax liability arises. Similarly if a person has a small amount of income which exceeds his personal allowances, he is 'likely to be liable to tax' but under the current legislation if this excess turns out to be, say, covered by gift aid payments no obligation to notify arises. We realise that the penalty would in fact be nil, but that is no excuse for imposing a new obligation on taxpayers.

This is a substantive change which does not favour the taxpayer and we do not support it.

7. 'By 5 October following the end of the tax year' would be far easier to understand.

9. Subsection (4) also seems much wider than the current obligation. Currently a person does not need to notify chargeability if all of his income is within the scope of PAYE. He has no obligation to assess whether or not he believes that his employer will correctly operate PAYE. Under the new clause, that is not sufficient. He has to form a 'reasonable' belief that the correct PAYE deductions will be made. This puts a much greater onus of responsibility on the average employee. Furthermore, 'reasonable belief' is an objective test but it is open to considerable interpretation as to what it means. For example, if a person knows that his employer is innumerate, can he 'reasonably believe' that the employer will be able to cope with the PAYE system?

10. We do not agree that subsection (4)(a) has the effect claimed. The wording in the current legislation looks at the income, i.e. all that the taxpayer needs to show is that all of the income is or will be within the scope of PAYE. The new wording looks at the PAYE deductions, so the taxpayer has to believe not only that the income is within the scope of PAYE but also that the correct amount of tax will be deducted.

11. Subsection (5) is also much wider than the present system. Contrary to what the note indicates, currently no obligation to notify arises if the income will be covered by allowances and deductions, as he is not 'chargeable' to tax. Under the new formulation a person would have to notify if, for example, his income exceeds his personal allowance but the excess is covered by the married couple's allowance under section 257A, ICTA 1988, or the blind person's allowance under section 265, ICTA 1988. Furthermore, some people might consider that they are 'liable to income tax' if their income is covered by allowances, so the subsection itself creates

confusion as it suggests that subsection (1) has some meaning different from that which the wording suggests.

12. Subsection (6) is confusing and unnecessary. If income is of a kind in respect of which liability to income tax will not arise then the person cannot be 'likely to be liable to income tax', with the result that they are not within the scope of clause 1. Accordingly it is unclear what subsection (6) is actually excluding and we think it should be deleted.

14. Whilst we think that this is the right place for setting out the penalty, if other penalties are to be collected together under the new penalty provisions, it is anomalous to deal with this one here.

'Before the end of 31 January' does not appear to be an improvement on the existing wording. Why not say 'before 1 February'?

**Clause 2**

21. As indicated at 6 above we think that 'is likely to be liable' goes far wider than the existing obligation.

**Clause 4**

29. As stated at (6) we think that 'is likely to be liable' is much wider than the current 'is chargeable'.

35. We welcome this change.

36. New subsection 4(7)(a) is an extension of the existing obligation. It requires a company that has not yet commenced business but which has acquired an asset to notify HMRC. Notification appears to be necessary even though the asset may not be a source of income, so that the company may well not have commenced its first accounting period. It is also unclear whether this is a one-time notification, or a notification each time any such asset are acquired, but we do not think it is necessary.

**Clause 5**

37. As 'a person' (which is the requirement in clauses 1 and 2) includes trustees, please clarify why this clause is necessary?

**Clause 6**

40. It is not obvious how these rewritten provisions interact. They need more signposting and greater clarification. It would be clearer to re-instate the existing phrase (in Sch 1, VATA 1994) 'But is not registered'. Some people might think that if they register initially only in respect of, say, EU acquisitions, they will need to register again if they start to make UK supplies, when this is not the case.

**Clause 7**

54. Why does subsection 6(4) not apply to clause 7? It currently applies to para 1(b), Sch 1, VATA 1994.

**Clause 8**

55. This provision looks out of place at this early point in the basic registration rules and is likely to create confusion.

**Clause 10**
67. It would be easier for a taxpayer to understand his obligations if, instead of using a separate clause, subsections 10(1) and (2) were included in clause 6 and subsection 10(3) were included in clause 7.

**Clause 12**
72. The wording is confusing and needs to be clarified. The obligation to register arises when supplies since 1 January come to exceed £70,000. The clause suggests that one can wait until after 31 December in the same calendar year to apply the test.

**Clause 18**
87. It would be clearer to retain the existing para 1(a), Sch 3, VATA 1994, i.e. that this only applies to a person who is not already registered by virtue of UK supplies.

**Clause 20**
94. It appears that the existing para 2(2), Sch 3, VATA 1994 has not been re-enacted. Whilst we think this sensible, we would welcome clarification of the precise reason for this?

**Clause 22**
100. We agree that it is sensible to permit earlier registration if the taxpayer wants this.

**Clause 24**
110. We welcome new subsection 24(6), which does not appear to have an equivalent in the current legislation. However, it needs to be clarified whether new subsection 24(6) is merely illustrative of conditions under subsection 24(5) or is intended to delineate the scope of subsection 24(5).

**Clause 25**
115. The comments about clause 24 in the above paragraph also apply here.

**Clause 27**
120. The meaning of the phrase ‘no liability to be registered’ is not readily apparent. The current legislation uses the word ‘requirement’, which seems clearer to us and we think the existing wording should be retained.

**Clause 28**
127. The wording of new subsection 28(6)(a) and (7)(a) appears defective and needs to be amended. The replacement of the current ‘by’ with ‘before’ does not reflect the intention that the person must make supplies by the date that he said he would when he said that he is intending to exercise the option.

It is also unclear why a failure to exercise the option should no longer entitle HMRC to de-register the person, and we would welcome clarification why this change has been made.

**Clause 29**
129. New subsection 29(1)(c) appears defective as it will not cover the position where only some of the supplies are zero-rated and the standard rated supplies are small. Subsection 31(1)(b) clearly envisages that not all supplies will be zero-rated.

Currently it is only necessary to show that 'the taxable supplies are predominantly zero-rated' (see VAT Manual VI-28, section 28). The clause needs to be redrafted.

**Clause 31**

134. The wording in subsection 31(2)(b) lacks certainty. There will always be such a date but it may be unclear what that date is. The current wording, 'if no particular date is identifiable', seems far clearer and we think it should be retained.

**Clause 33**

141. New subsection 33(4) is unclear in its scope and we would welcome clarification. It does not appear to come from the existing legislation. In what circumstances can a person cease to be liable to be registered other than by ceasing to make taxable supplies (which is covered by subsection 33(1)), or reducing taxable turnover to below the VAT registration threshold (which is covered by subsection 33(2)? Does it mean that a person who is entitled to remain registered for VAT, even though no longer actually liable to be registered, can request to be de-registered? If so, the meaning needs to be made clear.

**Clause 35**

145. This clause does not make sense and we would welcome clarification as to why it is necessary. Everybody who makes supplies, however small, is eligible to be registered for VAT, but those whose supplies are under the registration limit are not required to be so registered. Surely it should only be a registered person who should need to notify HMRC – but such a person is already required to notify under subsection 33(1).

**Clause 36**

146. It is unclear why the 'furtherance' of a business has been omitted and we would welcome clarification. It is questionable whether, for example, a disposal of a fixed asset is in 'the course' of a business, but it would certainly be in furtherance of it. We think this word needs to be retained.

**Clause 39**

153. We are concerned about the wide scope of 'if they think the information is likely to be … useful'. For example, the Commissioners should not be able to ask in a notice for information that they already have merely because it is more convenient to HMRC to require the taxpayer to supply the same information several times than to put HMRC staff to the trouble of looking it up. This requirement does not appear to us to stem from section 113, TMA 1970 or any of the other quoted sources and we think it should be deleted.

**Clause 40**

160. We are concerned at the breadth of the new subsection 40(2). 'Information' is a very wide term and goes far beyond the existing provisions.

As defined in this clause, a direct tax return could include forms such as the tax review form P810; currently there is no statutory requirement for taxpayers to submit this. Is it the intention to bring non-statutory forms such as this within a statutory filing regime in the same way as self assessment returns? If so, it represents a major change.

162. We are particularly concerned that 'information' includes documents (as

defined in clause 93). This goes far wider than the current meaning of a return. It seems to completely override the current rights of taxpayers under sections 19A and 20, TMA 1970 to challenge the relevance of documents, by enabling HMRC to ask for a wide-ranging return. For example, they could ask a taxpayer to list and attach receipt for all birthday and Christmas presents given to his children on the basis that knowing details of personal expenditure would be of use in determining the reasonableness of their income. We are not of course suggesting that HMRC might intend to do this, but merely demonstrating that the wording is so wide that a demand for virtually any information could come within it.

165. Equally, we do not think that a VAT return should include a 'statement providing evidence'. We are in any event unclear how a statement can provide evidence.

We think that the scope of these provisions needs to be narrowed to reflect the current rules.

**Clause 41**

167. Why has the requirement for HMRC to 'have regard to the desirability of securing so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amount derived therefrom'( section 113(1), TMA 1970) been dropped?

170. Why cannot the contents of a VAT return be included in the legislation in the same way as those of direct tax returns rather than being left to be prescribed by regulations? A VAT return is a far simpler document. Surely a New Management Act should do more than consolidate existing rules? The concept ought to be to achieve a combined set of rules, not to preserve the separation as far as possible between former Inland Revenue and former Customs & Excise legislation.

**Clause 42**

172. The comments made above in relation to clause 41 apply equally here.

173. We are unclear what new subsection 42(2) is intended to do. Is it merely trying to say that a notice can set out the regulations under subsection 42(1), or is it saying that HMRC can bypass subsection 42(1) (as regulations are subject to parliamentary scrutiny) and instead put their requirements in the notice requiring the return itself, so obviating the risk of such scrutiny? If it is the latter then we object. In any event the clause needs to be clarified.

**Clause 43**

177. This is a statement of the obvious. Should it not say that it can 'only' deal with such matters?

180. New subsection 43(4)(a) appears to be new and extends the scope of circumstances where companies will be required to make a return. Why should a company be required to make a return simply because it owns an asset? Similarly, why should it be required to make a return simply because it incurs an expense? Every newly-formed company incurs formation costs but many companies are formed to protect a name, as a nominee, or for other non-business purposes and will never generate any taxable income. We cannot see that it can be in anyone's interest to require such a company to make a return. We think the existing wording is

preferable and should be retained.

181. As indicated above, subsection 43(4) appears to us to go far beyond the existing requirements. Currently, a return can be required only if the information requested is relevant to the tax liability of a company or otherwise relevant to the application of the Corporation Tax Acts (para 3, Sch 18, FA 1998), neither of which will apply prior to the first accounting period of a company.

**Clause 44**

182. We are concerned about the replacement of the phrase 'is to the best of his knowledge correct and complete' (section 8(2), TMA 1970) by 'reasonably believes … is complete and accurate'. We believe the current test is reasonably clear, whereas the proposed new test is far too prescriptive. A person can be expected to declare what he knows. However, this does not require him to seek knowledge that he does not possess. On the other hand, it might be considered that a person cannot 'reasonably believe' something without seeking out additional knowledge, and perhaps having to incur substantial costs to do so, which might change his belief.

We are also concerned at the use of the word 'accurate'. Many areas of tax are matters of judgement. Where a judgement is required there will be a range of figures that are equally correct. It is difficult to describe any of them as 'accurate', as that is a word that is appropriate only where there is a single figure that meets the requirement.

187. We note that a major change is contemplated here; the effect of the clause together with clause 60 is that agents and other third parties will be able to make returns on behalf of the taxpayer. We welcome the flexibility that this change provides for taxpayers and their advisers.

We can however foresee risks for our members, on which we will need to provide guidance. A particular issue is what degree of 'due diligence' HMRC might expect an agent to perform in order to sign the declaration required by subsection 44(2), if the validity of the declaration was challenged at some later stage.

We are puzzled by the statement that this change brings statute into line with operational practice. Our experience is that operational practice is to refuse to accept income tax returns signed by third parties other than under a power of attorney (or other Court authority) in respect of someone who is mentally incapacitated, or if the taxpayer is prevented by disability from making his own return.

The clause needs to make clear how the requirements of a subsection 44(2) would apply to a person with power of attorney or otherwise appointed by a Court to act on behalf of the taxpayer. Presumably, since legally they 'stand in the shoes' of the taxpayer, they would only need to comply with subsection 44(1).

We foresee a difficulty where the person making the return on behalf of a mentally disabled person is not legally appointed. It is likely that the taxpayer himself does not have the mental capacity to make the declaration at new subsection 44(1). It is unreasonable in such a case to treat him as having done so.

**Clause 48**

192. The power to set out time limits for delivering VAT returns should be included

in the legislation rather than being left to regulations.

**Clause 51**
203. We welcome clarification as to how an amount 'in respect of which the person is liable to tax' is a negative amount, because the UK does not have negative income tax.

**Clause 52**
205. We do not think that this is necessary and, whilst we appreciate the intentions, we think this is likely to confuse rather than clarify. The clause brings in a number of items which are not currently required to be shown on tax returns, such as the figure for net income and the figure for each component after deducting reliefs. We cannot see that this clause adds anything, since HMRC already have a power to specify what must be in a return, and because taxpayers are extremely unlikely to turn to this part of the legislation for help with their tax calculations. A taxpayer ought to be able to calculate his tax liability in whatever way he finds most convenient.

It is unreasonable to require a taxpayer to refer to the Tax Law Rewrite Bill 4 (or whatever Act it emerges as) to find out what the expressions used in the clause mean.

**Clause 55**
217. We are not convinced that clause 55 achieves its objective. It does not seem to us to say that the tax cannot be repaid. 'No account shall be taken of tax' seems to prohibit it from being deducted in calculating tax payable. The tax legislation permits it to be taken into account for such a purpose, so the clause is in conflict with other legislation. The clause needs to be redrafted.

**Clause 56**
218. Currently HMRC are entitled to correct 'obvious errors or omissions'. This is a reasonable provision and clearly covers the circumstances set out in new subsections 56(3)(a) and (b). However, the new power in subsection 56(3)(c) is much wider than the current power and will enable HMRC to correct anything that they believe may be an error, but which may not be. Experience shows that HMRC are often in possession of incorrect or misleading information. For HMRC to incorrectly 'correct' what is actually a correct return creates unnecessary work for taxpayers who then have to reject the correction. It also creates unnecessary work for HMRC who then have to re-amend the self assessment.

**Clause 57**
228. There is currently no power for HMRC to prescribe how a return should be corrected. We cannot see a need for such a power – or indeed how HMRC can prescribe a method when the correction may relate to a large number of different matters. The current system of leaving it to the taxpayer seems to us to work satisfactorily and subsection 57(2) should be deleted.

**Clause 58**
232. We are concerned about the new clause 58. This is new legislation and its effect may be disproportionate to the offence. It is unreasonable that a person who omits to complete a minor item on his tax return that may have no effect on the tax payable should lay himself open to a penalty for not having submitted the return by the due date. We appreciate that an unsigned tax return causes inconvenience to

HMRC, but do not consider that the convenience of HMRC should drive the tax system or should outweigh the rights of taxpayers.

235. We welcome this provision but it does not seem reasonable that a taxpayer's liability to penalties should depend on whether or not HMRC choose to make an amendment.

**Clause 59**

237. We are concerned about this new provision and think that it needs to be redrafted. We do not agree that it brings statute into line with operational practice. Currently operational practice distinguishes between a provisional figure, i.e. one that is likely to be substituted by a more accurate figure at a later date, and an estimate, i.e. the taxpayer's best attempt to quantify a figure for which he cannot provide an actual amount and will never be able to do so. The new clause seems to combine the two. Condition 3 can never be met for an estimate. Furthermore, condition 2 can be very burdensome in relation to estimates. It effectively requires everyone who uses an estimate in his accounts to provide full details every year even though the same method of estimation is used each year and even if it has been explained to HMRC.

Furthermore, as condition 3 can never be met if an estimate is used, it will become impossible for a person who does not keep full details of minor business expenditure such as taxi fares, postage and purchases of newspapers or journals, which are commonly estimated, ever to complete a tax return.

**Clause 60**

244. Whilst on the face of it the new clause 60 is helpful to agents, we question whether it is wise on public policy grounds. An individual's tax return is fundamental to his tax position. We doubt that it is in the public interest to allow an agent to submit a tax return on behalf of a client without the client having seen and reviewed it. Whilst we would hope that qualified agents will continue to ensure that a return is approved by the client, we can envisage some agents not doing so. Therefore, although we welcome the change as giving greater flexibility to our members and their clients, it is a substantive change about which there needs to be more debate and discussion.

**Clause 61**

249. Whilst we appreciate that new subsection 61(5) reproduces section 8(1B), TMA 1970, we do not see how an individual can certify that he reasonably believes his return to be correct if he believes that the figure shown on the partnership return is incorrect but is obliged by law to include that incorrect amount in his personal tax return – or even if he has no knowledge of whether or not it is correct. We think it wrong for the legislation to impose two conflicting requirements on a taxpayer. The NMA project could take the opportunity to consider this anomaly.

251. The opening words of subsection 61(7)(b) seem redundant and should be deleted. By definition every mixed partnership must include one or more companies and one or more individuals.

**Clause 62**

256. As a general point in the Assessments section, we note that there is nothing whatsoever about appeal rights. This is a significant omission, which we trust will be rectified. It does make it harder to comment upon the assessment clauses at this stage.

265. We do not agree with the change to 'HMRC thinks' and object to it in the strongest possible terms. We think it wrong to downgrade taxpayers' statutory rights and require them to rely on 'a principle of administrative law' to restore the position, especially when no attempt has been made to set out precisely what are the principles of administrative law upon which HMRC seeks to rely. 'HMRC thinks' is clearly a far weaker requirement than the existing requirement for an assessment to be to the best of an officer's judgement (which requires him to have an informed thought not merely a thought) or the best of his information and belief (as 'belief' implies a far greater degree of certainty than 'thinks').

We are unclear why it is proposed that HMRC should make an assessment if a person fails to co-operate with an attempt by HMRC to verify the return or fails to retain documents. What is wrong with the current procedure under which HMRC amend his self assessment?

We note from paragraph 265 that the making of an assessment when a trader fails to keep documents is intended to apply to VAT. However, the wording of the clause does not restrict it in this way. Do HMRC intend to extend this provision to direct tax?

266. We welcome the proposed new approach.

267. We would welcome clarification as to why an assessment should be made in addition to the self assessment, or what is meant by 'the self assessment shall have effect subject to the assessment'. Is the intention that a person can be taxed twice on the same amount, or is it that in future it is not proposed that HMRC should amend the self assessment? We would not support either of these approaches. One of the objectives of self assessment was to make it easier for taxpayers to understand their tax. Splitting off amendments and taxing them under a separate assessment undermines this concept.

**Clause 64**

272. We think that the use of the word 'assessment' to replace the current 'determination' is unhelpful. The effect of a 'default assessment' is different to that of an ordinary assessment so it can be displaced by filing the return, so the use of the same word is a recipe for confusion. The clause should be redrafted to remove this confusion.

**Clause 65**

278. We do not agree this clause derives from existing legislation. A person may be entitled to reliefs or allowances of which HMRC are not aware. If HMRC believe that a person who has not been required to make a return may owe tax, they should issue him with a return in order to obtain all of the relevant information that will enable them to properly quantify the liability.

The clause provides for an assessment to be made for a 'tax year', which as defined in clause 90, applies for income tax and CGT. There is no mention of the period for which a corporation tax assessment would be made.

**Clause 70**

301. Whilst we have no technical objection to the proposed clause, we think it wrong in principle to burden already complex legislation with provisions which HMRC

have no current intention to use, just in case HMRC change their procedures at a later date. The provision can easily be included in a Finance Bill if and when it becomes relevant. We think this clause should be deleted.

We can see practical problems arising from the use of combined assessments, when the different elements of the assessment could be subject to different interest and penalty regimes. How would appeals against a combined assessment be handled? These practical problems would have to be resolved before we would support the idea of combined assessments.

**Clause 75**

332. We would welcome clarification as to why this provision is needed for VAT only. New clause 62 does not limit the number of assessments that can be made for the same year. Presumably, if HMRC think that a direct tax assessment under clause 62 understates the tax, they will raise a supplementary assessment. Please clarify why this cannot also be done for VAT? We do not think that the policy intention, which we welcome, need be enshrined in legislation, particularly as we do not ourselves think that mistakenly specifying too small a sum as a result of clerical or arithmetical errors should limit HMRC's power to correct the assessment.

**Clause 76**

333. Again, we cannot see why this provision is necessary, as new clause 62 seems to us already to sanction such an assessment.

**Clause 77**

334. We do not think that the changed approach is helpful. Most people would regard 'year' as meaning either a tax year or a calendar year. To define it solely for the purpose of this provision as a year to 31 January is confusing. We suggest that the time limit should be 'before the end of the fifth year after the filing date for the return to which the assessment relates' in the same way as in new clause 78.

**Clause 79**

343. We doubt that the wording achieves its objective. As clause 79 displaces the normal rule under new clause 77 (see subsection 79(4)), it enables a recovery assessment only to be made during the year after the repayment was made or whilst an enquiry into the return is in progress. Currently it can be made within the later of 5 years 10 months after the tax year to which it relates or the end of the tax year in which the repayment is made. For example, a repayment for 2000/01 which is made in 2006/07 can be recovered up to 5 April 2008 even though a 2000/01 assessment would otherwise be out of date, but a repayment made in 2001/02 can be recovered up to 5 April 2007, whereas under the new provision it could not be recovered after 5 April 2003. The clause should be redrafted.

**Clause 80**

349. We do not agree that a 20-year time limit should apply to neglect by an agent where the taxpayer could reasonably have believed that he was entitled to assume that the agent was competent to act on his behalf. Further, we think that there should be a presumption of competence if the agent is a member of a professional body whose members commonly deal with the tax concerned.

We also believe that the 20-year time limit is inappropriate in the case of negligence and ought to be reviewed. The 20-year time limit was originally introduced in the

context of wilful default, i.e. deliberately not doing something, which most people would regard as far more culpable than negligence. Most people do not retain records for 20 years, so for HMRC to allege negligence in a case where they know that the taxpayer is unlikely to be able to disprove the assessment does not fit easily with human rights legislation. It sits particularly uneasily with the identical time limit for fraud, where it is for HMRC to prove the allegation not for the taxpayer to disprove it.

The provisions in this clause need to be aligned with the work currently in progress on the new penalty regime for incorrect returns. The proposal is to replace the term 'negligence' with 'not taking reasonable care'. A 20-year limit is not appropriate for instances of not taking reasonable care.

**Clause 81**
356. We do not think that the proposed new wording has the same effect as the old. 'The facts on which the assessment relies' are not the same as 'the facts which justify making the assessment'. Suppose, for example, a person treats a supply as zero-rated and, two years later, a court decision shows that treatment to be incorrect. 'The facts on which the assessment relies' may well be the zero-rating but the facts that 'justify the making of the assessment', which is the wording in current legislation, refer to the court decision. However, we have no objection to the wording in clause 81 – we are simply highlighting the point.

357. It is not clear that the normal time limit at subsection 81(1) applies to assessments under sections 73(7)(7A) or (7B), VATA 1994 or are taken out of new subsection 81(2).

**Clause 82**
360. The comment made above in relation to paragraph 356 also applies here.

**Clause 84**
367. Posthumous assessments are covered for VAT but have been omitted from the clauses on direct tax. It might in fact be better to have a single section to deal with posthumous assessments embracing both section 77(5)(a), VATA 1994 and section 40, TMA 1970.

**Clause 87**
372. We are unhappy with the reformulation. Section 114, TMA 1970 has been the subject of judicial interpretation and we can see no reason to adopt a new definition that discards the benefit of that interpretation. Further, the new wording appears to be less favourable to the taxpayer than the current wording. Subject to that, we have no objection to also applying the principle to VAT.

**Clause 90**
376. We are unclear why the definition of a tax year is different for income tax and CGT. The legislation always provides for income tax to be charged by reference to a year ending on 5 April.

**Clause 92**
378. Why does this clause not also include the existing section 118(2), TMA 1970 which provides for a reasonable excuse for a failure to do something? The proposed change appears to take away a useful and sensible protection for taxpayers.

**Clause 93**
379. We are unhappy with this definition. Please clarify why, for example, the meaning of a tax return include a reference to a non-statutory document that a taxpayer has voluntarily attached to it?

**Clause 96**
381. We are unhappy with this definition which lacks clarity. It appears to mean, for example, that a tax return filed on 31 January will be treated as not having been filed on that day (unless it was filed immediately after the stroke of midnight). This does not accord with the day-to-day meaning of the word of 'on' as applies currently, namely 'at any time on'.

JMM/FJH
26 February 2007

## APPENDIX 1

## WHO WE ARE

1. The Institute of Chartered Accountants in England & Wales is a professional body representing some 128,000 members. The Institute operates under a Royal Charter with an obligation to act 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).

2. The Tax Faculty is the centre for excellence and an authoritative voice for the Institute on taxation matters. It is responsible for tax representations on behalf of the Institute as a whole and it also provides services to more than 11,000 Faculty members who pay an additional subscription.

3. Further information is available on the ICAEW website, www.icaew.com.

## APPENDIX 2

## 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**