THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW REPRESENTATION

TAXREP 7/11

DATA-GATHERING POWERS

Comments submitted on 10 February 2011 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the consultation document *Modernising Powers, Deterrents and Safeguards: Data-gathering powers* issued on 9 December 2010.

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INTRODUCTION

1. In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the consultation document *Modernising Powers, Deterrents and Safeguards: Data-gathering powers* (the Condoc) issued by HM Revenue & Customs (HMRC) on 9 December 2010.

2. We are pleased to have the opportunity to respond to this consultation. We would be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

3. We responded to the previous consultation *Bulk and specialist information powers* in TAXREP 53/09 (October 2009). We had a meeting with HMRC about the current consultation on 3 February 2011, in which we were able to put forward our key comments and concerns and discuss aspects of the proposals.

4. Information about the Tax Faculty and the ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's ten tenets for a better tax system, by which we benchmark proposals to change the tax system.

WHO WE ARE

5. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

6. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

7. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions 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 of the Institute who pay an additional subscription, and a free weekly newswire.

KEY POINTS SUMMARY

8. Our key comments on this consultation are as follows:

   (a) **A consolidated Act:** There is now a clear need for a new consolidated Taxes Management Act, ad we strongly recommend that one be drafted. It would consolidate and integrate the taxes management legislation, and bring together in one place all the new legislation arising from the HMRC Powers Review.

   (b) **Compliance burden:** We are concerned that providing information to HMRC should not impose a disproportionate or unreasonable compliance burden on data-holders. We should like to see a specific requirement in primary legislation for HMRC to have regard to the likely cost for the data-holder of complying with the notice. HMRC's guidance must also contain safeguards to minimise compliance burdens, and we list some recommendations in paragraph 15.

(c) **Time to comply with a notice:** The legislation should specify a minimum time for complying with a data-holder notice, preferably 90 days but certainly no less than 30 days. As drafted, no limit is specified.

(d) **Retention of documents:** Para 7 should differentiate between documents which are returns of data in the required format and any original documents of the data-holder. The data-holder should have a right to have any original documents returned.

(e) **Charities:** Para 27, which defines charities as data-holders, is too widely drawn. It should be more specific, and relate to donations to charity.

(f) **Appeal rights:** We feel strongly that there should be a right of appeal on the grounds that a data-holder notice is onerous, even if the information relates to statutory records. At present the appeal right in para 28 is excluded in this situation.

(g) **Foreign tax:** We would welcome detailed confirmation about HMRC's approach to requests from overseas tax authorities and what tests will be applied to ensure that any requests meet the required guidelines.

(h) **Statutory records:** The definition of statutory records needs to be clearer, to distinguish between the data a person is required to hold and the records themselves.

(i) **Section 76, TMA 1970:** This section should be retained, though not in the data-gathering legislation, as it provides a necessary protection for trustees where income is mandated directly to the beneficiary.

GENERAL COMMENTS

The need for a consolidated Act

9. We concur with the approach of moving the data-gathering powers and some specialist third-party powers into a single schedule. However, there does need to be clarity about these powers and how they interact with Sch 36, FA 2008.

10. This leads us to the more general recommendation for a new Taxes Management Act. The legislation arising from the HMRC Powers Review is currently spread across four years' Finance Acts – 2007 to 2010 – and this will become five years once Finance Act 2011 is in place. Further, each year's Finance Act has made additions or amendments to previous Powers legislation. We think this is an unsatisfactory situation. It means that taxpayers and advisers have difficulty firstly in finding the legislation, and secondly in understanding how the new administrative and compliance powers fit together. It is also not clear how the new legislation fits with the provisions that remain in Taxes Management Act 1970. No doubt HMRC would also find it much more efficient to have the legislation consolidated and in one place.

11. We participated in discussions when a New Management Act was mooted in 2006; we did not support that project at the time, as it was unworkable to re-write the administrative rules before the Powers Review had produced the new framework for compliance matters. However, now that the Powers Review is drawing to a close and we have most of the new legislation, now is absolutely the right time to consolidate and integrate the taxes management legislation.

Compliance burden

12. We are concerned that providing information to HMRC should not impose a disproportionate or unreasonable compliance burden on data-holders. We and others raised this issue in response to the previous consultation; as noted in the December 2009 summary of responses (para 2.4): 'Many respondents felt that HMRC underestimates the work that has to go into collating and checking the accuracy of information that is often only held incidentally to the data-holder's main business.' We strongly agree with this statement.

13. The *Bulk and specialist information powers* consultation discussed the administrative burdens on data-providers and ways to mitigate them in some detail – for example, if HMRC could give advance warning of what data should be collected and offer alternative formats for providing it, what time limit should be allowed for providing data.

14. However, there is very little about this in the current Condoc or in the legislation. We assume that the way HMRC uses the data-gathering powers will be specified in guidance, and this must contain safeguards to minimise the compliance burden on data-holders.

15. We should like to review the guidance before it is published. We highlight below some principles which it should cover:

    - HMRC must first ensure that it does not hold or could not extract the information from its own records before it issues any information notice.
    - Information requests need to be given in good time, be proportionate and not be overly burdensome.
    - Data-holders should be given advance warning of what data HMRC will require. Warning should be as far in advance as possible and certainly well before the start of tax or accounting year so that data-holders can adapt their system to provide it.
    - HMRC should be flexible about the form in which data is provided, especially if there has been no advance warning of the requirement.
    - The time limit for providing the data must be reasonable (this is discussed further at paras 20–23 below).

16. We also think that it is best for safeguards to be in legislation rather than just in non-statutory guidance. Para 4, Sch 1 says that the format and time-frame for complying must be 'reasonably specified'. In addition to this safeguard, we should like to see a specific requirement for HMRC to have regard to the likely cost for the data-holder of complying with the notice.

Bulk data and overpaid tax

17. We were pleased to note in the *Bulk and specialist information powers* (para 1.7) that one of the uses of bulk information is for HMRC to target publicity and support where there is a risk tax has been overpaid. In our response we asked for HMRC to set out the details of its current and proposed campaigns to assist those who have overpaid. The issue was noted in the summary of responses (para 2.7) but is not mentioned in the current Condoc.

18. We include this point here as we do not want it to be forgotten while the emphasis is on finding undeclared or underpaid tax. It is HMRC's duty is to make sure that taxpayers pay the right amount of tax, which includes ensuring that those who have overpaid get refunded.

SPECIFIC COMMENTS

19. We set out below our comments on specific aspects of the Condoc and the legislation. Our comments broadly follow the order of paragraphs in the legislation.

Time to comply with the data-holder notice

20. There is nothing in the draft schedule specifying the period allowed for compliance with a notice, other than it must be 'reasonably specified in the notice' (para 4(1)) . The Condoc notes that: 'There is no intention to shorten the periods currently allowed, although this is a matter which may be discussed with specific data-holders.'

21. In our response the earlier consultation we supported a 90-day time limit (which, as HMRC said, applies to many of the current bulk information powers). We note from the summary of responses that: 'Most respondents were opposed to any reduction in the 90-day period usually allowed to provide data, saying that accuracy may be compromised if its collection were rushed.'

22. We do not think it is acceptable that despite these comments, the primary legislation does not specify a time limit. Even though HMRC says it does not intend to shorten the periods currently allowed, we think it likely that in a few years' time the superseded time limit will be forgotten and HMRC might start imposing shorter deadlines. A time limit specified in guidance alone is not an adequate safeguard.

23. We recommend that the legislation should specify a minimum time for complying, preferably 90 days but certainly no less than 30 days.

Approval by the tribunal

24. Para 5, Sch 1 provides for an un-appealable pre-approval by the Tax Tribunal. We are concerned that this gives insufficient or poor protection to ordinary taxpayers and does not strike a fair balance. There is also concern that the un-appealable pre-approval route might be over-used or incorrectly applied by HMRC.

25. In particular when HMRC applies the very wide opt-out in para 5(5), where notice allegedly might prejudice any purpose, then the limited test left to be applied by the Tribunal in paras 4(a) and 4(b) is very weak.

Power to retain documents

26. We welcome the safeguards in para 7 that if HMRC retains any document, the retention must be on reasonable grounds, and that the data-holder can ask for a copy.

27. However, there does not seem to be anything preventing HMRC retaining data-holder's documents indefinitely. It is difficult to see why a data-holder might send original documents rather than the specific return of data required by the notice, but if this happens, the data-holder should be able to get the documents back.

28. We think this safeguard would be clearer if it differentiated between documents which are returns of data in the required format – which presumably HMRC would wish to keep permanently – and any original documents of the data-holder.

Charities as data-holders

29. The way in which charities have been included as data-holders (para 27, Sch 1) is very broad. The rest of Part 2, Sch 1 sets out specific categories (activities or types of data) and then defines the data-holders. Para 27 simply has the heading 'Charities' and then says that a charity is a relevant data-holder – thus it is open to HMRC to ask a charity about pretty much anything.

30. We understand that HMRC would only exercise this power where the charity appears to be a party to activities that relate to tax avoidance. However, this safeguard is not in the legislation and we are concerned that smaller charities in particular might find themselves subject to onerous information requests.

31. We note that a charity can already be a data-holder under the specific headings (eg where it is an employer) and that the regulations anticipate that data requests will relate to donations to a charity. Therefore we do not think a widely-drawn further category is necessary. We suggest that para 27, Sch 1 be made more specific so that it relates to donations to charity, and then lists charities as data-holders.

Appeals

32. The right of appeal against a data-holder notice in para 28(1)(a), Sch 1 on the grounds that the requirement is unduly onerous does not apply if the information requested is part of the data-holder's statutory records. Statutory records are defined in para 46.

33. We accept that a data-holder should have the statutory records required of it but we do not think that it is adequate to remove the right of appeal on those grounds. It might be that the format in which HMRC requires the data or the time-frame in which it is required is too onerous. It may not be a simple matter to extract the data from statutory records and present it in the way HMRC has requested. We think that there should be a right of appeal on the grounds that a notice is onerous, even if the information relates to statutory records.

34. We also have some more general concerns about what is meant by statutory records, see paragraph 36 below.

Foreign tax

35. Para 45, Sch 1 provides that for the purposes of the data-gathering powers tax includes 'relevant foreign tax' (para 45(1)(m)). We understand that any requests either by or to overseas tax authorities would be by reference to the OECD guidelines on the subject. We understand that in using the power HMRC would also consider reciprocity – ie if HMRC made a similar request to the overseas authority, would that overseas authority have the power to obtain such data and would they actually do so?

36. We would welcome detailed confirmation about HMRC's approach to requests from overseas tax authorities and what tests will be applied to ensure that any requests meet the required guidelines. In particular, in what circumstances might HMRC decline a request, for example because of concerns about confidentiality in the overseas tax authority?

Statutory records

37. We do not think that the definition of statutory records in para 46 is sufficiently clear. This is relevant in the context of appeal rights under para 28(2) as mentioned above.

38. We note that para 46(1) defines statutory records as ‘data the data-holder is required to keep and preserve under or by virtue of any enactment relating to tax’. We presume from this that the legislation is intended to target the data rather than the records or underlying documents themselves. This is different from the usual concept of statutory records, which would include (for example) original invoices. We do not think the legislation is sufficiently clear on the point and that it should be clarified.

Section 76, TMA 1970

39. The Condoc proposes (at para 2.36) repealing s 76, TMA 1970. We think this should be retained. It is not in fact a data-gathering power but is designed to protect trustees of an interest in possession trust where income is mandated directly to the beneficiary. As such it should be retained in the taxes acts though not with the data-gathering powers.

40. The background to this section, which explains the reason for it, is as follows:

41. Section 76 deals with the situation where the trustees of an interest in possession trust mandate income direct to the beneficiary. It provides the vires for ensuring that the trustees cannot be taxed on such income.

42. It derives from s 103(3), ITA 1918. That gave the exemption to the trustees. In 1918 the Inland Revenue did not have power to require a return of total income from a taxpayer; nor did they have power to require information returns. Both of these powers were introduced by FA 1927 in a single section, ie it gave HMRC power to require a return of total income and such other returns as they felt appropriate. FA 1927 made the s 103(3) exemption dependent on complying with the return requirement.

43. In the 1952 consolidation these two powers were separated out. Unfortunately it does not seem to have been done well. Section 76 was s 367, ITA 1952. The reference to s 13 (which was introduced in the 1952 Act) is not appropriate. This deals with returns where a person receives income belonging to someone else, whereas s 76 deals with the situation where someone else (the life tenant) receives income that technically belongs to the trustees on its receipt but on trust for them to pay it over to the life tenant. We think the reference to s 13 should have been to s 9 (ie that the trustees needed to complete their own income tax return in order to secure the exemption).

44. Be that as it may, if the section is scrapped the protection against being asked for tax on sums which technically were earned by the trustees but which they have never received is both fair and important.

45. It may be that HMRC says it is no longer needed because the trust tax return does not ask for details of such income. If so that misses the point. The section was not designed to elicit information; it was designed to protect the trustees from being assessed on income that is technically theirs but never comes into their hands. They still need such an exemption.

QUESTIONS FOR CONSULTATION

Question 1: Do the draft regulations contain the correct level of detail?

We think that in general terms the draft regulations do contain the correct level of detail. However, we will carry out a more detailed review of these and provide any comments by the 9 March 2011 deadline.

Question 2: Are any data-holders expecting to incur significant costs in meeting HMRC's anticipated format requirements? If so, please give details.

We are not in a position to quantify the costs which data-holders are likely to incur. However, we do have a general concern about the potential compliance burden, especially for smaller data-holders or those subject to ad hoc data requests. We have commented on this at paras 12–16 above.

Question 3: Do you have any comments on the 'relevant foreign tax' aspect of the proposed legislation?

Our comments on this are at paras 35–36 above.

JMM
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APPENDIX 1

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.