

Tax Representation



TAXREP 11/10

WORKING WITH TAX AGENTS: THE NEXT STAGE

Memorandum submitted on 3 March 2010 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to a consultation document published on 9 December 2009 by HMRC

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WORKING WITH TAX AGENTS: THE NEXT STAGE

INTRODUCTION

1. We welcome the opportunity to comment on the proposals in the consultation document '*Working with tax agents: the next stage*' ('the consultation'), which was published by HMRC on 9 December 2009 at http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1029995.
2. This latest consultation builds on the previous consultation document which was published at the time of the Budget 2009. Our response to the earlier consultation was published as [TAXREP 48/09](#).
3. In our response below, we have not commented in detail on the draft legislation on deliberate wrongdoing by tax agents which was published on 8 February 2010 and which is intended to implement some of the proposals set out in this consultation. We have met with HMRC to discuss this legislation and we will be responding to it shortly. We welcome the announcement that the deadline for comments on the draft legislation has been extended to 28 April 2010 rather than 3 March 2010.
4. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex A. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Annex B.

KEY POINT SUMMARY

5. The ICAEW will continue to support any reasonable measures to address deliberate wrongdoing or fraud. However, we remain unconvinced that a compelling case has been made for the changes currently proposed and we think that HMRC could and should endeavour to use its existing powers in this area more effectively before further powers are sought.
6. Any proposed measures must be clearly targeted at fraudulent behaviour and not at honest agents who may have simply made an error. If they are not then there is a danger that any measures will not have the support of the tax agent community. Such support is essential if the policy objective of reducing tax loss is to be achieved.
7. Given the sensitivity of many of the proposals in this consultation, it is vital that they are not rushed through and that sufficient time is given to ensure that any changes have the support of the tax profession. We firmly believe that a solution is possible that would deliver benefits to HMRC, agents and taxpayers, but that it will only be achieved through further consultation.
8. Building mutual trust and respect will, in our view, have a far greater effect on closing the tax gap than some of the current proposals. It is essential that the path taken by this consultation process does not undermine efforts to build a better working relationship between HMRC and the tax agent community.

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9. As a professional body, we support efforts to raise standards and believe that tax agents should be encouraged to belong to an appropriate professional body. We are concerned that the current proposals may have exactly the opposite effect. HMRC needs to consider greater oversight of unaffiliated agents. It needs also to improve its own standards, which continue to cause the tax agent community concern.
10. We would welcome the opportunity for further discussions with HMRC so as to ensure that disclosures under the s 20 Commissioners of Revenue and Customs Act 2005('CRCA 2005') gateway work as intended. We also believe that greater use should be made of informal channels to help raise the standards of agents who produce poor work.
11. The proposals are predicated on the basis of agents being individuals and do not reflect the fact that many tax agents are firms. This aspect needs much more consideration than appears currently to have been given.
12. Access to working papers is a very serious sanction and an agent must be given a fair hearing. The agent must be provided with notice of any such proceedings and have the ability to mount a defence in front of any tribunal and/or court. The proposals as set out in the consultation (and the draft legislation) need considerable further thought.
13. We do not think that a tax-geared penalty would necessarily be an appropriate or proportionate response unless an agent has personally benefited from the deliberate wrongdoing.
14. We are not convinced that the consultation provides a compelling case for the introduction of a 'naming and shaming' provision, although it may be an appropriate sanction in certain circumstances. Further, professional bodies such as the ICAEW already publicise disciplinary sanctions, so if HMRC were to name and shame a member in addition it would create a double sanction for a single offence.
15. In principle we support efforts by HMRC to tackle high volume repayment agents (HVAs) in cases where it appears that most of the claims could be considered fraudulent. However, it is essential that bona fide HVAs are not prejudiced. We suggest that consideration be given to requiring repayment claims to be evidenced. Again, we believe that HMRC already has powers at its disposal to deal with such cases and that these should be used fully and effectively before further powers are sought.

GENERAL COMMENTS

'Deliberate wrongdoing' and the need for proper targeting

16. The proposals in this latest consultation document are aimed primarily at addressing 'deliberate wrongdoing' by tax agents. Deliberate wrongdoing is a new term and we understand that it is tantamount to fraudulent behaviour. As a professional body, such behaviour by a member would be completely contrary to our ethical rules and we would support any reasonable measures to address such problems.
17. It is, however, vital that any measures designed to address fraudulent behaviour and poor work have the full support of the tax agent community. Any proposals aimed at

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rooting out such behaviour must be clearly targeted and proportionate, so that they cannot be used against the vast majority of tax agents who are honest and who seek to do good work, but who may from time to time make mistakes.

18. 18. We said in our response to the April 2009 consultation (TAXREP 48/09) that we were not convinced that a compelling case had been made for changes to the existing rules. We are still not convinced that this case has been made. A recurring comment from many of our members is that HMRC already has all the powers that it needs and that it should use its existing powers more effectively and, where necessary, prosecute agents involved in fraudulent behaviour.
19. Many of the proposals in this latest consultation are controversial and highly sensitive: HMRC should only proceed with them after exhaustive consultation to arrive at a consensus about the best way forward. If there is not consensus, the danger is that far from any of these proposals being supported by the tax agent community, they may provoke exactly the opposite reaction. This could undermine much good work.
20. We remain concerned as to whether all of the comments made to HMRC as part of the previous consultation process have been properly reflected in the latest proposals. For example, various concerns were expressed at HMRC's workshop on 6 October 2009 in relation to many of the proposals that were on the table at that time. Some of these have been carried forward to this document, which suggests to us that the concerns have not currently been given sufficient consideration. This is disappointing given the sensitivity of many of these proposals. We would like to emphasise again that many of these proposals require time and consultation: they should not be rushed and, if more time is needed to get them right then this needs to be reflected in the timetable for implementation.

Changing behaviour

21. Much of the consultation document is taken up with proposals for further penalties and sanctions on tax agents with the declared aim of changing behaviour. We are not convinced that this is necessarily the right approach. HMRC already have considerable powers to investigate fraudulent behaviour by agents, but there is a widespread perception that it does not use the powers sufficiently often or effectively to provide a strong deterrent.
22. We recognise that in the short-term, using currently-available powers such as s 9A enquiries is resource intensive but a targeted approach would send a strong message that HMRC is determined to root out agents engaged in fraudulent behaviour and that such actions would not be tolerated.

Clarification of tax lost and action taken

23. HMRC's 9 December 2009 paper '*Protecting Tax Revenues*' estimates that tax of £7 billion is lost owing to evasion. The impact assessment accompanying the consultation estimates that tax lost relating to the deliberate behaviour of tax agents, derived from both successful criminal prosecutions and other HMRC inquiry work covering a number of past years, is 'at least £25 million'. This is a serious assertion and our understanding is that the figure of £25 million contains a number of estimates and covers a period of more than 10 years.

24. We have subsequently received clarification from HMRC that some of the prosecutions involved agents who belong to a professional body. We would welcome clarification of the points set out below.
- What action HMRC took against the agents concerned.
 - Whether any of the agents prosecuted were found guilty by a court.
 - Whether the agents who were professionally-qualified had or have been reported to their professional body.
 - Where agents were reported to a professional body, the outcome.
25. HMRC have stated that that they intend to use the proposed new powers 'on a regular basis' even though their justification for them appears to cover just a few cases over a long period of time. HMRC still need to demonstrate publicly that the powers they are seeking are proportionate and that they will be used sparingly since it is far from clear to the tax agent community that this is the intention.

Working to joint standards

26. Many of our members have expressed the view that whilst they support the maintenance and improvement of professional standards, it needs to work both ways. Our members report that in their dealings with HMRC, they are spending more and more time trying resolving problems due to poor work by HMRC. We have raised these concerns for a number of years but overall service standards have not improved. This is a significant factor in determining tax agents' reaction to the proposed measures.
27. We support measures to improve agent standards and professionalism where appropriate but it is important for the credibility of this consultation that HMRC demonstrates that it also intends to raise its own standards and professionalism. We would welcome the opportunity to discuss with HMRC how professional standards in taxation can be raised across the whole profession, including HMRC. We are in favour of joint training in some areas of compliance and of pursuing opportunities to exchange views in order to achieve better mutual understanding of concerns and risks.
28. Members of the main professional bodies involved in tax are guided by the joint bodies' guidance '*Professional Conduct in Relation to Taxation*', currently being updated. As we noted in TAXREP 48/09, we think it would be reasonable for HMRC staff to work to equivalent standards, and we welcome the publication of HMRC's 'Your Charter' as being a step in this direction.

The role of the professional bodies

29. Paragraph 1.4 of the consultation emphasises again that tax agents play a vital role in the delivery of the tax system and that the overwhelming majority of tax agents advise their clients appropriately and calculate the right amount of tax. Paragraph 1.6 also makes it clear that 'any tax agent behaving in accordance with appropriate professional standards would not be affected personally by the proposals on which HMRC is now seeking views'.
30. These are welcome statements but we fear that they are at odds with the apparent intent of the draft legislation on deliberate wrongdoing. The publication of the legislation has concerned members deeply and has significantly reinforced the

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perception of many of our members that these proposals are aimed indiscriminately at the 'overwhelming majority' rather than the 'small fraction' of the agent community who persistently get things wrong or engage in fraudulent behaviour.

31. In accordance with our Royal Charter obligation to serve the public interest, the ICAEW provides a clear framework to maintaining professional standards and addressing them where problems are identified. Other professional bodies have similar obligations. Given our key role in setting and maintaining standards, and that HMRC concluded in the previous consultation that it did not wish to regulate tax agents directly, the starting point should be to build on the roles of the professional bodies and to encourage all tax agents to belong to a professional body that commits to appropriate standards in relation to tax.
32. However, this consultation does nothing to encourage unaffiliated tax agents to join a professional body. Indeed, we have some concerns that the proposals in this document may have the opposite effect and discourage tax agents from seeking to belong to a professional body, not least because an affiliated tax agent may now be faced with two sets of sanctions rather than one in respect of the same 'offence'.
33. Given the regulatory nature of the professional bodies and our commitment to upholding professional standards, we believe that any proposals need to recognise and give due credit to the obligations which apply to agents who belong to appropriate professional bodies. HMRC also needs to consider critically the role of unaffiliated agents, how the risks they present should be managed and what further sanctions may be needed for those in this group who do poor or fraudulent work. We think that there may be a case for such agents to be subject to supervision or oversight by HMRC.

ANSWERS TO SPECIFIC QUESTIONS

Chapter 4 Disclosure to professional bodies

1. Would greater disclosure to professional bodies with a regulatory function be a proportionate way to achieve HMRC's policy aim?

34. We think that provided it is structured correctly, greater disclosure by HMRC to the professional bodies may be a proportionate and effective way of achieving the policy aim. The formal disclosure route would usually be appropriate in cases where agents have been involved in cases of misconduct, but as we have said before there will need to be a good standard of evidence before a case will be taken up by the disciplinary arm of a professional body.
35. We note that there remain concerns about whether the ICAEW is 'a body which has responsibility for the regulation of a profession' under s 20(3) CRCA 2005 *Public interest disclosure*. As a responsible professional body, the ICAEW may still need to take formal legal advice about whether HMRC are properly authorised to make a disclosure to the ICAEW under this section. We remain of the view that s 20 may need to be amended to ensure that it does work as intended and, as we said in TAXREP 48/09, we are happy to work with HMRC to achieve that.
36. We remain convinced that much more use could be made of informal channels to deal with cases where agents make persistent errors that fall short of misconduct.

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The approach here would be first to try and resolve issues with the agent without invoking the formal disciplinary procedures. We suggest that HMRC revive the *'Helping to get it right'* approach announced on 21 March 2000 in REV10. On our side the personnel who were engaged in those discussions are still available, so we have the necessary experience to restart the process without reinventing the wheel.

37. HMRC needs to decide how it deals with unaffiliated agents, as otherwise unaffiliated agents might be seen to be at an advantage if the proposals in the consultation are enacted as compared to affiliated agents because unaffiliated agents have no supervisory body with whose standards they have to adhere or to which complaints can be made.
38. In collating views on this consultation, we have received numerous comments from members who have been very concerned at the bad work carried out on behalf of new clients formerly serviced by unqualified / unaffiliated agents. As we recognise above, the problem of bad work is not confined to unqualified / unaffiliated agents, and no doubt many of them do good work, but the fact remains that they are not subject to any external standards or to the disciplines needed to belong to a professional body. In many cases the concern relates to over rather than under paid tax.
39. This suggests that, if standards are to be improved amongst this class of tax agent, unaffiliated agents who are in business (ie excluding those who for example solely prepare tax returns for their families, friends, etc for no charge) may need some sort of direct oversight by a supervisory body, maybe HMRC, perhaps similar to that for anti-money laundering.

2. Are there any further safeguards that have not been identified?

40. To substantiate a case under the disciplinary proceedings of a professional body requires high standards of evidence and proof. HMRC needs to ensure that any reports of misconduct to professional bodies are based on clear and compelling evidence.

3. Are there circumstances where HMRC should make a disclosure to a professional body directly, without first seeking to resolve the issue with the tax agent?

41. HMRC would need to decide on the seriousness of the 'offence'. Where the actions of the agent are prima facie a case that is likely to result in disciplinary proceedings, in other words serious misconduct, then we would expect HMRC to approach a professional body directly.
42. We recommend that before making any changes to what happens in practice, HMRC should enter into discussions with the professional conduct/disciplinary arms of professional bodies to agree a mutually workable framework.

4. Are there issues concerning the interests of clients and employees of a tax agent or firm of tax agents that need to be reflected?

43. First, it must be remembered that HMRC's overriding remit is to ensure that all taxpayers pay the correct amount of tax under the law. If the outcome is, for example, that HMRC has taken action against an agent, for example removed his

papers, but at the end of the day clients' tax liabilities are still wrong then the exercise will not have achieved its objective.

44. Secondly, HMRC's approach (eg para 6.19) seems to be predicated on the basis of agents being individuals. Normally a practice, eg a firm or company, will act as agent, not the individuals comprising the practice. HMRC needs to consider this point further with the professional bodies. For example, when errors are found and HMRC wants to discuss the conduct of the practice, the appropriate place for discussions to start will be with someone senior within that practice. This may not necessarily be the individual(s) who made the error(s); in other words, the legal responsibility for the error is unlikely to rest with the individual who made the mistake, save in the case of a sole practitioner. This is an issue to which we will return in our comments on the draft legislation on deliberate wrongdoing.

Chapter 6 Deliberate wrongdoing: access to working papers

5. Is access to the working papers of tax agents involved in deliberate wrongdoing a proportionate response to the problem HMRC has identified?

45. Access to working papers is a very serious sanction and mere suspicion without more on HMRC's part should not be enough to invoke this sanction. Whether HMRC accessing generally the working papers of an agent will be a proportionate response will depend upon the facts and what hard evidence HMRC has. In serious cases where it appears clear that the problem might affect a number of clients of the tax agent, access to working papers of agents known to be involved in fraud would be a proportionate response. However, where there was wrongdoing but the evidence points to it being limited to, say, a particular client, it would appear a disproportionate response for HMRC to access all the working papers of the tax agent. HMRC needs to appreciate that applying to access an agent's working papers generally is a potentially draconian action that could put the agent out of business.
46. Whilst this may be the right result in some cases, it will not be so in all cases and HMRC must ensure that it has a high standard of evidence before invoking such a provision.
47. Whilst the proposals in the consultation may work for small firms, we are not sure how they are meant to work for larger firms. We remain concerned that the action of one partner could mean that the working papers of the whole firm, including at other offices, are potentially open to review. The draft legislation published on 8 February, to which we will be responding under separate cover, confirms our view that in respect of larger firms this proposal needs much more consideration.
48. Further, the list of working papers to which HMRC might seek access as set out in Annex B appears to go much further than would be required to establish the extent of deliberate wrongdoing. The request must be proportionate and directly related to the likely extent of the wrongdoing. Items such as time records, fees ledger and fee notes appear to relate to the running of the agent's practice and have nothing to do with his dealings with clients. In most circumstances we would have thought that how an agent arrives at his charges to the client or how he records his own income are irrelevant to whether the agent has been involved in deliberate wrongdoing.
49. The report of the Committee on Enforcement Powers of the Revenue Departments ('the Keith Committee') of March 1983 says in para 11.2.4 that the committee

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considered undesirable an extension to s 20A TMA 1970 'Power to call for papers of tax accountant' to allow inspectors to gain access to accountants' working papers in cases of suspected incompetence by going before the Appeal Commissioners and getting them to accept the inspector's grounds. It adds that such a power would in any case be unnecessary if their recommendation requiring traders to record certain basic particulars (para 3.2.17: '...as are necessary to enable an accurate return to be made of profits or gains of the trade ... for the purposes of tax and enable such return to be verified') coupled with a power for the inspector to have access to the original books and papers of any business (para 4.5.21 '...power to enter business premises to require production of business records for the purpose of checking on the accuracy of returns for Sch D profits') were implemented. They therefore made 'no recommendation in respect of any new power in relation to incompetent tax accountants'. We do not see that the situation that the Keith Committee was looking at is any different now from then but if HMRC thinks that it is then we would welcome clarification of what has changed.

50. Para 6.3 refers to the Keith Committee report and 'how far the rot had spread'. This expression is used in para 11.2.2 of the Keith Committee report. Para 6.3 is misleading, maybe because the Keith Committee report itself in its Summary of Recommendations says at no. 49 that 'the power to call for the working papers of a tax accountant should be extended' when para 11.2.2 from which this summarised recommendation derives actually says that s 99 TMA should be widened to make it easier for the Inland Revenue to use s 20A because where an accountant had been proved fraudulent on one client this commonly indicated that there would be errors on other clients which would not otherwise have come to light.
51. HMRC in paras 6.8 and 6.9 seem to be implying that the 'strong safeguards' referred to in 6.11 are as strong as s 99, TMA 1970. But this is not the case as although s 99 is not a criminal provision, it is normally interpreted by the tribunals / courts as necessitating a criminal level of proof. This is because the implications of being found liable to a penalty under s 99, namely HMRC being able to require the delivery of documents relevant to any tax liability of any client past or present, is generally accepted as being draconian quite apart from the disruption it would cause to the normal work of the practice.

6. What reasons are there to exclude tax advice and audit papers?

52. As stated in paragraph 6.8 of the consultation, under s 20A, TMA 1970 HMRC can access tax advice and audit papers, so the proposals in the consultation reflect the current position. Paragraph 6.8 goes on to state 'Following the principles developed by the Keith Review, this recognises that the powers will only be used where deliberate wrongdoing has been established, and that in such cases, the consequences should be the same as if a criminal prosecution had been secured.' We would appreciate clarification of what exactly are the 'principles developed by the Keith Review' in this context.
53. If the consequences are meant to be the same as if a criminal prosecution had been secured, we question whether it is necessarily appropriate that privilege should be attached to tax advice given by a legally qualified tax adviser. Whilst we appreciate that the proposals broadly reflect the existing position, we are concerned that this safeguard could be used when it is not appropriate and may encourage behaviours which are contrary to the policy purpose behind these proposals. There should be a

level playing field where fraudulent behaviour is suspected which could lead to a criminal prosecution.

7. Should the application to the judicial authority for access to working papers be with notice to the other side, unless it agrees HMRC's application for this to be without notice?

54. Given the seriousness of these provisions it is an essential safeguard that an agent is given a fair hearing. The agent must be provided with notice of any such proceedings and should have the ability to mount a defence in front of any tribunal and/or court.
55. We cannot see that it would ever be appropriate for such applications to be made *ex parte*. This seems to us little short of denying a person the right to a fair trial. It is a long way removed from being a 'strong safeguard' and is likely to be a breach of human rights. Where a serious allegation is made about an agent such that HMRC may examine all his books and records, it is only fair that the agent should be given the opportunity to look his or her accuser in the eye and put forward a defence.

8. Are there further safeguards that should be considered?

56. See our comments above. Whilst these powers are civil powers, the behaviours that they seek to address are potentially criminal in nature such that HMRC might want to consider a criminal prosecution. It is therefore important that taxpayers and agents are provided with safeguards at all stages.
57. Another safeguard that is needed is that the stated intentions of HMRC as set out in Chapters 5 and 6 should where practicable be implemented in the legislation. There are too many recent instances of tax being imposed by the law and relief being effectively allowed by guidance. Given that these proposals will impact directly on peoples' livelihoods, it is essential that the law enables agents to protect themselves against unjustified actions in the tribunal/court.
58. For example, the proposed meaning of 'deliberate wrongdoing' in paragraphs 5.3-5.4, which refer to fraud and dishonest evasion and exclude tax planning and taking a defensible view which may be at odds with HMRC's interpretation, appears to be on the right lines, although we should prefer that it was called 'fraud'. However, the definition in the draft legislation published on 8 February (on which we shall be commenting separately by the revised deadline of 28 April 2010) bears little resemblance to the proposed meaning as set out in the consultation. Similar comments apply to the definition of 'tax agent' in paras 6.17 onwards, where HMRC state their concern to be with those who are in business whereas the draft legislation is so wide it potentially includes 'golf club advice' or work carried out for free by other family members.

9. Is access to the working papers of tax agents involved in deliberate wrongdoing but held by third parties a proportionate response to the problem HMRC has identified?

59. We appreciate that in certain circumstances it may be necessary to obtain the working papers from a third party. However, on the assumption that the third party had no direct involvement in any wrongdoing, it is essential that any such powers are operated with considerable care and with complete confidentiality as regards the third party, as otherwise the exercise of the powers might inflict severe damage on the

third party, as well as the agent. Where access to working papers is sought from a third party, it is essential that both the third party and the agent should have a right to attend any hearing.

10. Are there further safeguards that should be considered?

60. Please see our reply to question 8. Under s 99, TMA 1970, the accused is entitled to confront his accusers in the same way as he would be entitled under criminal law. We consider that this is a fundamental human right.

Chapter 7 Deliberate wrongdoing: civil penalty for deliberate wrongdoing by a tax agent

11. Is a tax geared civil penalty for tax agents involved in deliberate wrongdoing a proportionate response to the problem HMRC has identified?

61. We do not think that a tax-geared penalty would necessarily be an appropriate or proportionate response unless an agent personally benefited from the deliberate wrongdoing by reference to the tax that was not paid when it should have been. An agent benefiting personally would be unusual.
62. Whilst civil sanctions may be appropriate for some tax agents and act as a strong deterrent for the future, given that HMRC is seeking to tackle fraudulent behaviour, they are not a substitute for HMRC pursuing and securing criminal prosecutions in appropriate cases.

12. Should the penalty be reduced to encourage disclosure?

63. It would appear reasonable to encourage an agent to come forward and admit wrongdoing by offering reduced penalties for disclosure. This would also align any agent penalty regime with the existing one for taxpayers. We have some concerns as to what extent agents will be able to make full disclosure without breaching client confidentiality, but given that these proposals are aimed at deliberate wrongdoing and that HMRC will probably be seeking access to working papers in any event, in practice this may not be a particular problem.

13. Should there be a maximum amount?

64. Given that these are meant to be civil powers and penalties we would have thought that the amount of the penalty should be subject to an upper limit (see Q15).

14. Should there be a minimum amount?

65. If there is to be a minimum amount we think it should be set at a relatively low level (see Q15).

15. Are there further safeguards that should be considered?

66. Penalties need to be proportionate by reference to the size of business, the financial resources of the agent, the particular actions of the agent, the potential size of the tax lost due to the deliberate wrongdoing and the level of subsequent co-operation of the agent.

67. We think that even though an agent may have been involved in deliberate wrongdoing, penalties need to take account of the individual circumstances of agents and that some agents will be more deserving of lesser penalties. We think that HMRC should have the power to apply special reductions or even defer penalties in cases where it may be reasonable to do so.

Chapter 8 Deliberate wrongdoing: publishing the name of the tax agent

16. Is publishing the name of tax agents involved in deliberate wrongdoing a proportionate response to the problem HMRC has identified?

68. This idea was discussed at the workshop on 6 October 2009 where the attendees identified a number of problems with this proposal. We recognise that currently there is not a level playing field between affiliated and unaffiliated agents. Currently, tax agents who engage in deliberate wrongdoing and who are members of a professional body to whom a complaint has been made are likely to face disciplinary hearings. They are, therefore, already subject to rules which can lead to public naming. In contrast, unaffiliated agents are not subject to such measures unless of course HMRC pursue a criminal prosecution. There is a danger that any naming and shaming may discourage membership of a professional body as it might result in that person being named twice, once by their professional body and once by HMRC.
69. Naming and shaming might also have perverse effects. Some taxpayers might be attracted to use tax agents who have been involved in deliberate wrongdoing. If this happened on a significant scale, it is likely to negate any benefits of naming and shaming.
70. Naming and shaming has only recently been introduced for taxpayers and the first lists will not be published until 2011. We think it is wrong in principle to extend these provisions to agents when we do not know how the FA 2009 provisions will work in practice. We would also note that Ireland, which has had naming and shaming rules for taxpayers for many years and upon which the UK provision is based, has never extended the provision to include tax agents.
71. In summary, we are not convinced that the consultation provides a compelling case for the introduction of a 'naming and shaming' provision. Whilst 'naming and shaming' may be an appropriate response for some agents, for others it may not be. Naming and shaming is likely to destroy an agent's business. Whilst this may be what is required for some agents, destroying an agent's business may be a disproportionate response for others. However, there may be a case for such a provision targeted at unaffiliated agents so as to ensure that all tax agents are in a broadly analogous position.

17. Should there be a de minimis threshold?

72. Given the seriousness of this proposal, we think there should be a de minimis.

18. Are there further safeguards that should be considered beyond what is already provided in section 94 FA 2009?

73. As noted above, we think this proposal is premature and that the FA 2009 provisions should be allowed to bed down first before any consideration is given to extending the rules. This suggests that the position should be reviewed in, say, 2013.

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Chapter 9 Deliberate wrongdoing: further matters

19. Are there any taxes or duties which should be specifically excluded? If so, why?

74. We have no particular views on whether certain taxes or duties should be excluded, subject to our overriding point that we do not think that these proposals should be pursued until the FA 2009 provisions have been given a chance to operate in practice.

Chapter 10 High volume agents

20. Does this proposed change provide a proportionate response to the problem HMRC has identified?

75. In principle we support efforts by HMRC to tackle high volume repayment agents (HVAs) where most of the claims made have little merit and could be considered fraudulent. At the 6 October workshop, it was suggested that HMRC needs to pursue such activity more rigorously than it does at present and, where necessary, perpetrators should be prosecuted.
76. Where HMRC think that a tax agent is submitting many repayment returns that have little or no merit, the first step should be for HMRC to open inquiries into the returns. The impact assessment uses the words (2nd para, page 9) 'left unchecked' which we read as HMRC acknowledging that it does need to undertake more inquiries. Whilst an inquiry is in progress, any repayments would automatically be stopped. Once some inquiries have revealed errors with a pattern then HMRC could ask the agent to explain his processes.
77. The proposals in effect say that HMRC will seek to put HVAs to more work and verify that the claims they are making for their clients are substantiated. Given that it is being suggested that that such claims currently have little or no merit, this suggests that some HVAs have little regard for complying with the law. We are therefore not convinced that imposing further obligations will have any effect on these HVAs as we suspect they will continue to operate with little regard for the tax system. We therefore think it is essential that any new obligations are backed up by stronger HMRC intervention policy with the aim of seeking prosecutions.
78. Given that HVAs business model appears to rely on the tax repayment being made to the HVA which then deducts its fee, one approach that looks as if it has merit would be to only make repayments directly to the taxpayer. However, many bona fide tax accountants request that repayments are made to them as a way of ensuring that they know when HMRC has made the refund and they can check that the correct amount has been repaid as well as having the certainty of their fees being paid. We think that where a risk assessment indicates that the repayment claim may not be correct, HMRC should run detailed checks before making any repayments and if in doubt then repayments should be withheld until such time as HMRC are satisfied that the claim is genuine.

21. Are the suggested safeguards sufficient?

79. The former Inland Revenue would not generally pay a repayment claim unless it was accompanied by original vouchers sufficient to 'frank' the repayment. This may have been administratively cumbersome but it ensured that repayment claims were bona fide. We understand that many repayment claims are still made not on efiled self assessment returns but on paper forms R40 and P87 or in letters. If this is the case, there may be a case for returning to the procedure under which claimants who file on paper have to submit original vouchers with their repayment claims to cover the repayment. Where the claims are efiled on SA returns, then if they are considered risky or come within some other criteria, for example size, then they could be subjected to a s 9A TMA inquiry and vouchers requested under para 1 of Sch 36 FA 2008. Any repayment claimed would then be put on hold pending receipt of the vouchers and closure of the inquiry.

22. Are there any taxes or duties which should be specifically excluded? If so, why?

80. The particular problems appear to centre around income tax repayment claims so it would make sense to limit these provisions initially to income tax. An assessment will then need to be made as to whether they work and also whether the problem spills over into other areas of tax and duties.

23. Does recovering overpayments jointly from the tax agent provide a proportionate response to the problem HMRC has identified?

81. This may be a proportionate response where HVAs are submitting fraudulent claims but again it will be important to ensure that bona fide HVAs are not subject to these rules. We suggest that the better solution is for HMRC to take measures (see our answer to Q21) to ensure that payments are not made which need to be recovered.

FJH/PCB
3 March 2010

ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 130,000 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 for Business, Innovation and Skills through the Financial Reporting Council. 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, including 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 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

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**; see www.icaew.co.uk/index.cfm?route=128518.