



DRA/cf
Ref: Working with Tax Agents05

HMRC Review of Powers
Room 1/72
100 Parliament Street
LONDON
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5 August 2009

Dear Sirs

Modernising Powers, Deterrents and Safeguards: Working with Tax Agents

Executive Summary

Members of the Institute of Chartered Accountants of Scotland have reacted adversely to the consultation document issued by HMRC entitled 'Working with Tax Agents'.

The vast majority of taxpayers and professional advisers have a common interest with HMRC which is to ensure that the taxpayer pays the right tax at the right time. There is disappointment that this document makes no attempt to recognise the difference between a professional adviser who is a member of a reputable professional body and who is obliged to not only act in the best interests of the client but also ensure that advice given is up to date and correct, helping the client meet their obligations.

We recognise that there is a problem with bad agents and we support the objective of HMRC to raise standards and ensure that something is done to address the problem of bad agents who might undercut reputable agents and who may be responsible for serious attacks on the fiscal regime and a serious loss of tax. We do not support registration as registration without regulation is a burden which is pointless. We do encourage HMRC to focus its limited resources on where the risk is more serious and to have in place a framework to remedy defective work and defective procedures where an agent is responsible for careless errors or a serious loss of tax through dishonesty.

We recognise that where there are serious attacks on the system by tax agents who submit a high volume of repayment claims that are of little or no merit, action needs to be taken effectively and quickly. In this respect HMRC needs to improve its performance and we are sympathetic to further discussion with HMRC to consider additional powers enabling HMRC, in serious cases only, to obtain access to working papers and to consider exchanges of information at an earlier stage than is currently available so that HMRC's concerns can be considered by professional bodies. We agree that it is inappropriate to create a two-tier system and therefore HMRC must put in place a framework which would be effective in challenging sub standard work from tax agents who are not members of professional bodies.

In our response we have expressed disappointment that HMRC has failed to recognise the benefits of dealing with professionally qualified agents including our members. Our members follow a code of ethics agreed between the major professional bodies and they subject themselves to monitoring, quality

review of procedures and the investigation and discipline procedures of the professional body. HMRC should recognise that professionalism benefits clients, HMRC and overall compliance with the fiscal regime.

The tone of this consultation document is disappointing but we support the objective of trying to improve compliance and trying to identify and eliminate poor standards.

The stated policy objective was to improve HMRC's relationship with tax agents by supporting professional standards, working more closely with professional bodies and working with practitioners to identify and address tax risks generated by tax agents. We think that the consultation has proved detrimental to HMRC's relationship with many tax agents and we suggest that HMRC should reconsider its efforts and direct its resources towards those tax agents about whom it has objective evidence that they make illegitimate claims and have an irresponsible and careless attitude to the work that they do.

To the extent that tax is at risk at the more serious end of the scale with the actions of a few unscrupulous tax agents resulting in attacks against the tax system and tax being deliberately understated, we suggest that HMRC should consult specifically on what additional powers it needs to obtain the information to enable prosecution of these serious cases.

Chapter 1: Introduction

1.1 Who We Are

The Institute of Chartered Accountants of Scotland is the first professional body of accountants in the world with its Royal Charter being awarded in 1854. In return for membership of this professional body, members are expected to display the highest ethical standards and integrity. We have approaching 18,000 members many of whom work in senior positions throughout the world. Our members are professional people, operating in the public interest, offering views and opinions based on their skills and experience.

In all that a CA does, they should embody the values of integrity, wisdom, innovation and service. In all actions, a CA must act in the best interests of the client whether that client be an employer or a business seeking advice from an independent consultant.

The role of a professional body is to ensure the highest ethical and professional standards are intrinsic to the ICAS member and are maintained not only during a period of training but throughout the member's career.

1.2 Raising Standards

We support the policy objective of the consultation document entitled 'Working with Tax Agents'. This document aims to raise standards and for there to be fewer inaccurate returns submitted. Taxation is often complex and in recent years it is disappointing that the complexity has grown. It is important to encourage all taxpayers to pay the right tax at the right time and to aim to keep the cost of compliance to a minimum.

1.3 Tone of the Document

The consultation document aimed to consider how HMRC interacts with tax agents to ensure that client's tax returns and claims are correct when submitted. The consultation recognises the vital role that tax agents and advisers play in the delivery of the UK tax system. The consultation document has provoked considerable hostility from members who read it on the basis that it fails to distinguish and recognise the extensive training and continuing professional development of professionals who are members of a professional body and who are registered and regulated by that professional body.

1.4 Recognition of Professional Qualification

In common with the other major professional bodies in the UK, there are exacting standards. Retaining membership imposes an obligation to keep up to date, comply with the professional body's continuing professional development and seeking to maintain the highest standards of ethics and integrity, at all times acting in the best interests of the client to whom a duty of care and confidentiality is owed. Being a member of a recognised and respected professional body not only benefits the client but it ought to reassure HMRC. Membership of a respected professional body involves a degree of external scrutiny that should be taken into account when HMRC is risk assessing the population of returns which it receives.

1.5 Cost of Compliance

In 1991, the Inland Revenue published a consultation paper entitled 'A Simpler System for Taxing the Self Employed' whose main objectives were to:

- Make it easier for taxpayers to understand their obligations
- Make it simpler and more efficient to administer the tax system
- Make it possible for the Revenue to accept the tax return and accounts without further correspondence
- Make it possible for taxpayers normally to pay the right amount of tax at the right time without Revenue intervention by a self assessment system
- Open up the way to further reforms to simplify and improve the personal tax system

A review of the following 18 years of fiscal developments shows that taxpayers now face impossibly complex and voluminous legislation which makes it impossible to understand and increases the possibility of mistakes occurring. The complexity also leads to criticism from ordinary taxpayers that the fiscal system within the UK is unfair and overly burdensome and expensive for those who wish to comply.

Registration and regulation imposes cost which inevitably must be paid by the user which in this case is the taxpayer. Retaining membership of a professional body imposes costs on its members and in addition the professional bodies have in place mechanisms to monitor and check the quality of the work being done by the member ensuring that they meet and pass the statutory obligations. However, we recognise that, as the document says, the performance of a small minority of tax agents falls below the standards expected and this can lead to the risk of tax being lost. We support efforts which are

proportionate and reasonable to close the tax gap and we support HMRC in its policy of tackling a few unscrupulous tax agents who make deliberate and organised attacks against the tax system.

1.6 Closing the Tax Gap

We welcome initiatives from HMRC to see whether it is possible to share understanding of risks and to close the tax gap. Helping agents target better their pre-return checks should reduce the risk of error.

1.7 Responsibility to Self Assess

A fundamental principle that has underpinned the responsibility for tax return accuracy has always been that it is the taxpayer personally who signs the return and who makes the declaration that the return is correct and complete to the best of his knowledge.

In 2006, a decision of the Special Commissioners made it clear that where a taxpayer has relied upon advice from an independent professional adviser, that reliance gives the taxpayer a reasonable excuse should it subsequently be found that there is an error in the return. We note that HMRC are rightly concerned that unscrupulous taxpayers might abuse what appears to be a loophole.

In principle, we agree that there needs to be a mechanism to look at errors and this needs to distinguish between mistakes which arise from human fallibility and errors which are deliberate and aimed to achieve non compliance. Sanctions for deliberate non compliance must be set in statute, clear and publicised, proportionate to the offence, effective in deterring and tackling non compliance and employed consistently.

1.8 Working Together

We welcome any initiative to improve HMRC's relationship with tax agents especially through greater face to face engagement. HMRC needs to improve by a considerable margin the level of basic services which it delivers to taxpayers in general and to agents in particular. There is concern that HMRC is responsible for many errors that occur within the tax system and it is responsible for wasting a great deal of resource by, for example, issuing incorrect coding notices and failing to use the information in its possession. HMRC could achieve a great deal in reducing the cost of compliance to taxpayers in general and we welcome any initiative to develop this. We support issues such as joint training and discussion of practical issues to come to a shared understanding and a potential solution.

The Commissioners for Revenue & Customs Act 2005 introduced a gateway that enables HMRC to report agents whose conduct or standards fall short of a benchmark, to their professional body. Professional bodies have in place mechanisms which respect individuals' human rights but will investigate and wherever appropriate suggest either further education, remedial action or disciplinary action to try to improve standards.

There is no merit in HMRC trying to create a parallel mechanism when they have available to them access to the professional bodies and the opportunity of further education, investigation, sanction and discipline in such cases. However, those who are not members of professional bodies will not be the subject of similar monitoring, quality control, education or discipline and HMRC should try to ensure that standards are maintained. Where defects in process, quality, integrity and accuracy are identified, HMRC should have a clear policy on how such defects will be addressed. The major professional bodies have in place a process that respects human rights and where decisions would be the subject of

judicial review should the decision be viewed as unreasonable or unfair.

In answering the detailed questions raised within the consultation document, we will return to this point about how to deal with examples of failed standards. We do not believe there is much of a case made for registration of tax agents as registration by itself would achieve virtually nothing.

Chapter 2: Design Principles

At paragraph 2.2 there is a summary of the design principles which have been used in the drafting of this consultation document. We agree with the framework which has been used.

At paragraph 2.4, we support the objective that HMRC needs to ensure that it has minimal impact on those doing a competent job in assisting their clients in submitting correct tax returns. We also agree that the actions of the tax authority should not distort existing market rates or competitiveness. However we are disappointed to see that HMRC does not distinguish between those who are competent and professional and whose standards are high and those where HMRC needs to take some remedial action to raise standards.

The problem is that there are some agents who do poor work, often undercutting their competitors and who are identifiable and known to HMRC by the level of errors and mistakes in the returns for which they are responsible. We recommend that HMRC needs to use technology to target their resource at these agents whose work is demonstrated to be defective.

It is important to distinguish between a mistake which will be all too common when dealing with such a complex legal environment as taxation and work which is defective.

We acknowledge that there is no single regulatory authority to oversee standards in the profession. We also agree that the creation of such a role and subsequent monitoring function would add unnecessary cost to those who are registered and regulated by their professional bodies.

Although HMRC recognises at paragraph 2.10 that the use of inappropriate powers has the potential to damage the professional reputation of tax agents, the underlying problem is whether the agent thought to be problematic has his rights respected. The concern is that HMRC and its officers may not be the most appropriate persons to act as a judge and jury. Without substantial evidence showing to a high standard of proof, that the conduct of the tax agent is sub standard, HMRC should not consider seeking assurances.

The problem is that HMRC is often responsible for many errors and an important safeguard would demand that there should be an independent review of the evidence and conclusions reached by HMRC before action is considered. The evidence must be objective and not subjective.

Where an agent is a member of a respectable professional body, the mechanism to exchange information under Section 20, CRCA 2005 is already largely in place. In cases where HMRC has legitimate concerns about the standard of work of a member of a professional body, HMRC should report those concerns to the professional body leaving it to the professional body to investigate and to consider the spectrum of responses from education to discipline that is required to raise standards.

HMRC needs to set in place a mechanism that would be acceptable to those tax agents who are not members of professional bodies ensuring that they are subject to the same standards and that a process

exists to remedy failed standards. We recognise therefore the need for HMRC to consider existing legal powers and protections in place to obtain the evidence required and we are willing to discuss with HMRC what amendments might be required to its existing powers.

Q1: Has HMRC identified the correct design principles? In applying these principles are there any other matters which HMRC need to take into account?

A: We recommend that any mechanism in place should respect the professional qualification obtained and maintained by members of respected professional bodies. HMRC should try to ensure that there is no additional red tape, procedures or costs imposed on professional agents doing a competent and thorough job ensuring that their clients submit returns which are accurate and complete. To the extent that HMRC has evidence that standards have been failed, that evidence should be to a high standard and should be capable of review externally before HMRC exercises any new powers it might obtain.

Those regulated by respected professional bodies should understand that any sub standard performance will be reported to that professional body to take the appropriate action. Those that are not members of a professional body should be identified and HMRC should create a framework to deal with those cases where the agent's work or conduct is demonstrated by evidence to be unsatisfactory. Again a spectrum of remedial action would be required ranging from further education through to discipline. We shall expand on this in later answers.

Chapter 3: A Changing Environment

3.1 Dealing with Risks

At Chapter 3, HMRC recognises a worrying development. Information technology has facilitated online filing and the bulk submission of returns. Paragraph 3.3 identifies an emerging risk around tax agents who submit a high volume of repayment claims by advertising a service that claims to secure repayments from previous years' tax liability. HMRC's document recognises that if such claims have little or no merit, it poses a major threat to tax revenues and a strain on HMRC's resource. In its Vision, HMRC claims:

- We believe that most of our customers are honest and we treat everyone with respect
- We are passionate in helping those who need it and relentless in pursuing those who bend or break the rules

3.2 HMRC Improvements

HMRC needs to improve its performance in this area incorporating systems that identify the risk of fraudulent and incorrect claims and ensuring that bulk claims are identified quickly with appropriate action being taken to ensure that repayments which should not be made are prevented. Procedures need to be developed to protect any loss of revenue from false or incorrect claims to repayment and we should be happy to work with HMRC in establishing sensible and proportionate protocols to strengthen the system.

3.3 The Need for Simplification

The fact that such attacks on the tax system should occur is indicative of a fundamental problem. Our fiscal regime within the UK is overly complex and there is overwhelming research which shows that

complexity by itself can generate feelings of unfairness as well as errors (please see research paper by Margaret McKercher published on OECD website). In addition, research has been conducted in other fiscal jurisdictions which indicates that the quality of returns prepared by professional agents is higher on average than returns prepared by unqualified agents and even higher than self assessment returns (see for example tax practitioner credentials and the incidence of IRS audit adjustments by Hite and Hasseldine, 2003).

3.4 Working with Professional Bodies

This consultation follows on from Schedule 24 to Finance Act 2007 which applies to returns filed from 1 April 2009. Significant changes to the penalty regime have been introduced and are dependent on the behaviour which gave rise to the submission of an incorrect return. The legislation recognises that if HMRC are satisfied that the taxpayer took reasonable care, no penalty is due. Professional advisers are required to take reasonable care and to operate offering best advice to the client. Professional advisers who fail to take reasonable care are therefore a risk area for HMRC and the question posed at paragraph 3.9 of the document is whether there should be some sanction upon a tax agent who has not taken reasonable care.

There are already mechanisms in place for HMRC to report to professional bodies their concerns about members who appear to take little care and who have a high incidence of errors in the returns for which they are responsible. Professional bodies have in place mechanisms to monitor quality control and to investigate concerns. They have processes which respect human rights, are subject to judicial review and can provide for a spectrum of remedial steps to be undertaken which would range from support, education, penalties and more severe sanctions.

When faced with a problem, HMRC has to start somewhere. We recommend that it should liaise with professional bodies to ensure that a satisfactory mechanism is in place to exchange information and improve standards. But the problem in the main does not lie with those who are members of professional bodies. The highest risks lie with those who are not professional in their approach and who fail to meet the standards which would be demanded from members of professional bodies. HMRC need to focus its resources on raising standards where there is an urgent need for this to occur and, in particular, ensuring that agents act in the best interest of their clients taking reasonable care to support the client submitting a correct, accurate and complete return.

3.5 Targeted Powers to Gather Evidence

We agree therefore with paragraph 3.10 that HMRC is not able to use the powers which it currently has because of defects within Section 99 TMA 1970 and Section 107 TMA 1970. We support fully HMRC to have effective powers to take effective action against any tax agent who facilitates a deliberate under-statement in the tax liability of their clients. We sympathise with the difficulties which HMRC have outlined at paragraph 3.12 and paragraph 3.13. There is a balance to be struck between giving the State sufficient powers to investigate and establish guilt and respecting the rights to privacy of citizens of the State. In 1994, Clause 241 of Finance Bill 1994 was withdrawn and a report commissioned from Philip Ely which recommended:

1. The circumstances in which HMRC should require the delivery of documents in the possession or power of tax accountants should be clearly defined, preserving the balance of the individual's right to privacy and the right to obtain advice in what is a complex area of the law.

2. That power to obtain information and documents should only be exercisable where the duly authorised senior officer, perhaps at Board level, has objective evidence which would support a reasonable conclusion that the accountant involved whose working papers are being sought knew that he was involved in submitting information and returns which were incorrect with the intention of evading a tax liability.
3. When an officer applies for authorisation to a member of the Board of HMRC, this must be made by way of affirmation on oath.
4. The power to access documents of the agent should apply only to documents containing information relevant to named clients of the tax adviser, being the client or clients to whom such information, documents or return etc relates. The power should not extend to any client of the tax adviser.
5. A person against whom HMRC seek to exercise such power should have the right to be heard before that power is exercised. Such right to be heard might be effected by allowing an appeal against the notice in writing requiring the accountant to deliver such documents etc.
6. Whilst knowledge on the part of the accountant should remain a constituent element, the power being granted to HMRC should properly be initiated on the basis that HMRC has reasonable grounds for believing such knowledge on the part of the tax accountant.
7. There should be a right of appeal with oversight of the new power being exercised by the first-Tier Tribunal.
8. In the case of reasonable concerns about the work of a particular individual, tax agent or accountant, the power should only be exercisable in respect of the named clients or a particular individual tax accountant and should not operate against the clients of a partnership or limited company as a whole.

3.6 Reasonable Descriptions in Targeting Risks

Paragraph 3.14 acknowledges the important role that tax agents play in the system. The overwhelming majority of tax agents advise their clients appropriately ensuring that the right tax is paid at the right time. Responsible tax agents will make every effort to ensure that they have good systems, processes and staff training in place which lead to accurate returns.

Paragraph 3.16 gives a number of examples where serious and material errors have occurred which indicate a failure to take reasonable care. We agree that this sort of error is unacceptable.

At paragraph 3.17, there is an example of poor work which should not be condoned, paragraph 3.18 fraudulent claims which should be prosecuted and paragraph 3.19 examples of unprofessional work which is unacceptable.

3.7 Unreasonable Assumption

The consultation document then goes on to suggest that a tax agent might take responsibility for inaccuracies to protect clients from incorrect return penalties. This is not a credible suggestion as tax agents will wish to protect their own reputation. We do not doubt the Revenue when it claims to have

evidence of poor tax agents taking responsibility for a careless error but this will be the exception and an appropriate power such as we have outlined above would adequately deal with such poor work.

We therefore do not accept that there is a potential injustice and we reject the suggestion that a taxpayer who deals with his or her own tax affairs has not such avenue of escape. Research shows that taxpayers who obtain good professional advice submit more accurate and more complete returns than those who attempt to do so themselves. It follows that a proportionate response from HMRC is to concentrate its efforts and powers on where the risk lies rather than suggest there are hypothetical injustices which simply do not exist.

3.8 Development of the 1999 Initiative – IR9

We have a complex system and it is inevitable that fallible human beings are going to make mistakes when interpreting such complex law and dealing with complex returns. If HMRC gather objective evidence which shows that the level of error in a particular tax agent and adviser is seriously out of line with the norm, we support HMRC in seeking to have procedures and sanctions in place to deal with such poor performance.

In concluding our comments on Chapter 3, we recommend that the responsibility for the accuracy of tax returns should remain primarily with the taxpayer. In cases where HMRC has obtained objective evidence which indicates that the work of a particular agent may be below an acceptable standard, we support initiatives to set in place procedures to raise standards and to take appropriate sanctions against the under-performing professional tax agent. We shall expand on these views in our comments which follow.

Chapter 4

4.1 HMRC's Response to Risk

In principle, the responsibility for the accuracy and completeness of tax returns must lie with the taxpayer. In many instances, a professional agent will act using the information which the taxpayer has provided.

4.2 HMRC Should Use Technology to Identify Performance Indicators

Modern technology enables the capture of vast amounts of information and it is well known that many loyalty cards now collect data on customers which can be used to the advantage of the trader. Similarly, HMRC would be expected to collect data and if it identifies a recurrent risk from a particular tax practitioner it is sensible to use the technology to assess the extent of the risk and to decide upon the appropriate remedial action.

4.3 Role of Independent Review and Safeguard

The problem is that HMRC is not as well respected as the separate organisation's used to be and there is a feeling that there has been considerable down-skilling of much of the work. Consequently, HMRC's capacity to take a view on whether or not errors arise from careless or deliberate behaviour is very suspect. It is important that a safeguard be inserted at this point to ensure that isolated mistakes which arise from human fallibility should not be viewed disproportionately and serious action initiated without considerable objective evidence supporting the decision which has been taken. In addition, it

is not appropriate for HMRC to act as judge and jury in such matters and there needs to be a mechanism for independent review.

Professional tax agents have a responsibility to their clients to ensure that they pay the right tax at the right time. This can mean that the adviser needs to set out for the client to decide, the options which are available to minimise their tax liability in a legal manner. This can lead to disputes with HMRC.

4.4 Human Rights and the Respect for Privacy

At paragraph 4.3, HMRC suggests that their concerns might be addressed by undertaking a compliance check on a representative proportion of all agents identified as being responsible for errors in tax returns and therefore a high risk of non compliance. We should resist such a proposal as it is intrusive and an invasion of taxpayer's right of privacy. Professional agents owe their clients a duty of care and confidentiality and pursuing compliance checks on a representative proportion of all of the tax agents' clients is not a sensible way to approach this problem. The document recognises that it could have significant resource problems and, in addition to producing unnecessary costs for compliant taxpayers, is likely to produce unnecessary confrontation.

4.5 Using Objective Evidence, Deciding what is Reasonable

Where objective evidence has been obtained that justifies the risk assessment of the tax agent by HMRC, this evidence should be subject to external and independent review. After the independent review has confirmed HMRC's assessment as being reasonable, we believe that it is realistic for HMRC to seek to work with the tax agent as is set out in paragraph 4.4. Where the tax agent is a member of a professional body, we recommend that HMRC should disclose its concerns to the professional body and have a procedure in place so that the professional body can consider the information and take appropriate action.

4.6 HMRC Framework

Where the tax agent is not a member of a professional body, HMRC must ensure that such agents are unable to obtain a competitive advantage. To achieve this HMRC must set in place a clear and transparent framework of the steps it will take to deal with those agents who have been identified as being responsible for significant non compliance. This would include investigating why the errors have occurred and the response of HMRC may range from education (to correct any misunderstanding) to suspended penalties to encourage procedural and behavioural change which would be beneficial through to more extreme sanctions which would include requesting an independent report assessing the extent and causes of the serious non compliance which has been identified. To put this in perspective, simple isolated mistakes caused by human fallibility must not form the basis of prosecution or sanction from HMRC.

Earlier in our response at paragraph 3.5 we summarised the conclusions of the report by Philip Ely in 1994. This would give, in cases of serious and recurrent non compliance for which the agent is responsible a mechanism for HMRC to obtain access to the tax agent's working papers. We agree that strong safeguards are required and these are in part covered within Philip Ely's recommendations but in addition we should like to suggest that if this route is to be developed it is essential that there be a parity of treatment across the board and a clear framework of how such powers would be exercised. The professional bodies should be involved in discussing this ensuring that the safeguards are adequate and the judgements exercised are reasonable, independent and fair.

4.7 Safeguard – Authorisation at HMRC Board Level

Authorisation should be at a very senior level. We recommend at Board level. The Board members should be accountable for that authorisation. Authorisation should only be considered where there is a substantial body of objective evidence which demonstrates that the risk is recurrent and the consequences are serious. That objective evidence must be substantial and demonstrate to the balance of probability that the risk which has been identified arises from careless or deliberate conduct by the tax agent.

We sympathise with HMRC's observations about the circularity of the current powers arising under the Taxes Management Act at Section 99 (and Section 107). We believe, however, that new computer technology can be used to gather objective evidence about error rates which would be sufficient to show that the concerns HMRC have identified are reasonable and need further enquiry. In such cases, we are willing to talk about enacting a specific power along the lines recommended in 1994 in the Ely report [see paragraph 3.5].

4.6.1 What is the most effective way of assessing the presence of a particular risk across a tax agent's client base?

A: This is a difficult question. HMRC may come across more than an isolated incident when dealing with a particular agent. In 1999 the Inland Revenue launched an initiative called 'IR9' which attempted to identify and analyse statistically the error rates of simple errors made in returns. Information technology has advanced considerably since then and it should be possible to ensure that where an agent is responsible for a particular error that can be compared with the performance of the average. Agents whose performance is seriously outside the statistical norms should anticipate being asked to explain why their performance is so different. We are happy to discuss with HMRC potential markers which would help identify those agents whose performance is lacking and we also recognise that there will be instances where an agent's response to questions raised by HMRC in an enquiry may indicate a misunderstanding or incompetence from which HMRC may conclude that there is a risk of errors on a more widespread basis. However, human infallibility being what it is, we think that it is essential that HMRC can produce objective evidence to a standard of high probability to justify conclusions such as this and this should be subject to independent review.

4.6.2 How can HMRC and professional bodies' best work to ensure risks are resolved for the future?

A: The professional bodies are responsible for ensuring members maintain their standards. We welcome the opportunity to discuss further with HMRC ways in which information can be shared and, where HMRC have reasonable concerns, creating a framework to address those concerns. This of course would require a spectrum of responses ranging in the first instance from consideration of the information supplied by way of exchange from HMRC that identifies their concerns to an understanding of how standards could be raised. This would range from education to correct any misunderstandings through to investigation, discipline and sanctions. Professional bodies have in the main already a monitoring role which can be used to assist members to improve and get things right in the future. The decision to refer information obtained by HMRC from statistical analysis or specific cases should be taken at a high level, ideally after an independent review.

This question has provoked the most serious criticism from our members. It does not appear to recognise the professional role played by members of professional bodies. An unqualified tax agent is

given the same standing as a member of a professional body as long as he appears to be competent to HMRC. This is unacceptable and HMRC should be focussing its efforts and attention on those who are responsible for non compliance and as a general rule we believe the majority of the problem lies with people who are not qualified and who are not members of professional bodies. Unqualified people may follow high standards but they do so voluntarily or for good practice. They do not have a code of ethics or a discipline procedure imposed by their professional body and may not have good procedures and practices in place.

We should have preferred this question to have asked how standards could have been raised and our response would have been that we are willing to work with HMRC to identify those whose standards fall short of a suitable benchmark. The professional bodies would then have procedures in place to ensure that the member who has caused concern has in place suitable procedures and systems as well as up to date education requirements. HMRC must have in place a framework to deal with those who are not qualified and not the subject of monitoring, quality review and discipline procedures of their professional body.

4.6.4 What guidance should HMRC produce for setting the standard of pre-return assurance work and therefore provide comfort to practitioners that adherence to a certain level of assurance would amount to a defence against either compliance checks or other action?

A: In common with the other professional bodies we do issue guidance to our members. If members follow this guidance HMRC should be satisfied that the return submitted accurately reflects the information obtained from the client. HMRC could set its own guidance for people who are not members of professional bodies and if this was followed it would constitute a defence that would be available to such non members. It is in everyone's interests that HMRC's limited resources are focussed on the areas where the risk of non compliance is greatest.

Considerable hostility has been provoked from the Institute's membership because the document refers to HMRC's proposals where a tax agent has made a mistake. If this was described as where HMRC have reasonable grounds for suspecting a tax agent has been responsible for a number of similar mistakes, the cumulative effect of which is serious or responsible for a serious mistake, then the reaction would have been less hostile. However the document refers to a singular mistake and for HMRC to react in such a disproportionate way to what might be a simple human error requiring an understanding of how this occurred and what work was done to investigate whether it might apply for other years and other clients and what steps have been taken to remedy it and ensure there is no further recurrence, is quite disproportionate.

It is part of the human condition to be fallible and almost inevitable that a mistake is going to occur. Firms have in place detailed review procedures which make the likelihood of a mistake being reflected in the tax return very remote and the document seems to assume that because one mistake has been made there will be a recurrence and a need to investigate it to put matters right in the past and the future. We hope that HMRC has used bad phraseology in the document and that it is focussing on mistakes, the cumulative effect of which are a serious loss of tax rather than suggesting that trivial human error which may have been overlooked because of concepts since as scope and materiality should require detailed investigation. Members have commented that paragraphs 4.7 to 4.12, which set out a number of consequences for an agent who has made 'a mistake', appear to be extreme for what is only a mistake.

This has provoked a reaction and questions about the volume of serious mistakes for which HMRC is

responsible. There is no balance to the paper and it is observed that HMRC often make mistakes but they will not be under the same scrutiny despite the fact that they are adding to the cost of compliance and causing a great deal of inconvenience to compliant taxpayers. Of greater concern is the lack of confidence in HMRC's judgement and the questions raised about who will decide if a mistake has been made. It is important that safeguards are introduced to ensure that whatever proposals emerge these are restricted to reasonable grounds and substantial evidence suggesting there has been a serious loss of tax as a result of mistakes arising from procedural or knowledge deficiencies. It is important that there must be a safeguard of a right of appeal and that authorisation is at the highest level, ideally at HMRC Board level with the Board member being held responsible.

Paragraph 4.10 suggests a possible extension of the penalty regime to apply to a tax agent where it can be demonstrated that the taxpayer has taken reasonable care but the agent had not. In principle we are against such an extension. We observed earlier that we were sympathetic to the difficulty faced by HMRC because of the circularity of the tests within Section 99 TMA 1970 and we are willing to be involved in consultation with HMRC to set in place a framework which would enable HMRC to gather objective evidence which would indicate that a particular agent has been responsible for mistakes leading to a serious loss of tax. In such a case, it might be appropriate to extend the penalty provisions currently found in Schedule 24 Finance Act 2007 and to consider whether such penalty mechanisms should be capable of suspension. We recommend that in cases of procedural deficiencies where there is no culpability in the conduct, a suspended penalty regime would be welcome.

Paragraph 4.12 suggests that a report should be made to the agent's professional body almost as a matter of last resort. We object to this and we suggest that HMRC should concentrate its limited resources on dealing with unqualified agents who are not members of professional bodies.

Once HMRC has identified reasonable grounds that a particular agent is responsible for a serious loss of tax as a result of a failure to take reasonable care or indeed more serious culpable behaviour, we recommend that HMRC should set up a framework to address those who are not qualified and not members of a professional body but should have a mechanism at a much earlier date to share information on the concerns with the professional body. Professional bodies have in place mechanisms of quality review, monitoring, investigation and discipline and these mechanisms respect human rights, are subject to judicial review and are recognised as being appropriate processes for the maintenance of standards.

Where a tax agent has been deliberately non compliant and there is sufficient objective evidence that the risk arose as a result of deliberate actions by the tax agent, the current law would enable HMRC to prosecute that dishonest tax agent. We think it entirely appropriate that serious and severe sanctions should be reserved for deliberately non compliant and dishonest conduct. We have no objection to the option set out at paragraph 4.13 and we would add that to these sanctions should be the possibility of prosecution which should be possible under a number of existing provisions in our law.

4.15.5 What methods would be appropriate for ensuring that a tax agent's past failings are remedied, and good standards adhered to in the future?

A: It is important that resources are concentrated where most needed. Assuming that stringent safeguards have been passed that identify to a standard of high probability, HMRC should have a spectrum of responses in place to deal with failed standards that come short of the appropriate benchmark. These should include education, discussion with the agent, referral to the professional bodies and the possibility at the more serious end of using powers to obtain access to the working

papers of other clients of the agents to satisfy itself that standards have not fallen universally across the agent's client base.

4.15.6 Are there cases where it would be appropriate to charge behaviourally based penalties to tax agents?

A: Where the agent is deliberately involved in an error or cases of recurrent systemic error, we believe that it would be appropriate to charge penalties on the tax agent. We should like to restate our principle that the responsibility for the accuracy of the tax return should lie with the taxpayer and in cases where the agent has made a mistake, the taxpayer might be advised to consider suing the agent. Members of professional bodies will have in place appropriate professional indemnity insurance to cover such an aspect.

If HMRC, in penalising the taxpayer, made it clear that it thought that the agent was responsible for the mistake, this would help the taxpayer facilitate recovery from the agent. Whilst this is felt to be a slightly cumbersome route, the remedy currently exists and ultimately HMRC receives a penalty for the tax lost which will have been paid by the agent. We can however envisage situations where a penalty mechanism to be charged direct on the agent would be appropriate but we would insist that there are strong safeguards in place and that only objective evidence is used in such cases with the standard of evidence to a very high balance of proof.

4.1.5.7 If financial penalties are appropriate, on what basis should they be calculated, fixed, up to a certain amount, or linked to the tax at risk, fee income or relevant turnover?

A: We recommend that such penalties would only be reserved for very serious cases and they would be linked to the culpable tax at risk.

Paragraphs 4.16 to 4.20 look at the possibility of HMRC working with professional bodies. We have recommended earlier that HMRC should consider creating a disclosure route with appropriate safeguards to disclose its concerns to professional bodies at an earlier stage provided it had evidence of persistently careless or incompetent conduct.

We believe that different considerations should be given to different circumstances that led to HMRC's concern. In the main, the enhanced disclosure facility to a professional body should be at the level of the individual and this would remove the need to distinguish between a sole practitioner partner or employee who is a member of the professional body.

Paragraph 4.19 expresses concern that the professional body will fail to take action that HMRC considers appropriate. Professional bodies have in place well established procedures to maintain standards within its membership. Those procedures respect human rights but they are designed to investigate and in appropriate cases take disciplinary sanctions against any member who brings the professional into disrepute. In investigation and discipline committees, the decisions are surrounded by appropriate safeguards including consideration by a panel which includes independent members. As a result, the process of investigation and discipline are human right compliant and the judgements they deliver are appropriate and fair. Such judgements are of course subject to judicial review. There would be strong objection to any suggestion that HMRC might influence the processes or the decisions.

In such a complex area, we would welcome the opportunity to be involved in considering the wider options to share information at an earlier stage. However, it is necessary that HMRC sets in place a

framework to deal with those who are not members of professional bodies and whose standards fall short of the appropriate benchmark and give rise to concern.

4.20.8 Is there merit in seeking the power to disclose to professional bodies cases where HMRC are satisfied that there has been persistent careless or incompetent behaviour?

A: Yes.

4.20.9 What safeguards would be needed?

A: It is important that strong safeguards be in place. Authorisation to share information should be at the highest level, capable of independent review, based on objective evidence obtained and supported with a very high standard of proof.

4.20.10 Could there be a wider role for professional bodies working with HMRC to ensure that tax agents past tax failings are remedied, and good standards are adhered to in the future?

A: The short answer here is 'yes'. We cannot speak for the other professional bodies but we think that the checking of tax practitioners who have poor performance and who are not members of ICAS should not be conducted by ICAS. As a professional body, we are responsible for maintaining standards within our membership and we would not want to create a two-tier membership somehow ratifying or accrediting individuals who are not ICAS members. These non qualified practitioners are competitors to our members and members would not be happy if we conducted any work for those persons. It follows that we recommend that HMRC must set out its plans to deal with the unqualified and to ensure that where unqualified tax agents fail to meet benchmark standards, HMRC has in place an appropriate range of responses to remedy the shortcomings.

Chapter 5: Registration and Definition of a Tax Agent

Chapter 5 opens a debate on whether there should be registration and definition of a tax agent.

It is in everyone's interests that taxpayers are encouraged to pay the right tax at the right time. HMRC's vision makes it clear that they wish to assist those who wish to comply but to deal firmly with non compliance. With modern technology, it is easy for a tax agent to be involved yet appear invisible with all filing being done electronically by the taxpayer himself. Indeed the UK has a self assessment regime and the UK fiscal regime deserves criticism for its complexity and the burden of compliance cost which is imposed on citizens who wish to meet their fiscal obligations.

There is an overwhelming need to simplify the UK tax system and make it easier for those who wish to comply with the self assessment regime to be able to file their own returns and to be responsible for the content, accuracy and completeness of those returns.

The penalty system now looks at the behaviour which gives rise to an incorrect return and concentrating on a failure to take reasonable care or carelessness, it is necessary to realise that the legislation creates many fiscal fictions. Such fiscal fictions are regrettable and, as a matter of principle, are really inappropriate for a self assessment regime. Many fiscal fictions deem something to have a tax consequence as if it were something else. In such situations it is often necessary to provide a valuation as distinct from deal with a real commercial transaction to identify the tax liability. In such situations taxpayers require other advice and this can include legal advice, valuation advice and of course advice

on the preparation of the tax return itself.

Registration without regulation would be a complete waste of time. Registration of tax agents would create the problem that many of the other people involved in preparing a tax return (such as valuers and lawyers) are not acting as a tax agent but are acting as specialist advisers and they may be responsible for the incorrect return.

In its drive to reduce costs and increase efficiency, HMRC is relying more on electronic filing. An inevitable consequence is that the geographic location of tax agents and those who assist taxpayers in the preparation and filing of returns will extend far beyond the shores of the UK. It is doubtful that HMRC has the resource to regulate tax agents who are based overseas.

Despite this, the document recognises that the tax system functions with the help of tax agents, the vast majority of whom aim to meet high standards and give advice that is in the best interest of their client directed towards paying the right tax at the right time. It is appropriate for HMRC to focus its limited resources against those tax agents who fail to meet benchmark standards of performance. HMRC should then set in place a framework to deal with such persons. HMRC should not have drafted this consultation document looking at mistakes but instead should have considered what procedures and resources are necessary to deal with serious risks of non compliance which arise from serious questions about the ability, competence and honesty of tax agents who are involved. We would encourage HMRC to adopt a proportionate response and to identify those about whom it has serious concerns and then to put forward proposals to deal with that small population whose performance is unsatisfactory.

We doubt that there are many benefits for tax agents and taxpayers if registration became mandatory. Accordingly, a registration system is unlikely to deliver improved compliance because the vast majority of agents (and their clients) aim to comply with the fiscal regime obligations. But we do recommend that HMRC take action to identify those who do not meet benchmark standards and to have in place a spectrum of responses ranging from discussion, education through to sanction and criminal prosecution in cases where conduct is lacking.

Because we do not advocate registration, we see little benefit in defining ‘tax agent’ in the legislation. However, we do recommend that the Government should consider protecting the use of the term ‘accountant’ restricting this only to those who are members of chartered professional bodies.

If the objective is to improve compliance, HMRC needs to address where risks arise and this will inevitably embrace lawyers, valuers, shipping agents, payroll bureaux and others. It should cover all persons who are responsible for assisting a taxpayer with the provision of necessary information to HMRC. The definition should not be restricted merely to the preparers of tax returns because in many instances the area of risk of inaccuracy relates to valuations or services provided in interpreting legal provisions.

For the future, HMRC should expand its network of working with their counterparts in other countries. It is important that agents working in the UK should not find themselves facing unfair competition from agents abroad where there is no similar framework.

HMRC should have mechanisms in place to identify agents who may be regarded as having good quality review processes and procedures in place. This should give HMRC a degree of confidence that returns prepared by these agents reliably reflect the information given to the agent by the client.

Equally, data capture must enable HMRC to identify agents whose performance is sub standard and it is appropriate that HMRC take steps to improve compliance in such cases.

We are willing to explore with HMRC ways in which information can be shared on a confidential basis with professional bodies. However, HMRC needs to improve its own qualify review and performance and, in addition, it needs to set in place a framework to deal with unregulated agents who are not members of professional bodies.

Earlier in our response (paragraph 3.5), we reminded HMRC of the recommendations promoted by Philip Ely in 1994 and the safeguards that it would be necessary to introduce to give HMRC the power to access the working papers of accountants whose performance fell seriously short of a benchmark standard.

At paragraph 5.5, HMRC invites recommendations for credible light touch alternatives but other than reminding HMRC that there must be significant safeguards to protect taxpayers' privacy and the right to obtain good advice, we have no recommendations to make at this stage.

Many member of the Institute have expressed serious concern that HMRC should have produced a document such as this. The new penalty regime has only started for returns filed after 1 April 2009 and it is too early, at this stage, to reach conclusions. We remain of the view that the primary responsibility for the accuracy of the return should lie with the taxpayer and that the thrust of HMRC's consultation is therefore misconceived. However we recognise that there may be a problem of agents whose conduct is not acceptable and either through carelessness or more seriously conspiracy to defraud, there is a risk of tax being lost. There should be further consultation on this small population to see whether a framework can be created that would address HMRC's concerns enabling the identification, prompt action and an appropriate spectrum of reactions designed to improve compliance in the taxpaying population generally. Members of the Institute would be happy to participate in such a future consultation.

Yours faithfully

Derek R Allen
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