

## **Draft Legislation on Deliberate Wrongdoing by Tax Agents**

I set out below the comments of The Institute of Indirect Taxation on the draft legislation issued in February 2010. We have no comments on the draft clause. The numbering below is to the paragraph numbers in the draft Schedule.

The Institute of Indirect Taxation is a professional body representing indirect tax practitioners. It was formed in 1991 and has approximately 630 members and 100 students for its examinations with an additional 400 students for the IIT VAT Compliance Diploma, a qualification for VAT compliance staff. The membership comprises solicitors, accountants, barristers and other practitioners in indirect tax. Many of its members are ex-Customs staff. Serving officers of Customs are enrolled as both members and students of the Institute.

### **Definitions**

2(1) We are concerned about the very wide definition of a tax agent. We question whether volunteers with the CAB or charities such as TaxAid, which give advice on tax matters, ought to be exposed to the proposed penalties. We accept that it is unlikely that such a volunteer would deliberately assist a client to commit a tax fraud. However we believe that the definition of deliberate wrongdoing goes far beyond fraud. Even if this is properly targeted to limit its application to fraud the perception that a volunteer is at personal risk of penalties seems likely to deter volunteers from helping the poorer members of society in tax matters. That is clearly not in the public interest.

2(2)(d) Again this seems to us far too wide. Any person advising or helping another in relation to financial matters will be aware that the matter is “likely to be used” to assist with the client’s tax affairs. For example, a person who lectures on VAT at a night school course on “Running your own business” would hope that most of his students will use the knowledge gained in their own businesses and that knowledge of any aspect of VAT will inevitably assist with the student’s tax affairs once he sets up in business.

2(3) This appears to mean that if a person witnesses a Will – or even a passport application (as the passport may be used in connection with tax-deductible business travel) – he is liable under these provisions.

2(4)(b) We think there ought to be an exclusion for employees of the client. It seems unreasonable that a person engaged by a business as a book-keeper or as a secretary (if she will type letters on tax) or as an administrative clerk (if he will post a person’s VAT return, or cheques, to HMRC) should be at risk of falling within the provisions merely because the nature of his work involves acting as an agent for his employee. All employees are agents of the business in which they work.

2(5) We are unclear how the legislation can work where multiple members of staff of a professional firm are likely to assist a client. For example A may prepare advice for approval by his manager, B, which when approved will be typed by C and reviewed by the partner D. Indeed A may discuss the advice with his colleagues, E and F, before drafting his letter. Accordingly a simple letter could involve six

members of a firm, so in reality the maximum penalty on the firm becomes £300,000 – or probably £350,000 as the firm itself can also presumably be regarded as an agent.

It seems equally unreasonable in such a case that HMRC should be able to obtain access to all of the firm's working papers – or indeed even to those of clients on whom each of B, C, D, E and F have worked.

3(1) The definition of deliberate wrongdoing is far too wide. It should be limited to fraud. Suppose for example a VAT advisor completes the form to include a new company in a group VAT registration for convenience, and as a result the group VAT liability in some VAT quarters is a few pounds less than it otherwise would have been. The tax agent does an act that is capable of bringing about a loss of tax (as this is defined as a loss of revenue from tax) and the effect of the different treatment must be capable of bringing about such a loss (even if it is offset by a counter-acting extra charge in the following VAT quarter). It is done deliberately (as the agent intends to bring about a group registration) and is done deliberately with the intention of bringing about a loss in any VAT quarter in which the group pays less VAT than it otherwise would have done.

3(6) We are concerned that although the paragraph is headed “deliberate wrongdoing” sub-paragraph (6) seems apt to include a penalty for a mistake caused by failure to take reasonable care. We were under the impression that HMRC had indicated that they were not seeking to impose penalties on agents for carelessness, at least at this time.

#### **Power to obtain Tax Agent's files, etc**

4. We are very concerned about the wide scope of this power in the context of the very broad definition of deliberate wrongdoing.

4(a) We think that HMRC should be required to issue the notice within 12 months of the deliberate wrongdoing coming to their attention. This 12-month period applies where the agent has been convicted of an offence. We cannot see any justification for harsher powers to apply in the absence of a conviction.

5(2)(b) We are concerned about the wide scope of this. For example it appears that if a tax agent puts old files into a commercial storage facility, a notice could be served on the owner of the facility. This could be commercially damaging to the tax agent and is, in reality, an unnecessary power as the files concerned are clearly in the power of the agent.

6(1) The reference to “other documents” in the second line is far too broad. It seems capable of covering any document whatsoever. The use of the word “including” makes heads (a) and (b) merely examples of things that are included, not an explanation of the connection that the documents need to have with the tax agent's clients. Indeed the same applies to “the tax agent's working papers”, but at least this phrase gives some scope for argument as to what is meant by working papers.

We are also very concerned at the wide scope of the power. Paragraph 1(5) allows each individual in a firm to be regarded as a separate tax agent, but does not require

it. Accordingly it appears that the firm itself can be the tax agent. Suppose the firm is one of the big four firms of accountants, a former employee has colluded in a fraud with a client, the firm discovered this and immediately it did so it sacked the individual and ceased to act for the client. Suppose also that the client had not yet reflected the fraud in his tax return and the firm persuaded him to exclude the fraudulent transactions when completing his tax return. As the paragraph is drafted HMRC would be entitled to serve a tax agent notice on the firm (as it, through the former employee, engaged in deliberate wrongdoing) and as a result gain access to all of the working papers of all of the international offices of the firm, as they come within the definition of “relevant documents”. It could probably then share those overseas documents with the tax authorities in the overseas jurisdiction under a DTA or TIAA. That cannot be reasonable.

7(3) Please can HMRC confirm that, where a sole practitioner has joined a partnership which has subsequently merged with another partnership, a notice addressed to a third party, such as the manager of a storage facility, needs to specify each of those entities if HMRC are seeking access to files covering work done whilst a member of all three. This is particularly important in the context that the individual may not have been connected with all of the entities (e.g. the former sole practitioner may have retired at the time of the merger).

8(1) We believe that there ought to be a specified period in which the notice needs to be complied with. Because of the seriousness of the notice – as its service is likely to seriously damage, if not destroy, the agent’s business, we suggest a period of 90 days to allow the tax agent an opportunity to take legal advice.

10(2) Because the issue of a notice is likely to destroy, or at least seriously damage, the tax agent’s practice or career, we think it essential that the tax agent has an unfettered right to appear before the Tribunal, to be faced by his accusers (bearing in mind that at the time of the hearing his involvement in dishonesty will normally not have been proved), and to question HMRC’s allegations and any assumptions on which they are based. Although the hearing is a civil procedure, we believe that in many cases it is likely to be regarded as of a criminal nature under EU law as the damage to the agent’s practice will often be disproportionate to the alleged offence. We accordingly believe that the agent is entitled to all of the rights that he would have in a criminal investigation and trial. We understand that HMRC now accept that the agent ought in all cases to have a right to appear before the Tribunal.

10(2)(c) We would appreciate confirmation from HMRC that, even if the Tribunal is satisfied that paragraph 4 is met, the Tribunal is entitled to weigh the likely damage to the agent in granting the notice against the likelihood of the documents being sought providing compelling evidence of wrongdoing to HMRC.

The legislation does not provide the tax agent with the opportunity to provide voluntarily the information that HMRC is seeking. In these circumstances the Tribunal ought to have power to vary the notices. For example suppose that a tax agent has colluded in a fraud with a client who is a relative. The Tribunal might feel it reasonable in the circumstances to limit the documents being sought to those that relate to clients of the agent who are also relatives if there is nothing to suggest that the agent is likely to have colluded with non-relatives. It ought to have power to do

so, particularly bearing in mind that HMRC are able to issue a further notice subsequently.

11(2) This ought not to apply if in the opinion of the Tribunal the tax agent has a reasonable excuse for not having given notice of appeal. It is in any event unclear at what stage “the time for giving notice of appeal has expired”, bearing in mind that under VATA 1994, s 83G(6) the Tribunal can give permission to appeal after the end of the normal appeal period and under TMA 1970, s 49H(4) a taxpayer can notify an appeal to a Tribunal after the end of the acceptance period if the Tribunal gives permission.

12. We understand that HMRC no longer intend to proceed with this. As mentioned earlier we think it essential that the tax agent has notice of the application and can attend the hearing and make representations.

13. Whilst we understand the reason for this, we presume that the tax agent is obviously entitled to seek judicial review of the decision.

18(2) There should be a requirement for the copy to be provided without unreasonable delay.

21. Before daily penalties are imposed, we think that a tax agent ought to be given an opportunity to comply with the notice. We suggest that daily penalties should be exigible only if the tax agent has not complied with the notice within 30 days of the imposition of the paragraph 20 penalty.

23(2)(a) We think it unreasonable that a person should be liable for a penalty as a result of a failure by a third party to take reasonable care. This particularly applies in circumstances where the failure is simply to produce documents. A tax agent cannot, for example, produce documents if these are held by a third party who is claiming a lien on them. Although in theory the tax agent may have power over such documents, he may need to take court action to enforce the production but as the third party does not in fact have a lien (because of paragraph 18(3)), the third party probably cannot be said to have taken reasonable care by seeking to enforce his lien.

### **Penalty for deliberate wrongdoing**

25(1) As stated in our response to the Consultation itself, we do not think that in most cases a tax-related penalty is a sensible sanction. In many cases it is also likely to be disproportionate both to the gravity of the tax agent’s own offence and to any benefit obtained by the tax agent from the offence.

25(3) We think it particularly unfair that if wrongdoing involves non-declared income or falsely claimed expenses, in most cases the £5,000 penalty is doubled because the wrongdoing must affect both income or corporation tax and VAT.

28. Whilst we welcome the proposed reductions for disclosure, we are concerned about sub-paragraphs 6(b) and (c). A professionally qualified agent (and also we suspect an unqualified person who acts in the capacity of tax advisor to the client in the course of a business) has a legal duty of confidentiality to his client. Whilst this

duty is overridden by the public interest in combating crime, so would not prevent the agent from disclosing information in relation to clients who are involved in crime, it would prevent him from voluntarily disclosing information in relation to other clients in order to allow HMRC to satisfy themselves that such clients have not been involved in wrongdoing.

We do not think it in the public interest to grant a reduction only if an agent is prepared to ignore his contractual obligations to clients who are unconnected with his wrongdoing.

30. We think that a cap of £50,000 is too high, particularly bearing in mind that the wide definition of a tax agent includes a wide range of individuals that would not normally be regarded as an agent. Such a penalty would be likely to bankrupt most individuals.

30(5) We think that the cap ought to be applied in relation to the wrongdoing. It is unreasonable that if, for example, an agent assists in hiding an overseas bank account he should indefinitely thereafter be liable for a penalty of a maximum of £50,000 in each subsequent year because the client, perhaps without the agent's knowledge, continues to use that account in subsequent years.

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