THE CHARTERED INSTITUTE OF TAXATION

ASSOCIATION OF TAXATION TECHNICIANS

Professional Conduct in Relation to Taxation

Guidance for members on dealings with the tax authorities

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CONTENTS

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I INTRODUCTION

1. PRELIMINARY

Basis of guidelines

1.1 These guidelines have been prepared in conjunction with The Association of Taxation Technicians, The Institute of Indirect Taxation, The Institute of Chartered Accountants in England and Wales, The Institute of Chartered Accountants of Scotland and the Association of Chartered Certified Accountants. Sections 2 to 7 have been reviewed by the Revenue and Sections 2 and 8 to 10 have been reviewed by Customs. Whilst not necessarily agreeing with every view expressed the Revenue and Customs acknowledge that these sections are an acceptable basis for dealings between members and the Departments.

1.2 These guidelines supersede the previous editions, the last of which was issued in October 1997 by three of the six bodies under whose authority they are now reissued.

1.3 Section 2 (Principles applicable to all taxes) has been extended, mainly as regards members' general duties, maintenance of notes of meetings and advice, removal of documents and materiality.

1.4 In the context of self-assessment for income tax, capital gains tax and corporation tax, Section 3 of the 1997 edition (Disclosure to the Inland Revenue) has now been omitted and replaced by new Section 3 (Disclosure under self-assessment) which is an extended version of Section 4 in the previous edition. The remaining sections 5 to 11 have been re-numbered 4 to 10. Some amendments and additions have been included in new Sections 4 to 9 (which includes new guidance about VAT errors).

1.5 Annexes A to K have been retained. Annex A and C have been updated to include self-assessment for corporate bodies, Annex H includes three new introductory paragraphs, Annex I has been updated to refer to self-assessment and an additional sentence has been added to paragraph 3 of Annex K. The remaining annexes are unchanged and, in so far as they relate to Revenue matters, are of diminishing significance following the introduction of self-assessment.

1.6 In following these guidelines it should particularly be borne in mind that each case depends upon its own circumstances and a member who is in doubt should seek advice from the Institute and, where appropriate, independent legal advice. Members' attention is also drawn to Professional Rules and Practice Guidelines published jointly in 1999 by The Chartered Institute of Taxation and The Association of Taxation Technicians.

Interpretation

1.7 In these guidelines 'client' includes where the context requires 'former client'. 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof. 'The Revenue' means the Inland Revenue, 'Customs' means H M Customs and Excise and 'tax authorities' means either or both as appropriate. The masculine gender imports the feminine gender throughout this document.

Abbreviations

1.8 The following abbreviations have been used:

CEMA 1979	Customs and Excise Management Act 1979
FA	Finance Act
TA 1988	Income and Corporation Taxes Act 1988
TCGA 1992	Taxation of Chargeable Gains Act 1992
TMA 1970	Taxes Management Act 1970
SI	Statutory Instrument
SP	Statement of Practice
VATA 1994	Value Added Tax Act 1994

2. PRINCIPLES APPLICABLE TO ALL TAXES

Generally

2.1 The first duty of a member is to his client. A member's duty towards the tax authorities is to comply with the appropriate legislation and the common law when dealing on behalf of a client with a matter which is governed by tax law. The proper functioning of the UK tax system depends very heavily on mutual trust between the tax authorities and tax advisers. In all dealings relating to the tax authorities, a member must act honestly and do nothing that might mislead the authorities. A member must ensure that information he puts before the authorities is sufficient to allow the relevant official to make the decision required (see paragraph 2.13). A member may disclose information to the tax authorities without his client's consent only when required to do so by law (see paragraph 2.17) or where it is necessary to take action to correct any potentially misleading statement made by the member.

Relationship with the client

2.2 In dealing with a client's taxation affairs a member's role is often that of agent but he may be acting as principal in an advisory capacity. The contractual relationship should be governed by an appropriate letter of engagement in order that the scope of both the member's and the client's responsibilities are made clear. For reasons explained elsewhere in these guidelines (see in particular paragraph 4.23) members are strongly urged to include in the letter of engagement a statement to the following effect:

> 'We will observe the Professional Rules and Practice Guidelines of our professional Institute/Association and accept instructions to act for you on the basis that we will act in accordance with those guidelines. In particular you give us authority to correct Inland Revenue errors.'.

Members should refer to the separate guidance note issued in October 1997: 'Engagement letters for tax practitioners'. Members should bear in mind that an engagement letter once agreed with a client is a contract and should be aware of any variations that have subsequently been made whether orally or in writing.

2.3 Every relationship should be covered; if the member acts for a partnership and also for one or more of the partners, then the partnership and each partner acted for are separate clients for the purposes of these guidelines. Likewise, if the member acts for a husband and wife, each is a separate client.

2.4 If the client is a body corporate the client is the company and not the directors. Where a default of any kind is discovered, the matter should be raised at the appropriate level in the client organisation. Where the directors' actions have resulted in the company's defrauding the Crown, references in these guidelines to the 'client' should be regarded in the first instance as referring to the directors. For example, where the member has to advise a client to make a full disclosure to the tax authorities, the advice should be addressed to the directors. If it is believed that this advice will not be brought to the attention of the board as a whole, it should be given to each director, and then, if appropriate, to shareholders. Where the member is also the auditor it may be appropriate to cover this in the audit report.

2.5 A member should deal with taxation work only on the basis that the client is prepared to make full disclosure to him. Such disclosures are governed by confidentiality as an implied contractual term.

2.6 These guidelines explain the position of members if a client refuses to act in accordance with the member's advice, for example where the client has unreasonably delayed either the production of information needed for the preparation of returns or accounts or the full disclosure of irregularities. The member should consider whether to continue to act for the client but should note the recommendations contained in Sections 4 and 9 regarding termination of relationships with the client.

2.7 If a member believes that a relationship with a client has been or is likely to be terminated, whether by the client or by the member, the member needs to take extra care to make clear to the client in writing what matters within the terms of the engagement have been dealt with and what remains to be done, and by what date it should be done, and also what further action the member will, or will not, take.

2.8 A member is advised to keep detailed notes (preferably typed) of meetings and telephone conversations with his clients, the tax authorities and any other third parties, regarding his clients' affairs. By this means, the member may protect himself in the event of a subsequent dispute over what was said at the time and, in the case of what the member perceives to be important meetings and conversations, he should consider ensuring that such notes are signed and dated by the originator before filing.

2.9 Given the significant changes in approach that are evident with the tax authorities, it would normally be prudent for a member either to write to the client confirming oral advice as a matter of course or at least to make a note on file of advice given. Exceptionally, where it is felt that the note is of particular importance, it may be sensible to have the creation of the file note witnessed.

2.10 Members may find it additionally helpful to refer to section 1.306 (Professional conduct in relation to defaults or unlawful acts) of the Institute of Chartered Accountants in England and Wales Members' Handbook. Paragraphs 3 (full disclosure), 7 (confidentiality) and 13 to 21 (as regards freedom to disclose) are particularly relevant.

Tax avoidance

2.11 Tax avoidance is legal and is to be distinguished from evasion which is illegal. All taxpayers have the right to arrange their affairs under the law to minimize their liability to tax. The member should consider carefully the merits of arrangements which may be considered artificial by the tax authority concerned. Such schemes may not be in the client's wider interests because of the risk that they may be challenged by the tax authorities.

2.12 The tax authorities say that they object to arrangements set up for no purpose other than to avoid tax. They see such artificial arrangements as fundamentally different from choosing one commercial option, which generates a lower tax bill than another, or the mere organisation of a taxpayer's affairs in such a way as to minimize the tax bill.

Disclosure

2.13 In all tax matters, the member must act in good faith in dealings with the tax authorities: in particular the member must take care when making statements or asserting facts on behalf of a client. However, the member's duty to try to ensure that the information provided is accurate and that relevant facts are not withheld is not always simple to achieve, especially if the client does not co-operate. See Sections 3 (direct tax) and 8 (indirect tax).

Files and working papers

2.14 Members should keep copies of returns etc. and organise their working papers to separate matters such as the preparation of accounts and tax returns from those on which audit and other opinions may be expressed, because the latter are normally protected from disclosure. See paragraph 2.20 and Annex I, paragraph 7.

Members in practice overseas

2.15 Members in practice overseas are required to comply with local laws. They should follow the guidance of the Institute unless well-established and generally-accepted practice of local firms is to the contrary.

Responses to official requests

2.16 A member who is asked by the tax authorities to disclose documents should:

(a) contact the client;

(b) not give the tax authorities unfettered access to working papers without taking advice, if necessary, as to which papers the tax authorities are entitled to see and which parts of appropriate papers the member is obliged to disclose; and

(c) separate disclosable papers from others.

Where the member has ceased to act the enquirer should be referred to the former client.

2.17 Generally, advice given by a member to his client is not disclosable by the member to the tax authorities. As regards Revenue taxes only, an inspector may, under certain conditions, obtain access to documents in a member's possession or power relevant to tax liabilities: TMA 1970 s.20(3). However, this excludes documents which are the property of a member and were either created in relation to certain audit functions or relate to tax advice: TMA 1970 s.20B(9), (10). See also Annex I (Inland Revenue's powers to obtain information) and Annex K (Customs' powers to obtain information). As to ownership of documents, when in doubt the member should consider taking legal advice.

2.18 A member should be aware of the powers of the tax authorities in relation to the removal of documents (see Annexes I and K); he may also find it helpful to have identified a lawyer or other practitioner with relevant specialist knowledge of both civil and criminal law from whom he can obtain advice in need. If a member is faced with a situation in which the tax authorities are seeking to enforce disclosure by the removal of documents he should consider seeking immediate advice from such a source, before permitting such removal.

Legal professional privilege

2.19 Paragraphs 2.20 – 2.24 were prepared by a Leading Counsel before the decision in *Applicant* v *Inspector of Taxes ([1999] STC (SCD) 189)*. While this decision is of persuasive but not binding authority, members should be aware of the possible implications and should, where appropriate, take legal advice.

2.20 Legal professional privilege is related to but not quite the same as the general duty of confidentiality owed to a client (as to which see paragraph 3.5 below). Legal professional privilege, a part of the common law, has been developed and normally applies in the context of court proceedings, civil or criminal, where it can operate to exclude privileged material from having to be disclosed to the other party or, if known to the other party, being brought into evidence by him. Even if a document is privileged at common law a further question arises in the tax context: does the common law privilege justify a refusal to disclose the document to the Revenue? This is discussed in paragraphs 2.21 and 2.22 below.

2.21 At common law the concept of legal professional privilege is complex. The protection it provides has significant limitations. It is not the case that every communication, of whatever nature, by or to a lawyer (barrister, Scottish advocate, or solicitor) is privileged. At common law the two significant situations in which privilege arises are as follows:

(a) *Litigation privilege.* Documents created for the dominant purpose of litigation are privileged. The privilege covers not only documents prepared by the lawyer, but also documents brought into existence by third persons for the purposes of litigation. Therefore, once litigation has started or is contemplated, documents prepared by non-lawyer advisers (including tax advisers) may be privileged. It is considered that litigation for this purpose includes a tax appeal, although there appears to be no case in which this point has been expressly confirmed.

(b) *Advice privilege.* Documents passing between a client and his legal advisers are privileged if they are written for the purpose of obtaining or giving legal advice. Who is a legal adviser for this purpose is an open point, but the description is not restricted to lawyers in private practice. This type of privilege does not extend to documents to or from non-lawyers. So tax advice (not obtained for purposes of litigation) from a non-lawyer adviser is not privileged at common law. Nor are commissioned reports or investigations of companies.

2.22 Legal professional privilege should not be confused with the protections from disclosure to the Revenue given to tax advisers by some subsections of TMA 1970 s.20B (see paragraph 2.17 above). These latter protections arise from express statutory provisions and are protections of the adviser restricting the powers of the Revenue to require information or documents from him. Legal professional privilege, on the other hand, exists under the common law and is the privilege, not of the lawyer, but of the lawyer's client. The general common law rule is that the client, unless he waives the privilege, cannot be required to produce documents or answer questions where the subject matter is protected by privilege; nor can the lawyer produce the documents or answer the questions without the client's consent. There are exceptions, one of which is where a document came into existence as a step in criminal or illegal activity. It is immaterial whether the member was a party to the criminality or illegality.

2.23 Another possible exception is where the common law privilege is overridden by an express statutory provision. In this connection unclear questions may arise in the tax context. In particular, are documents or information which are covered by common law privilege protected from disclosure pursuant to a statutory notice (for example under TMA 1970 s.20) served on the client or the member? Or is the correct legal position that a valid statutory notice overrides privilege at common law?

2.24 There is little or no guidance on these questions in reported cases. It is, however, not uncommon for members, or their clients, when asked for some particular document or item of information by the tax authorities, to reply to the effect that, because the document or information is privileged, it is not being disclosed. If a member is consulted about, or receives himself, a request from the tax authorities (whether in the form of statutory notice or not) which calls for disclosure of material which he believes to be privileged at common law and which the client does not agree to disclose, it is suggested that in the first instance the member should reply along the lines mentioned. (See also paragraph 2.16). The tax authorities may not pursue the matter: frequently they do not (though this should not be regarded as some sort of tacit acceptance on their part that privileged matters are as a matter of law protected from compulsory disclosure under statutory powers). If they press the request for the documents or information the member should consider seeking specific legal advice.

Irregularities and errors

2.25 In the course of a member's relationship with the client, whether as agent or principal, he may become aware of irregularities or errors in the client's tax affairs. The client should be informed at once, normally in writing. Tact may be required and immediate corrective action may be difficult but the member should be seen to have acted correctly at the outset (see also Sections 4 and 9).

Materiality

2.26 The requirement that accounts should show a true and fair view implies that materiality is a factor that can be taken into account. The courts have long recognised this and FA 1998 s42(1) specifically requires the profits of a trader be computed on a basis which gives a true and fair view, subject to such adjustments as may be required for tax purposes. In other cases the tax authorities do not officially recognise the concept of materiality and the fact that an error or an omission is small does not of itself mean that the member can ignore it.

2.27 Whether an amount is to be regarded as material depends upon the facts and circumstances in each case. An amount which is not regarded as material for audit purposes may still be material for tax purposes. The tax authorities are not prepared to indicate whether there is an absolute minimum which they are prepared to disregard as not material. At least in the context of direct tax a figure of £100 or less might reasonably be seen as not material in the majority of circumstances.

2.28 In considering whether or not he must cease to act because a client refuses to make or permit a disclosure to the tax authorities a member may reasonably have regard to the materiality of the amount involved. See also paragraph 5.2 regarding Revenue errors and Sections 4 and 9.

Money laundering

2.29 Under the terms of the Criminal Justice Act 1988 as amended by the Criminal Justice Act 1993, tax evasion amounting to an indictable offence, or equivalent conduct overseas, will result in the acquisition of criminal proceeds. This amounts to money laundering and could require a report to be made to the National Criminal Intelligence Service (NCIS). Although there is at present no specific offence of failure to report money laundering other than that relating to drugs or terrorist activities, members should consider reporting any suspicions they have formed as a defence to a possible charge of assisting a money launderer. In particular, where a client has refused to disclose an admitted irregularity, or where criminal conduct, separate from or in addition to the tax evasion, is suspected, a report may be appropriate.

2.30 Firms engaged in relevant financial business as defined by the Money Laundering Regulations (SI 1993/1933), including those authorized under the Financial Services Act 1986 for the provision of investment services, are required to establish procedures for the forestalling and prevention of money laundering, including the reporting of money laundering suspicions. Such systems should lead to the reporting of all money laundering suspicions, including tax evasion, whether committed in the UK or elsewhere. Many other firms are expected to have established such procedures as a matter of best practice. Members should normally report through their firm's usual procedures.

2.31 A report by a member to NCIS may be used in furtherance of criminal enquiries. Whilst NCIS have stated that they will not withhold information from the Revenue, and may pass on such information in the furtherance of tax collection, a report to NCIS should not be considered a substitute for proper disclosure to the tax authorities. Where a report has been made to NCIS, the client should not normally be informed because this may amount to 'tipping-off' under the terms of the legislation.

2.32 The money laundering legislation does not prevent a member from advising clients on negotiations with the tax authorities in respect of evaded tax liabilities, on a bona fide basis of full disclosure in accordance with the guidelines. Further guidance on the effects of the money laundering legislation and how to report suspicions is contained in Section 4.6 of Professional Rules and Practice Guidelines (1999).

II INLAND REVENUE TAXES

3. DISCLOSURE UNDER SELF-ASSESSMENT

General

3.1 The taxpayer has primary responsibility to submit a correct and complete return to the best of his knowledge and belief.

3.2 As a general proposition it is likely to be in a taxpayer's own interest to ensure that factors relevant to his tax liability are adequately disclosed to the Revenue. The reasons for this are twofold:

(a) his relationship with the Revenue is more likely to be on a satisfactory footing if he can demonstrate good faith in his dealings with them; and

(b) he is likely thereby to be protected from the raising of a discovery assessment under TMA 1970 s.29.

3.3 It is at all times for the taxpayer to decide what information should be disclosed to the Revenue and in what manner. The member should ensure that his client is aware of the factors involved to enable him to reach an informed decision. Among those factors are:

(a) the terms of the applicable law;

(b) the view taken by the member;

(c) the extent of any doubt that exists;

(d) the manner in which disclosure is to be made; and

(e) the materiality of the item in question.

3.4 In dealing with the tax authorities or other third parties in relation to a client's tax affairs a member should bear in mind that he is acting as the agent of his client. He has a duty to present his client's case to the best of his ability and in the best possible light. Although a member is not required to verify information provided by a client he should take reasonable care to ensure that the facts presented are correct and that no attempt has been made to mislead.

3.5 A member owes a duty of confidentiality to the client. Thus, in general, a member should not disclose any information received in a professional capacity without the consent of the client whether in the engagement letter or elsewhere (see paragraph 2.2).

3.6 In a Press Release dated 31 May 1996 (reproduced at Annex H) the Revenue indicated their views as to the manner in which taxpayers should make their own disclosures. While this guidance may be adequate for taxpayers with straightforward affairs it is not considered that it can be regarded as satisfactory for more complex cases, which probably represent the majority of taxpayers who are represented by agents.

Discovery powers

3.7 Under TMA 1970 s.29(1) an officer of the Board is given powers to make an assessment to make good a loss of tax if he discovers that income has not been assessed, or has been under assessed, or that excessive relief has been given. However no such assessment may be made unless:

(a) the loss of tax is attributable to fraudulent or negligent conduct on the part of the taxpayer or his agent; or

(b) at the expiry of the period during which the officer is entitled to enquire into the taxpayer's return (normally 12 months from the filing date) the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation giving rise to the loss of tax.

3.8 Information under s.29(6) is to be regarded as made available to the officer if:

(a) it is contained in the return for the relevant year, or in any accounts, statements or documents accompanying the return; or

(b) it is contained in any claim for the relevant year, or in any accounts, statements or documents accompanying the claim; or

(c) it is information the existence of which, and the relevance of which as regards the loss of tax, could reasonably be expected to be inferred by the officer from the foregoing, or which is notified in writing to the officer.

3.9 Under s.29(7), in determining the extent of the information that is to be regarded as available to the officer in considering a return or claim for a particular year there is to be included information made available to the officer in respect of returns for the two preceding years.

3.10 In 1985 the House of Lords considered the discovery powers of the Revenue in the case of *Scorer v Olin Energy Systems* (*58 TC 592*). The facts of that case were that a company's corporation tax computations included a claim to offset a loss arising from a defunct trade against profits of a continuing trade, and the claim was admitted by the inspector. The court held that it was not open to the Revenue to reopen the assessment and to disallow the loss because although the inspector's decision was wrong:

(a) there had been no deliberate intention to mislead on the part of the taxpayer or his agents; and

(b) the claim had been sufficiently described in the computation for its significance to be apparent and in the circumstances the inspector could not reasonably be regarded as having agreed the computation without having understood and accepted the point.

3.11 The Olin case was decided in an era which was governed by the existence of an assessment. The introduction of self-assessment, and the enactment of TMA 1970 s.29(6), means that in all probability the Olin decision is no longer of direct effect. However it does indicate the likely attitude of the courts towards the operation of s.29(6).

Accompanying documents

3.12 The member should discuss with the client the extent to which documents are to be submitted to accompany the return. For companies, accounts are required in almost all cases. For trading individuals and partnerships there is no such requirement but it is likely to be good practice to send them in all but the simplest cases, because they are likely to supplement the self-assessment information contained in the tax return. In such cases it is also likely to be desirable to supply:

(a) computations linking the accounts to the figures in the tax return; and

(b) analyses of major items contained in the accounts, with explanations of disallowances and to refer to these on the face of the return.

3.13 In non-trading cases it is likely to be desirable to supply further information where the identity of figures is not readily apparent, for example :

(a) computations of chargeable gains including valuations where appropriate; and

(b) lists of investment income.

3.14 Where the taxpayer has undertaken a taxable transaction in the year, for example where a company has disposed of a major asset such as a subsidiary company, it may be desirable to provide documentation, for example the sale agreement. However in so doing the member should consider whether the relevance of the document could 'reasonably be expected to be inferred' without further amplification, particularly in the context of a lengthy document, and it would be sensible to indicate the extent to which it is seen by the taxpayer as relevant to the return.

3.15 In considering the extent to which the relevance of accompanying documents needs to be explained, the member is entitled to assume that the Revenue are broadly familiar with, but not expert in:

(a) normal accountancy terminology;

(b) generally-accepted accounting principles and financial reporting standards;

(c) generally-accepted auditing principles;

(d) the requirements of the Companies Acts; and

(e) the background to, and the relevance of, the usual wording of audit reports.

3.16 The Revenue have indicated (see Annex H) that they will regard documents as accompanying the return if they are sent in support of the return and within one month of its submission.

Benefit of the doubt

3.17 The report of the Keith Committee (Cmnd 8822) published in March 1983 contains in Chapter 7 a discussion on the subject of tax avoidance and concludes that a taxpayer's return ought to require an answer to a question framed along the following lines:

> 'In making this return have you taken the benefit of any doubt about whether any item ought to be declared, or any relief or deduction allowed? If so give brief details.'

3.18 In the event the Committee's recommendation was not adopted and there is no statutory requirement to indicate areas of doubt. However, the member ought to consider carefully what disclosure if any might be necessary in such cases. Although the context of the Committee's proposal was tax avoidance, the issue is relevant to any self-assessment tax return where a position is taken which is not free from doubt. For example, additional disclosure should be considered:

(a) where the Revenue have published their interpretation or have indicated their practice on a point, but the taxpayer proposes to adopt a different view, whether or not supported by legal opinion; and

(b) where there is inherent doubt as to the correct treatment of an item, for example expenditure on repairs which might be regarded as capital in whole or part.

Requests for guidance, including clearance applications

3.19 In 1990, and again in 1994, the Revenue have made it clear that they require a very high standard of disclosure if a taxpayer is to be able to rely on guidance provided in response to a request from a taxpayer or his agent. Details of the information required are to be found in Annex G, where the Revenue's letters dated 18 October 1990 and 3 June 1994 have been reproduced.

3.20 A member who is uncertain whether his client should disclose a particular item should consider taking further advice before reaching a decision and ensure that the client understands the issues and implications and the proposed course of action. Such decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including contemporaneous notes of discussions with the client or with other advisers, copies of any second opinion obtained and the client's final decision.

4. ACQUIRING KNOWLEDGE OF DIRECT TAX IRREGULARITIES

For the purposes of this Section, the term irregularity is intended to cover matters which could be treated as civil or criminal fraud for direct tax purposes.

Generally

4.1 A member must do nothing to assist a client to commit any criminal offence, or to avoid the consequences of having defrauded the Crown of tax or of having been negligent in regard to direct tax matters. This is equally valid under both an assessed and a self-assessed system.

4.2 A member who suspects that an irregularity may have occurred should discuss the position with the client. This applies whether or not the member has acted in relation to the actual matter concerned. Members should be aware that Statement of Auditing Standards 110 (Fraud and Error) gives guidance to auditors which may have relevance in a fiscal context. Members are particularly referred to paragraphs 50 to 64 of that publication.

4.3 If there is doubt as to whether or not an irregularity has occurred the member should consider protecting his position by obtaining other advice (see paragraph 1.6).

Materiality

4.4 In considering the action which he should take in the circumstances outlined in this section, the member may take account of materiality but reference should be made to paragraphs 2.26 to 2.28.

Advice to be given where an irregularity is admitted

4.5 A member whose client has admitted an irregularity should advise the client in writing to disclose it to the Revenue. The member should explain the consequences of not doing so, in particular, that:

(a) should the Revenue discover the irregularity later there might be no defence against the imposition of penalties;

(b) having knowledge of the irregularity but suppressing it may be construed as a criminal offence or a civil fraud; and

(c) interest may accrue up to the time the tax is paid.

When the Revenue are not aware of an irregularity

4.6 Where there is an irregularity which the Revenue have not discovered, voluntary disclosure and payment of the tax will usually reduce the level of a penalty, although interest will remain due. The Revenue does not regard interest as penal, but merely commercial restitution for use of the money that was in fact due to the Exchequer. Prompt disclosure of an error may avoid suspicion by the Revenue that it was deliberate, thus reducing the risk of a civil fraud penalty.

When the Revenue allege that irregularities may have occurred

4.7 When the Revenue allege that an irregularity may have occurred, but it has not been identified by the member or his client, the member should assist his client by approaching the situation with care and objectivity.

4.8 The member should establish from the Revenue such details as he can of the alleged irregularity and the circumstances in which it occurred. This should take place at a meeting or in the course of correspondence, depending on the circumstances.

4.9 The member should then discuss the position with his client and establish with him the full facts relating to the alleged irregularity. The member should evaluate the Revenue allegations in the light of the facts as they have been found and where appropriate he should advise his client to make a full disclosure to the Revenue and to offer them all facilities for investigation.

4.10 It may be appropriate for the member, having agreed this with his client, to offer that a full report of the facts behind and surrounding the alleged irregularity be prepared by the member on behalf of the client with a view to making a full disclosure to the Revenue.

When the Revenue are aware of an irregularity

4.11 When the Revenue are aware that an irregularity has occurred, an interview under caution may be conducted. If the member is made aware of such an interview, he should notify his client of the seriousness of the proposed Revenue action and advise him to take advice from a criminal law specialist. It must be apparent to all that an interview under caution is an indication of the possibility of a criminal prosecution.

4.12 Interviews conducted by members of the Special Compliance Office are frequently carried out within the terms of the Hansard practice as set out in Inland Revenue Code of Practice 9 (CoP 9, Special Compliance Office Investigations: cases of suspected serious fraud). The Hansard statement makes it clear that full disclosure and full co-operation are very important factors in their decision as to whether to seek a negotiated settlement. The Hansard statement also makes it clear that the Revenue always retain the discretion to prosecute in appropriate cases. A member should advise his client to make a full disclosure to the Revenue and ensure that at each meeting with the Revenue the client is represented by a professional adviser experienced in that type of investigation.

4.13 Until it has become clear that criminal proceedings are not being considered, the member should bear in mind that the client has a right to silence. He should exercise careful judgement in giving his advice and, if appropriate, tell the client to obtain specialist advice, which may include specialist legal advice. In cases where Special Compliance Office are involved, the adviser should confirm whether Code of Practice 8 or 9 will be used, although the client should be made aware that this will not guarantee that criminal proceedings will not follow. While Special Compliance Office have been instructed not to hold 'neutral' interviews (namely ones where neither the Hansard caution nor a Code of Practice is quoted), some officers may attempt such an opening. If no Code of Practice is offered, it should be assumed that criminal proceedings are being contemplated.

4.14 Equal care must be exercised in cases handled by the local district. An assurance that any disclosure will be dealt with along civil procedures before any admissions are made is unlikely to be obtained and districts are not authorized to administer Hansard or Code of Practice 9. However, before advising on a disclosure to a local inspector, the member should seek to establish that the client has not:

(a) been the subject of a previous investigation;

(b) previously completed a certificate of full disclosure, a certificate of bank accounts operated or a statement of assets and liabilities;

(c) used false documentation;

(d) conspired with another taxpayer to cheat the Revenue; or

(e) at any time practised as a lawyer, accountant or tax adviser.

If any of the above applies then a member should tell his client to obtain specialist advice, including, if appropriate, specialist legal advice.

The importance of confirming admissions of irregularities by clients

4.15 A member whose client has admitted an irregularity should consider whether to advise the client to take legal advice. A member should normally ask for written confirmation of the facts which are the basis of an irregularity in as much detail as is available at the time, but it is advisable that all such correspondence should be headed, 'This is prepared for the purposes of litigation'. Reasons for written confirmation include the following:

(a) to minimize the room for doubt about the sum involved: in some cases such as undisclosed sales, the figure may be an estimate but it is important to clarify the extent of the admission;

(b) to protect a member against any subsequent retraction by the client; and

(c) to reduce the risk that the correspondence has to be disclosed for the purposes of any litigation which might take place.

4.16 Misunderstandings can arise, especially when the client is under investigation by the Revenue. If a member were to inform the Revenue of an irregularity of a stated amount without having confirmed the amount with the client, the member could be in a vulnerable position if the client later claimed it was a lesser sum.

Instructions to disclose

4.17 If the client accepts the member's advice and instructs him to make a full and immediate disclosure, the member should write to the Revenue and either give full details or explain the position in general terms and say that the client has directed that a complete disclosure will be made as soon as possible. This letter should be provided to the Revenue as soon as possible in order to minimize the risk of their becoming aware of the problem before they are told. It would be improper to allow the Revenue to agree a settlement without putting them in possession of the full facts. The Revenue usually require a certificate of full disclosure to be signed by the client and it is vital that the client appreciates the importance of such a certificate.

Disclosure to other tax authorities of an admitted irregularity

4.18 The member should also consider the need to make a similar disclosure to other tax authorities

Unwillingness or refusal to disclose an admitted irregularity

4.19 'Unwillingness' in this context includes such procrastination or prevarication as effectively amounts to a 'refusal', albeit not expressed. A member should allow a reasonable period for the client to make a decision. Thereafter the member must decide whether continuing 'unwillingness' is in fact 'refusal' for this purpose.

4.20 If the client refuses to accept the member's advice to make a full and prompt disclosure to the Revenue, the member should ensure that his conduct and advice are such as to prevent his own probity being called into question. It is essential therefore to advise the client in writing properly and fully of the consequences of the failure to disclose.

4.21 The member should explain to the client the Revenue's wide-ranging powers to obtain information from taxpayers and their agents. The client should be told that there is a considerably greater likelihood of a criminal prosecution (with the likelihood of imprisonment) where the Revenue 'discover' a fraud than where the client makes a voluntary disclosure and offers a suitable monetary settlement, and that voluntary disclosure normally results in a lower scale of penalty.

Where the member has acted in relation to the irregularity

4.22 A member who has acted in relation to the irregularity should make it plain that if the client refuses to authorize disclosure, the member must cease to act for the client in all matters, not just those related to direct tax save that the member is entitled to take the view that he is not obliged to cease to act where the amounts are not material. The member should also explain that if the client refuses to disclose, the member must act in accordance with paragraph 4.23. The client should be left in no doubt that this step could result in the Revenue commencing enquiries which might lead to the discovery of the non-disclosure and possible offence.

4.23 If, despite fully advising the client of the consequences, the client still refuses to disclose to the Revenue, the member should forthwith:

(a) cease to act for the client in all respects and inform the client in writing accordingly; and

(b) inform the Revenue that he has ceased to act for the client.

If the matters in question affect accounts or statements which carry a report signed by the member as to their accuracy, he should inform the Revenue that he has information indicating that the accounts or statements cannot be relied upon, provided that the member has included in his engagement letter with the client wording such as that set out at paragraph 2.2. If he has not, and does not have his client's consent to the disclosure of errors generally, he should take specialist advice as to what action he should take.

4.24 The member should explain the practical hurdles to the appointment of a new adviser, if he ceases to act, in that it is the duty of professional advisers before accepting professional work to communicate with the person who previously acted in connection with that work.

4.25 A member who follows paragraphs 4.22 and 4.23 is still under no legal duty to explain to the Revenue the reasons why the returns, accounts, etc. are defective, and should do so only with the former client's permission.

Where the member has not acted in relation to the irregularity but has acted in relation to other tax matters

4.26 The member may discover a material irregularity which occurred either before the engagement began or in relation to matters dealt with by another adviser or by the client himself, for example PAYE, NIC and returns on forms P11D. In such cases, the member should advise the client to make full disclosure to the Revenue. If the client refuses to disclose, the member should cease to act because the relationship of trust which must exist between a member and the client will have been impaired and, just as important, the member's relationship with the Revenue would be prejudiced.

4.27 However, as the member has not acted in those tax matters to which the irregularities relate, the member's duty is merely to inform the Revenue that he has ceased to act.

Where the member has not acted in relation to tax matters

4.28 A member who has not acted in relation to tax matters, but discovers or suspects that a client has committed a tax irregularity, should discuss the position with the client. If the client confirms the discovery or suspicion the member should ask the client to discuss the situation with the tax adviser with a view to making full disclosure to the Revenue. If the client refuses, paragraph 4.21 applies.

4.29 The member's duty is limited to encouraging disclosure to the Revenue. It is thereafter for the client to decide how to proceed. The member is not required to take the steps referred to in paragraphs 4.22 to 4.25. However, in the event that the client fails to make the disclosure, the member should consider whether the relationship with the client, which is based on trust, has been impaired and, if it has, whether it is proper to continue to act for the client. A member who decides to continue to act should not thereafter give any advice in relation to any tax matters (other than the matter of disclosure) unless and until the client agrees to disclosure to the Revenue.

When the client refuses to admit an irregularity

4.30 Where the client denies any wrongdoing to the satisfaction of the member, the member is free to continue to act for that client. The member should protect himself by ensuring that his files fully document the discussions with the client and the reasons why the member is satisfied with the explanations given.

4.31 Where the client denies any wrongdoing and the member rejects outright that denial, the member must cease to act for the client. The member should inform the Revenue that he is no longer acting on behalf of the client and should consider whether he should act in accordance with paragraphs 4.22 and 4.23.

4.32 Where, despite the client's denial of any wrongdoing, the member still has reservations, but does not consider that he is justified in rejecting the denial outright the member must give careful consideration as to whether he can continue to act on behalf of the client. Having exercised his judgement, the member should then proceed having regard to paragraphs 4.28 and 4.29.

Suspicious circumstances

4.33 A member who acts in relation to tax matters and has good grounds to suspect that a client has committed a material tax irregularity should discuss the position with the client to confirm or remove the suspicion. This applies whether or not the member has acted in relation to the actual matter concerned. If the suspicion is confirmed, the member would then have actual knowledge of the irregularity and the guidance contained in this statement applies.

4.34 If the member finds no confirmation but remains suspicious such that the relationship of trust which must exist between the member and the client may have been impaired, the member should consider whether he should continue to act. Paragraph 4.32 applies. If the member is then approached by a new adviser, the member should consider his position in the light of paragraph 4.37.

Request for information from a new adviser

4.35 On changes in a professional appointment the initiative to request information lies with the new adviser who should obtain the proposed client authorization to communicate with the member. The member should not volunteer information to a new adviser in the absence of any such request.

4.36 When the member receives a request for information from a new adviser, he should:

(a) seek authorization from the former client to disclose all relevant information to the new adviser;

(b) on receipt of such authorization, disclose all the information needed and reasonably requested by the new adviser to enable him to decide whether to accept the work; and

(c) to the extent that he is authorized to do so, discuss freely with the new adviser all matters of which he should be aware.

4.37 If the former client refuses permission, the member cannot disclose information to the new adviser. However, the member can refer the latter to the fact that there is correspondence between the member and the former member and the former client without disclosing what it says. The new adviser will then ask the client for copies of that correspondence.

4.38 The new adviser will therefore become aware of the non-disclosure and possible offence. Since the previous adviser will have resigned on the grounds of the client's unwillingness or refusal to disclose, it should follow logically that if the client continues to be unwilling or refuses to disclose, or refuses permission for the previous adviser to communicate with the new adviser, the new adviser should decline to act. However, the new adviser is entitled to consider, after taking his own advice, whether or not he comes to the same conclusion as the former adviser.

5. INLAND REVENUE ERRORS

Notes:

1. The Revenue have explained that this section presents them with major difficulties and in particular they do not see how 'special circumstances' as in paragraph 5.3 could exist. They ask that members should take all possible steps to ensure that their clients pay the correct amount of tax due in law, even where following an error by the Revenue insufficient tax is demanded.
2. Members should be aware that the law in Scotland differs.

General

5.1 Throughout this section references to Revenue errors are to the position which may arise from the raising of an inadequate assessment, an under collection of tax or interest or an over repayment of tax or interest, in circumstances where it is apparent to the member that a mistake has been made by the Revenue. The mistake may be one of law (but see paragraph 5.6), or may be a calculation error, or a clerical error; equally it may arise from a misunderstanding on the part of the Revenue of the facts as presented. Reference should also be made to the Revenue publication Code of Practice 1: Mistakes by the Inland Revenue.

5.2 In this section references are made to de minimis amounts of tax. The Revenue have said that they accept that a trivial amount need not, on de minimis grounds, be disclosed, but they have not at present given any guidance on this matter. Members are referred to paragraphs 2.26 to 2.28.

5.3 Where the member becomes aware that the Revenue, in full possession of the facts, have made an error in dealing with the affairs of a client, the member should seek the client's authority to advise the Revenue of the error. If the client refuses to give that authority, the member should consider whether there are any special circumstances which might render the refusal reasonable. If there are not then, unless the amount of tax or interest at stake is de minimis, he should consider whether he should continue to act, bearing in mind both the importance for trust to exist between the Revenue and the member, and the exposure of both the member and the client to possible criminal or civil penalties should the Revenue not be informed of the error.

5.4 If, however, a member is specifically asked by the Revenue to agree a figure, he must, subject to paragraph 5.6, agree what he believes to be the correct figure; this may be a figure negotiated in the course of discussions following full disclosure of the facts and circumstances. He is not at liberty to accept a figure he knows to be incorrect, nor does he need to seek his client's authority to disclose to the Revenue their errors.

5.5 It may be prudent for members to include in their letters of engagement authority to advise the Revenue of errors, so that reference to the client is not needed. Where no such authority has been obtained, the procedure in paragraph 5.8 should be followed.

5.6 Where the Revenue make an assessment based on an interpretation of law other than that favoured by the member, the member should review the position carefully. If the member is satisfied that the full facts have been supplied, that the Revenue position appears to have been arrived at in the light of a proper understanding of those facts, and that in all the circumstances the Revenue's interpretation is a tenable one, he is not obliged to notify the Revenue of the consequences of his favoured interpretation. It would, however, be wise for him to inform his client of the position in case a further assessment is raised at a later date.

5.7 Counsel has advised that, in all other cases of excessive repayment or inadequate demand, unless the tax at stake is de minimis, the member should take the client's instructions. The client should be asked to authorize the member to advise the Revenue of the error, and warned of the possible legal consequences if he is reluctant to give the authority sought; such consequences might additionally include interest and penalties.

5.8 Because the member may himself commit a criminal offence under the Theft Act 1968 (see paragraph 5.11) through his involvement in obtaining an excessive refund, he should seek his client's authority to inform the Revenue of the error. If this is not forthcoming he should consider taking independent legal advice with a view to:

(a) notifying the Revenue in any event, and notifying the client of his action; and

(b) ceasing to act for the client.

5.9 Counsel has advised that, if the Revenue fail to take action when an error by way of under assessment is clearly pointed out to them, a member has no further duty in the matter.

5.10 A member should ensure that a written record is kept of all advice given to clients in connection with Revenue errors, and of any reassessment of his relationship with his clients. The member should also consider taking independent legal advice where he has any doubts as to the proper course of conduct to be followed. Revenue errors may cause expense to members, and thereby to their clients. Members should bear in mind that in some circumstances clients may be able to claim compensation. (See Code of Practice 1: Mistakes by the Inland Revenue.)

Legal considerations

Offences under the Theft Act 1968 (not applicable in Scotland)

5.11 Theft Act offences might apply when a repayment results from the error. The most likely offence is that of theft contrary to the Theft Act 1968 s.1. Such an offence is committed when a person dishonestly retains, intending to keep or use, money which he knows does not belong to him. Dishonesty is the core of this offence. If the defendant were to raise the defence that he did not consider what he was doing to be dishonest, the prosecution would have to prove:

(a) that what was done was dishonest by the ordinary standards of reasonable and honest people; and

(b) that the defendant himself must have realised (or would have, had he stopped to think about the matter) that what he was doing was by those standards dishonest.

It is no defence that the defendant did not himself regard his conduct as dishonest.

5.12 If, before a client receives an excessive repayment, a member knows that it is to be made and that it is excessive, where the member was in any way concerned, however innocently, in obtaining it (for example, by submitting the repayment claim) but does nothing to draw the Revenue's attention to the error, the member is at risk of prosecution. This is a very difficult area for the member. If he was unaware at the time he did the act he committed (for example, sign an account or submit a repayment claim) that the claim was excessive, and he only obtained that knowledge later, and if he does not himself receive the repayment, as a matter of law he is not guilty of any offence. The problem that the member faces however, is the risk of it being alleged against him that his knowledge of the client's dishonesty was earlier than in fact it was. Hence he would be vulnerable to prosecution either alone or together with the client.

5.13 If the Revenue send the excessive repayment to the member, and if he is aware that it is excessive, he should simply return it to the Revenue.

5.14 The offences for which the member would be at risk of prosecution are:

(a) obtaining a money transfer by deception;

(b) procuring the execution of a valuable security (for example, the repayment warrant) by deception;

(c) dishonestly retaining a wrongful credit; and

(d) conspiracy to commit any of those offences.

5.15 Members should also bear in mind that it is a serious criminal offence to tell

the Revenue an untruth (whether oral or in writing) if this is done with intent to 'prejudice' the Revenue, that is to deceive an officer into not doing his duty, namely further to investigate the taxpayer's affairs and raise any tax assessments that might be appropriate, whether or not any additional tax is in fact due from the taxpayer.

The offence of cheat

5.16 Revenue prosecutions for the common law offence of cheat are not uncommon. This is an ancient offence which requires proof of an intent to defraud or to prejudice the Revenue. The Revenue need to prove dishonesty, the test of which is effectively the same as that set out above.

5.17 The offence of cheat is certainly applicable to the dishonest obtaining or retention of over-repayments of tax.

5.18 Counsel has advised that mere failure to advise the Revenue that they have demanded insufficient tax, particularly if the amount is significant, may in strict law be sufficient grounds for a successful prosecution. Members are therefore warned that their clients have no valid defence to a charge of cheating in cases where they refuse to authorize the member to disclose to the Revenue an error of fact which results in such an underpayment.

5.19 The reality of the risk of such a prosecution being instituted, of course, depends on the facts of each case.

Other matters

5.20 Counsel has also advised that there is no legal obligation on a taxpayer, or a member, to press the Revenue to issue an assessment, even if by reason of the delay the assessment goes out of time, provided that the full facts and information have been supplied.

6. SUPPLEMENTARY GUIDANCE ON INLAND REVENUE ERRORS UNDER SELF-ASSESSMENT

6.1 With effect from April 1996, the tax affairs of individuals, partnerships and trustees have been dealt with on a self-assessed basis. This was extended to bodies corporate with effect from accounting periods ended after 1 July 1999. The purpose of self-assessment is to enable the Revenue to accept tax returns without further correspondence and to operate procedures whereby the onus is on the taxpayer to pay the correct amount of tax at the correct time without intervention by the Revenue, but subject to review.

6.2 Self-assessment clarifies what a taxpayer must do to discharge his responsibility to pay the correct amount of tax due in law. It explicitly links the completion of a tax return with the creation of the legal charge to tax (the 'self-assessment'). In addition there is a greater need to get the tax right first time. As a result there is a greater onus on members acting as agents to assist their clients in this regard.

6.3 Revenue errors may arise under self-assessment. Members will need to be alert to the following types of error:

(a) failure to issue a calculation of tax payable if a taxpayer has elected for the Revenue to do so;

(b) failure to raise an assessment or amended assessment to tax when the initiative to take action rests with the Revenue; and

(c) failure to demand or collect tax properly payable once a return is submitted and/or a self-assessment has been made including underpayment of tax and interest.

See also paragraph 5.1.

6.4 When advising clients of possible action in the light of Revenue errors, members should firstly consider whether the taxpayer has made a return which constitutes adequate disclosure (refer to Section 3). Only in this context should the impact of Revenue errors be judged when the onus is on the taxpayer to self-assess.

6.5 It is reasonable for members to weigh the cost to the client of rectifying errors or mistakes against the amount of additional tax at stake. (See also paragraph 5.2.)

6.6 Members are advised to include the form of words suggested in paragraph 2.2 in their letters of engagement.

7. INVESTIGATION OF TAX ACCOUNTANTS

General

7.1 This section sets out circumstances relating to the law as it presently stands, and does not take account of possible changes arising from the joint Customs and Revenue press release CW3 dated 9 March 1999 (Securing the Tax Base).

Background

7.2 The Revenue have specialist units, part of whose brief is to monitor and investigate the standards of practising accountants and tax practitioners.

7.3 Generally the investigator will seek a meeting with the member. In the first instance it may be that the investigator only outlines to the member the reasons for seeking a meeting. There is no legal obligation on a member to acquiesce. In order to enable the member to consider whether to agree to the request, he should request full details of the matters giving rise to the investigator's concerns. If a meeting is held, it is likely that the investigator will ask to examine one or more sets of working papers relating to clients of the member either immediately or shortly after the meeting. There is no legal obligation on the member to comply at that stage.

7.4 On the evidence available before, during, or after a meeting with the member the investigator will consider whether:

(a) the member may have committed a criminal offence such as false accounting, or conspiring with a client to defraud the Revenue; or

(b) the member may have committed an offence within TMA 1970 s.99 (see paragraph 7.8); or

(c) the member's standards may be otherwise unsatisfactory in that he has been negligent or incompetent in preparing accounts and returns for submission to the Revenue.

7.5 Any approach to a member by an investigator should be regarded as a serious matter, as should any request for access to working papers. A member who receives such an approach should consider taking the advice of a suitably-experienced specialist in tax investigations at an early stage. A member who believes at any stage that criminal proceedings may be taken against him and who is not entirely confident of the legal position should take legal advice, especially in view of the conflict between refusal to co-operate and his obligation of confidentiality.

7.6 The Revenue's legal powers to obtain information are considered at Annex I. It should be noted that TMA 1970 s.20A enables a Revenue investigator to obtain access to a member's working papers, and that its operation is clearly restricted to those circumstances where a 'tax accountant' has been convicted of a tax offence by a UK court or had a penalty imposed under TMA 1970 s.99. The Revenue can also obtain access to working papers for specific clients under TMA 1970 s.20(3) subject to the override in TMA 1970 s.20B(11), and a warrant for entry and seizure under TMA 1970 s.20C would in practice give access to the working papers of all clients.

7.7 A negotiated civil settlement resulting in no penalty actually being imposed on the member does not enable the Revenue to use s.20A.

7.8 Before the Revenue are able to impose a penalty on any person under s.99 they have to prove that the person:

(a) had assisted in or induced the preparation or delivery of any information, return, accounts or documents; and

(b) knew, at the time of the preparation or delivery, that the items would be, or would be likely to be, used for some purpose of tax, and knew that they were incorrect.

The Revenue have confirmed that auditors who correctly ignored small errors because they were not material would not fall within s.99: see paragraph 7.9.

7.9 Following the case of *Inland Revenue* v *Ruffle (\[1979\] SC 371)* and observations made by the Revenue in 1989, it is clear that because s.99 is a penalty section a very high standard of proof is imposed on the Revenue. In relation to TMA 1970 s.99 (Assisting in preparation of incorrect return, etc.), the changes then proposed by clause 161 of the Finance Bill 1989 were discussed at a meeting with the Revenue, the agreed notes of which were issued by the Institute of Chartered Accountants in England and Wales as TR759. These notes include the following:

(a) The Institute of Chartered Accountants in England and Wales considered that the provisions should be qualified to make it clear that auditors who correctly ignored small errors because they were not material did not fall within the ambit of s.99.

(b) The Revenue explained that the revised wording corrected two lacunas in the wording of the present section, so that it applied generally to persons involved in the preparation of returns, accounts or other information to be used for tax purposes. These had come to light in the case of *Inland Revenue* v *Ruffle ([1979] SC 371)* and the amended wording was as recommended by Lord Jauncey in that case and endorsed by the Keith Committee. They added that, unlike other penalty provisions in the tax code where there were comparatively weak tests of culpability, s.99 applied only where a person had assisted in the preparation of a return or accounts which he 'knew' to be incorrect. This requirement of 'guilty knowledge' was the equivalent of 'civil fraud' and required a correspondingly high level of proof. It followed that there could be no question of the situations which were of concern to the Institute of Chartered Accountants in England and Wales – an auditor who noticed a small error but decided it was not material, or a person whose responsibility for an error was small – being caught by s.99.

7.10 The Revenue normally act against an individual practitioner, and not against a firm as a whole. It is questionable whether there is any power to proceed under TMA 1970 s.20A in respect of a firm's working papers where the individual penalised under s.99 no longer has the firm's papers in his power or possession (see s.20A(1)).

7.11 SP5/90 (accountants' working papers) explains how the Revenue in practice use the powers available to them (see also Annex I, paragraph 10).

7.12 Even without reliance on any legal powers, a Revenue official can simply request a member to give access to a wide range of working papers. Members should consider the matters referred to below before agreeing to do so.

Confidentiality and freedom to disclose

7.13 There should be no disclosure of confidential client information without the prior consent of the client unless there is a legal right or duty to disclose. There is generally freedom to disclose where it is:

(a) in the public interest; or

(b) in the member's own interest (where paragraph 7.15 applies); or

(c) required by statute.

7.14 The first and last options will generally not apply in the circumstances of Revenue scrutiny of the member's standards, but the member will need to consider whether it is in his own interests to give general access.

7.15 A member may disclose to the proper authorities information concerning a client where it enables him:

(a) to defend a criminal charge or to remove suspicion; or

(b) to resist proceedings for a penalty in respect of a taxation offence (typically TMA 1970 s.99).

7.16 The member is entitled to disclose confidential information only if put on notice that he is suspected of a criminal offence or of committing an offence within, effectively, s.99. Beyond that, access should not be given to client working papers without the client's prior consent.

Further considerations

7.17 Members should bear in mind that:

(a) the papers to which access is given may contain prima facie evidence of criminal offences by the member or a client;

(b) the papers may contain prima facie evidence of an offence within TMA 1970 s.99, leading to an award of penalties under which the Revenue could legally seek access to the accountant's working papers for all clients;

(c) if the member gives access to client working papers without the prior knowledge and consent of the client, he may be liable for breach of at least an implied term of the contract between the member and the client;

(d) other factors may deter the member from disclosing client working papers, such as a possible restriction on access included in the terms of professional indemnity insurance contracts;

(e) if access on a voluntary basis is refused the Revenue may exercise any of the statutory powers referred to above. Alternatively tax districts may be advised that the investigator has misgivings as to the member's standards, and that clients' returns and accounts submitted by the member should be viewed in that light; and

(f) the imposition of a s.99 penalty, or an agreement to enter into a civil settlement with the Revenue, may prejudice the status of the member as a fit and proper person for audit and other regulatory purposes.

Advice in practice

7.18 As stated in paragraph 7.5, a member who believes at any stage that criminal proceedings may be taken against him should take legal advice.

7.19 In particular, where the Revenue have alleged that the member may have committed an offence within TMA 1970 s.99, and it is clear that formal proceedings under s.99 may be taken against him, the member should consider disclosure of working papers in the light of paragraphs 7.13 to 7.17.

7.20 It may be appropriate, after discussions with the investigator, to suggest the appointment of an independent practitioner to review and report on a sample of the member's working papers; this still represents disclosure of confidential information and paragraph 7.16 applies. It is, however, likely that the investigator will still wish to have direct access to a sample of the member's working papers.

7.21 An independent practitioner may be able to negotiate a settlement on behalf of the member. A member is not always the best advocate in his own cause.

7.22 Where it is alleged by the Revenue investigator that the member's standards are unsatisfactory, but in circumstances falling short of the possibility of criminal proceedings or a penalty being imposed under TMA 1970 s.99, then generally the member should not give access to client working papers without the prior knowledge and consent of the client. Any member contemplating giving access to a Revenue investigator where paragraph 7.15 is not in point should consider the matters at 7.13 to 7.17. The possibility of appointing an independent practitioner to represent the member, as discussed at 7.20 , should be considered.

7.23 The member may wish to seek guidance from the Institute or Association in any of the above circumstances. In the first instance it is recommended that the member contact the Secretariat.

III VALUE ADDED TAX

8. DISCLOSURE TO HM CUSTOMS AND EXCISE

Relevant responsibilities in preparing VAT returns

8.1 The client has the primary responsibility to submit a true and complete VAT return to Customs. It follows that the final decision as to whether to disclose is the client's. A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.

8.2 Where a member is acting as a 'tax representative' for an overseas principal the obligations and liabilities of the VAT legislation are imposed jointly and severally on the client and the member. A member who acts in this way as a tax representative should seek indemnity from the client against failure by the client to provide information required. The member should also make clear in writing his obligation to disclose any irregularity to Customs (see Section 9).

8.3 A member is not required to audit the figures in the books and records provided by the client but should exercise normal care and judgement in preparing the return, and should record detailed figures in working papers.

Disclosure of specific transactions to Customs

8.4 Normally, specific transactions need not be described to Customs. Nevertheless, a member may recommend to a client that a particular matter be disclosed in order to avoid uncertainty.

8.5 In such a case the full facts concerning it, including the reasons for doubt, should be disclosed to Customs. The client can then generally rely on any unequivocal ruling in writing received from them on the point.

8.6 If a transaction is found to have been treated incorrectly but it can be shown that full information about it was disclosed to Customs, the client will be able to claim the benefit of the concession concerning misdirection given in the Ministerial undertaking known as the 'Sheldon Statement' and reproduced as VAT Extra-statutory concession A11. The undertaking says 'If a Customs and Excise officer, with the full facts before him, has given a clear and unequivocal ruling on VAT in writing or, knowing the full facts, has misled a registered person to his detriment, any assessment of VAT due will be based on the correct ruling from the date the error was brought to the registered person's attention.'.

8.7 The meaning of full disclosure was considered in *Matrix Securities Limited v IRC ([1994] STC 272)* albeit in the context of direct tax. Customs have stated that the Sheldon statement will not be honoured in cases where a local VAT office has been misled to obtain a specific ruling.

8.8 When disclosing transactions on which the member has advised, extra care may be needed to ensure that the full facts are disclosed. The advice given must not be allowed to affect the member's objectivity.

8.9 Customs consider that they are entitled to override their general guidance by a specific ruling relating to the affairs of a particular taxpayer. Whether a specific ruling is applied retrospectively will depend on whether the general guidance could reasonably have been read as covering the particular case.

Known Customs' practices

8.10 Particular care is needed if Customs have published their interpretation or have indicated their practice on a point and the client proposes to take a different view. Disclosure will probably be prudent in the interests of the client. Even where a taxpayer has counsel's opinion that Customs' interpretation is wrong, it is advisable to disclose the facts to the client's local VAT office in writing making it clear that Customs' interpretation is not accepted. However, the final decision on what, if any, disclosure is to be made rests with the client.

Requests for rulings from Customs

8.11 Once the member is satisfied that it is appropriate to apply for a ruling he should ensure that the client understands the issues and implications of the proposed course of action. This advice to the client should normally be confirmed in writing.

8.12 All rulings should be confirmed in writing. If necessary the client, or the member, should write to Customs confirming the facts and the ruling which is understood to have been given.

8.13 If a written ruling appears to the member to be incorrect, he should consider whether it is clear that full facts were disclosed (the amount of VAT involved may be a material fact) and whether it is clear from the wording of the ruling that the officer of Customs has understood the question.

Effect of rulings and official practice

8.14 Members are entitled to rely on official Customs' practices and rulings where these are favourable to their clients.

8.15 However, there are limits to the extent to which Customs are bound by undertakings and statements of policy which they have given or issued. Examples of restrictions on a taxpayer's entitlement to rely on Customs' rulings are:

(a) The VAT and duties tribunals will have regard to the strict terms of the law in their decisions and may ignore any Customs' advice or extra-statutory concessions which the taxpayer may have relied on even if they have been published in an official Customs' notice or leaflet; and

(b) The tribunals cannot take account of the Sheldon statement.

8.16 If Customs refuse to stand by a ruling given, whether generally or specifically to the client, there may be a remedy in judicial review before the High Court. In this event the member should seek legal advice as soon as possible as to the applicable time limits for such procedures. Application may also be made to the Adjudicator or to the Ombudsman.

8.17 If an error was obvious in the records available when the control officer visited, this should prevent any suggestion of fraudulent evasion or recklessly negligent conduct entailing a criminal penalty; nor should there be any question of an accusation of conduct involving dishonesty which could lead to a civil penalty. However, the concession on misdirection explained in 8.6 will not apply unless it can be shown that the officer saw the records in question and failed to point out the error. By its very nature, this is difficult to prove.

Demands by Customs for information

8.18 Customs' powers to demand information and their policy on access to working papers etc are outlined in Leaflet 700/47: Confidentiality in VAT matters (tax advisers) Statement of Practice. See Annexes J and K.

8.19 Enquiries from Customs are often unexpected and informal and usually arise from a visit to the client. The member should consider whether authorization to reveal the information requested is needed from the client. The nature of the enquiry may not be immediately apparent and the position may need reviewing as it progresses.

8.20 A member who is in doubt about the implications of a question should consider asking for it to be put in writing so that a response may be agreed with the client.

9. ACQUIRING KNOWLEDGE OF VAT ERRORS AND IRREGULARITIES

This section deals with VAT and should be read in conjunction with Sections 1, 2 and 8. For the purposes of this Section, irregularity means conduct which could give rise to prosecution or an evasion penalty (see Annex D). Some errors may constitute or become irregularities.

Generally

9.1 A member must do nothing to assist a client to commit any criminal offence, or to shield the client from the consequences of having defrauded the Crown of tax or of having been negligent in regard to VAT matters.

9.2 A member who as a result of any work undertaken on behalf of a client has reason to believe that a VAT error or irregularity has occurred should discuss the circumstances with the client that gave rise to that belief and consider whether in the circumstances it is appropriate for him to act. Where the member has not acted in relation to that question, he should take into account the fact that he may not be party to all the facts and circumstances and may not therefore be able to reach a conclusion on the issue. It is not the duty of a member to pursue a matter, in respect of which he has not been engaged, to a conclusion unless it affects work in respect of which he has been engaged.

9.3 If there is a VAT error, the member should normally advise the client to follow the procedure set out in Customs Notices 700 paragraph 8.10 and 700/45/93 or any equivalent advice on disclosure in respect of other indirect taxes.

9.4 If there is doubt as to whether or not an irregularity has occurred the member should consider protecting his position by obtaining other advice (see paragraph 1.6).

9.5 A member who assists a client to prepare any return or advises a client on a VAT matter has, subject to the terms of his engagement, no responsibility to carry out an audit of the client's accounts or to investigate any matter not directly affecting the assignment he has agreed to undertake or to seek or to detect any error or irregularity. In general, his duty is limited to carrying out the assigned work, and he need only deal with errors or irregularities in respect of that assignment which came to his attention in performing it.

9.6 Where there is an error which Customs have not discovered, voluntary disclosure and payment of the under-declared or over-reclaimed tax will usually remove the risk of a penalty, although interest may remain due. Prompt disclosure of an error may avoid suspicion by Customs that it was deliberate thus reducing the risk of a civil fraud penalty.

Materiality

9.7 In considering the action which he should take in the circumstances outlined in this section, the member may take account of materiality but reference should be made to paragraphs 2.26 to 2.28. As regards VAT errors in particular, the directions given in Customs Notices 700 paragraph 8.10 and 700/45/93 should be followed.

VAT errors

9.8 Correction of errors up to a prescribed amount can be made on the current VAT return as part of the entries for that period. If this is done, neither penalties nor interest are due. If the net value of the errors is greater than the specified level this procedure is not available, and separate disclosure of the error must be made. Form VAT 652 is provided for the purpose of making a voluntary disclosure separate from the VAT return, although its use is not mandatory and in most circumstances it may be more appropriate to make the disclosure by letter.

9.9 Customs have stated that disclosure of errors after a visit date has been arranged will be rejected where there is reason to believe that:

(a) the errors were disclosed only because of the visit; or

(b) disclosure made during or after a visit was prompted only by Customs' enquiries.

Other voluntary disclosures made after the visit date has been arranged may, however, be accepted by Customs.

Instructions to disclose VAT errors

9.10 Provided the member has the client's written permission (or a note of oral instructions which he has confirmed in writing to the client) to disclose an error too large to be corrected on the next return, he should write to Customs giving as much detail of the inaccuracy in the return(s) as is available.

9.11 It may be more appropriate for the letter of disclosure to be sent by the client. In this case the member may either draft the letter for the client or review the client's draft to ensure that adequate disclosure has been made.

9.12 The disclosure should be made to Customs as soon as possible in order to minimize the risk of their becoming aware of the problem before they are told.

The member prepares or assists in the preparation of the VAT return

9.13 Where the member either prepares or assists in the preparation of VAT returns, and the client refuses to disclose errors which occurred during or before the period in respect of which the member has acted, it may be necessary to cease to act in relation to the client's VAT affairs, or indeed all his affairs.

9.14 If Customs are aware that the member has been acting for a particular client, the member should, when appropriate, notify them that he has ceased to act for that client.

The member prepares or assists in the production of accounts

9.15 A member may prepare or assist in the production of accounts, without advising on VAT. If the client refuses to disclose a VAT error, the member should consider whether the relationship with the client, which is based on trust, has been impaired and, if it has, whether it is proper to continue to act for the client. A member who decides to continue to act should not thereafter give any advice in relation to any tax matters (other than the matter of disclosure) unless and until the client agrees to full disclosure.

The member is engaged to provide VAT advice

9.16 If required to deal with Customs on the client's behalf, the member might not be in a position to do so in good faith whilst aware of an undisclosed error and the member should consider ceasing to act. This does not apply where the member has advised on VAT matters, or otherwise, without dealing with Customs, but the member should consider his position carefully.

Advice to be given where an irregularity is admitted

9.17 A member whose client has admitted an irregularity should consider whether to recommend his client to take legal advice. If this is not appropriate he should advise the client in writing to disclose it to Customs. One of the factors the member must take into account is that he will not have the benefit of legal professional privilege. The member should explain the consequences of not making a disclosure, in particular, that:

(a) should Customs discover the irregularity later there might be no defence against a misdeclaration penalty;

(b) having knowledge of the irregularity without acting upon it may be construed as a criminal offence or a civil fraud;

(c) interest may accrue up to the time the VAT is paid: the policy of Customs not to assess interest in 'no loss to the revenue' cases may not be relevant; and

(d) it would be improper to allow Customs to agree a settlement without putting them in possession of all the facts.

When Customs allege that irregularities may have occurred

9.18 When Customs allege that an irregularity may have occurred, but it has not been identified by the member or his client the member should, if instructed, assist his client by approaching the situation with care and objectivity.

9.19 The member should try to establish from Customs the exact details of the alleged irregularity and the circumstances in which it occurred. This should take place at a meeting or in the course of correspondence, depending on the circumstances.

9.20 The member should then discuss the position with his client and establish with him the full facts relating to the alleged irregularity. He should consider whether to recommend to his client to take legal advice. One of the factors the member must take into account is that he will not have the benefit of legal professional privilege. If legal advice is not thought necessary the member should evaluate Customs' allegations in the light of the facts as they have been found and where appropriate he should advise his client to make a full disclosure to Customs' and to offer them all facilities for investigation.

9.21 It may be appropriate for the member, having agreed this with his client, to offer that a full report of the facts behind and surrounding the alleged irregularity be prepared by the member on behalf of the client with a view to making a full disclosure to Customs.

When Customs are aware of an irregularity

9.22 If Customs intend to prosecute a person for evading tax, they should administer a caution to that person. When, therefore, Customs are aware that a serious irregularity has occurred, an interview under caution may be sought. If the member is made aware of such an interview, he should attempt to ascertain Customs' reasons for the interview and then notify his client of the seriousness and the potential implications of the allegations. If the interview under caution is already taking place, and no legal advice has been sought, the member should repeat the need to take legal advice which Customs should in any case have indicated at the outset as the client's legal right.

9.23 A tax adviser who is not a lawyer has no right to attend his client's interview under caution. Customs have indicated that when a client is being interviewed in a criminal investigation, that client may already be under arrest and there is no obligation to allow a tax adviser to be present during such an interview unless that adviser is also a lawyer. It is therefore unlikely, in most instances, that tax advisers will have access to their clients in such circumstances.

9.24 The benefit of full co-operation and complete disclosure in civil fraud cases is set out in Customs Statement of Practice (VAT Notice 730). In criminal cases co-operation can facilitate the agreement of offers to compound criminal offences (under CEMA 1979 s.152) and the mitigation of penalties although it will not always prevent prosecution.

9.25 An interview under caution is an early indication of the possibility of a criminal prosecution. If it appears likely that criminal charges will be brought, the member should advise the client to take advice from a criminal law specialist. Even if Customs are prepared to compound proceedings it may still be appropriate to take legal advice.

9.26 If the advice is to co-operate, the member should advise his client to make a full disclosure to Customs and when under investigation for civil evasion co-operate within the terms of VAT Notice 730. In the case of a criminal investigation under caution, the advice of a specialist professional should be taken throughout in respect of full disclosure and production of documents etc.

9.27 Customs will advise the client at the outset if they are considering an investigation under the civil regime by issuing VAT Notice 730: this is not a caution. In the event of a criminal investigation a caution will be issued. Co-operation under the civil regime affords a maximum discounted penalty of 25% of the tax concerned. In the case of criminal investigations the situation is set out in Notice 12 'Compounding, Seizure and Restoration', issued by Customs in April 1998.

9.28 Members should be aware that Customs' current policy is not to offer the civil regime to professional advisers in respect of their own affairs.

The importance of confirming admissions of irregularities by clients

9.29 A member should normally ask for written confirmation of the facts which are the basis of an irregularity by the client in as much detail as is available at the time, but the confirmation should be headed 'This is prepared for the purpose of litigation'. Reasons for written confirmation include the following:

(a) to minimize the room for doubt about the sum involved: in some cases, such as undisclosed sales, the figure may be an estimate but it is important to clarify the extent of the admission;

(b) to protect the member against any subsequent retraction by the client; and

(c) to ensure that the confirmation does not have to be disclosed for the purposes of any litigation which might take place.

9.30 Misunderstandings can arise, especially when the client is under investigation by Customs. If a member were to inform Customs that a stated sum had been omitted from a return without having confirmed the amount with the client, the member could be in a vulnerable position if the client later claimed it was a lesser sum.

Disclosure to other tax authorities of an admitted irregularity

9.31 The member should also consider the need to make a similar disclosure to other tax authorities.

Unwillingness or refusal to disclose an admitted irregularity

9.32 'Unwillingness' in this context includes such procrastination or prevarication as effectively amounts to a 'refusal', albeit not expressed. The member should allow a reasonable period for the client to make a decision. Thereafter the member must decide whether continuing 'unwillingness' is in fact 'refusal' for these purposes.

9.33 If the client refuses to disclose an admitted irregularity the member should again write to the client making clear the consequences of a continued refusal.

9.34 If the client refuses to accept the member's advice to make a full and prompt disclosure to Customs, the member should take such steps as are necessary to disassociate himself from the client's conduct. The member should write to the client setting out the facts understood by the member or agreed, and advising the client of the latter's duty to disclose. He should also make it clear that he, the member, may have an obligation formally to disassociate himself from any work done, should disclosure not be made.

9.35 If the client refuses to disclose or to take other steps (for example, seeking counsel's opinion on the member's view) to regularize the situation, the member should consider taking steps formally to disassociate himself from the relevant work taking account of all relevant issues. In certain cases it may be necessary to cease to act in relation to the client's VAT affairs, or indeed all his affairs.

9.36 If Customs realized that the member had continued to act after becoming aware of such undisclosed errors, they might consider the member to be 'knowingly concerned' in the commission of an offence. At the very least Customs might cease to trust the member. Furthermore, the relationship of trust which must exist between member and client will have been impaired.

Where the client refuses to admit an irregularity

9.37 Where the client denies any irregularity to the satisfaction of the member, the member is free to continue to act for that client. The member should protect himself by ensuring that his files fully document the discussions with the client and the reasons why the member is satisfied with the explanations given.

9.38 Where the client denies any irregularity and the member rejects outright that denial, the member must cease to act for the client at least in relation to his VAT affairs, and perhaps, in relation to all his affairs. The decision depends on the nature and scope of the member's relationship with the client having regard to the various circumstances.

9.39 Where the client denies any irregularity and the member still has reservations, but feels unable to reject the denial outright, the member must give careful consideration as to whether he can continue to act on behalf of the client. Having exercised his judgement, the member should then proceed in accordance with paragraphs 9.37 or 9.38, as appropriate.

Consequences of ceasing to act

9.40 The member need not inform Customs of the cessation unless the member is at the time dealing with Customs on the client's behalf.

Suspicious circumstances

9.41 A member who acts in relation to VAT matters and has good grounds to suspect that a client has committed a material tax irregularity should discuss the position with the client to confirm or remove the suspicion. This applies whether or not the member has acted in relation to the actual matter concerned. If the suspicion is confirmed, the member would then have actual knowledge of the irregularity and the guidance contained in this statement applies.

Request for information from a new adviser

9.42 On changes in a professional appointment the initiative to request information lies with the new adviser who should obtain the proposed client's authorization to communicate with the member. The member should not volunteer information to a new adviser in the absence of any such request by the new adviser or his former client.

9.43 When the member receives a request for information from a new adviser, he should:

(a) seek authorization from the former client to disclose all relevant information to the new adviser;

(b) on receipt of such authorization, disclose all the information needed and reasonably requested by the new adviser to enable him to decide whether to accept the work; and

(c) discuss freely with the new adviser all matters of which he should be aware.

9.44 If the former client refuses permission, the member cannot disclose information to the new adviser. However, the member can refer the latter to the fact that there is correspondence between the member and the former member and the former client without disclosing what it says. The new adviser will then ask the client for copies of that correspondence.

9.45 The new adviser will therefore become aware of the non-disclosure and possible offence. Since the previous adviser will have resigned on the grounds of the client's unwillingness or refusal to disclose, it should follow logically that if the client continues to be unwilling or refuses to disclose, or refuses permission for the previous adviser to communicate with the new adviser, the new adviser should decline to act. However, the new adviser is entitled to consider, after taking his own advice, whether or not he comes to the same conclusion as the former adviser.

10. VAT AND ACCOUNTS

10.1 A member who prepares accounts should ensure that they reflect all material liabilities for VAT whether or not they have been declared to Customs. If a material liability for VAT is omitted an auditor cannot, without qualification, report on the accounts as showing a true and fair view. Customs often request the accounts in the course of a control visit in an attempt to reconcile turnover to the VAT returns.

10.2 If an assessment based upon alleged undisclosed takings is accepted by the client or a settlement at a reduced figure is agreed with Customs, and the member has already submitted accounts information for the period in question to the Revenue, the member must consider whether the accounts are defective and if so follow the procedures in Section 4.

10.3 In such circumstances it may be wise to inform the Revenue before a final settlement is agreed with Customs in order that the self-assessment for direct tax purposes can be amended as well. This may help to avoid a second investigation.

ANNEX A

DISCLOSURE: SUMMARY OF RELEVANT INLAND REVENUE STATUTE LAW

Annex A

DISCLOSURE: SUMMARY OF RELEVANT INLAND REVENUE STATUTE LAW

General

A.1 The main provisions regarding returns of income and gains are set out in TMA 1970 Part II (ss. 7 to 12B); those relating to other returns and information are contained in TMA 1970 Part III (ss. 13 to 28). In each case, a specified person is required to provide the details set out in the relevant section. Returns must include a declaration that '... the return is to the best of his knowledge correct and complete'. Under self-assessment, the Revenue have specific powers to enquire into returns. Such enquiries will cover the full range of return compliance activity by the Revenue, from questions related to a single entry ('aspect enquiries') to detailed investigations ('full enquiries').

A.2 The reporting obligations fall into two categories:

(a) notice of liability to tax; and

(b) returns of income, profits and chargeable gains.

Notice of liability to tax

A.3 A person who is liable to tax is required to give notice of liability to tax where he has not delivered a return of profits, gains, or total income and has not received a notice requiring such a return, within a specified period after the end of a year of assessment (for an individual or trustee) or the end of an accounting period (for a company). The relevant sections are:

(a) notice of liability to income tax and capital gains tax (individuals and trustees) (TMA 1970 s.7;) and

(b) notice of liability to corporation tax (TMA 1970 s.10).

Returns

A.4 The obligations regarding returns for individuals are set out in TMA 1970 ss.8, 8A and 9. TMA 1970 s.8 requires an individual's personal return to contain 'such information as may reasonably be required in pursuance of the notice' together with 'such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required' and new s.9 deals with the self-assessment of tax liabilities.

A.5 Partnership returns and the partnership statement now occupy new ss.12AA and 12AB. New s.12B deals with the record-keeping requirements under self-assessment.

A.6 For companies the legislation is to be found in FA 1988 s.117 and Sch 18. Sch 18 para 3 requires 'such information, accounts, statements and reports:

(a) relevant to the tax liability of the company, or

(b) otherwise relevant to the application of the Corporation Tax Acts to the company, as may reasonably be required by the notice.'

ANNEX B

INLAND REVENUE TAX DEFAULTS: CIVIL ASPECTS (PRE SELF-ASSESSMENT)

Annex B

INLAND REVENUE TAX DEFAULTS: CIVIL ASPECTS (PRE SELF-ASSESSMENT)

General

B.1 This Annex deals with the civil (that is non-criminal) aspects of tax defaults. Serious defaults, in particular those which involve or are alleged to involve some form of fraud, can have important implications under criminal law. Certain aspects of that topic are considered in Annex D.

B.2 The civil consequences of tax defaults arise under the TMA 1970 or subsequent statutes dealing with the same subject matter. There was a substantial recasting of the law in the FA 1989. It is helpful to remember that there are two classifications which have to be kept in mind:

(a) the different kinds of conduct which can constitute a default (see paragraphs B.3 and B.4); and

(b) the various consequences which can follow a default (see paragraphs B.5 to B.17).

The old law

B.3 Before the FA 1989, tax defaults fell within the three-fold classification of fraud, wilful default and neglect. 'Fraud' and 'wilful default' were not defined by statute. 'Neglect' was defined by TMA 1970 s.118 (1) and (2).

The present law

B.4 The FA 1989 (principally by ss.149 and 159 and Schedule 17 Part VIII) made several changes to the old concepts. 'Wilful default' and 'neglect' disappeared altogether. There are now four kinds of default which are of major practical importance. They are fraudulent conduct, negligent conduct, failures, and errors. The changes in terminology and concepts may be more significant in form than in practical effect. In particular:

(i) anything which was wilful default under the old law will almost certainly be fraudulent or negligent conduct under the post-1989 law; and

(ii) anything which was neglect under the old law will very probably be negligent conduct under the post-1989 law.

Observations on each of the four kinds of default referred to in the post-1989 law are contained in the following sub-paragraphs.

(a) TMA 1970 s.36(1) as amended refers to 'fraudulent ... conduct'. TMA 1970 ss. 95 and 96 refer to a person who 'fraudulently ... delivers' incorrect returns. There is no statutory definition of what is 'fraudulent' in these contexts. The extensive case law about 'fraud' under the pre-1989 law will presumably be relevant.

(b) The same sections of TMA 1970 (namely ss.36(1), 95 and 96) also refer to 'negligent conduct', or to a person who 'negligently delivers' incorrect returns. Negligent conduct presumably has many similarities to the old concept of 'neglect', but whereas 'neglect' had a statutory definition, negligent conduct does not. It is likely to have its common law meaning of a failure to observe the standard of care expected of a reasonable man in the circumstances concerned. The same will apply in the context of negligently delivering incorrect returns.

(c) 'Failure' to give a notice, make a return, etc., required by or under the Taxes Acts can be relevant to the interest provisions of TMA 1970 s.88 (see paragraphs B.7 to B.10) and also to various sections concerning penalties (see paragraphs B.11 et seq.). Before 1989 'failure' was expanded on for both purposes (s.88 interest and penalties) by TMA 1970 s.118(2) but, by reason of the insertion of a new s.88(7) in 1989, s.118(2) now applies only for the penalty provisions. In summary, the position now is as follows:

  (i) 'failures' attracting penalties are regulated by s.118(2). For most practical purposes they are limited to failures without reasonable excuse to give the required notice, etc. The saving for cases where there is a reasonable excuse is the result of the second part of s.118(2). The first part of s.118(2) deals with slippage on statutory time limits: missing a time limit is not a 'failure' for this purpose if the Revenue allow a longer time; and

  (ii) 'failures' attracting section 88 interest are not regulated by s.118(2), but by s.88(7). Missing a time limit is a 'failure' for this purpose, and there is no provision to say that it is not if the Revenue allow a longer time. Nor is there any saving for reasonable excuse.

(d) An 'error' in any information, return, etc., delivered to the Revenue can be relevant under TMA 1970 s.88 (default interest – see paragraph B.7 et seq.). There is no definition of 'error', and there is no 'reasonable excuse' exception either, so it seems that an error still counts as an error for this purpose even if the taxpayer had a reasonable excuse for it.

Consequences of defaults

B.5 Defaults may give rise to any one or more of three different kinds of consequences, namely:

(a) extended time limits for assessment;

(b) s.88 interest; and

(c) penalties.

Which kinds of default give rise to which of the above consequences depends on the detailed statutory provisions and is summarised in the remaining paragraphs of this annex.

Extended time limits for assessment

B.6 The FA 1989 significantly changed the law. The Revenue can make assessments for up to 20 years back in cases of either (i) fraudulent conduct or (ii) negligent conduct. No distinction is drawn between the two for this purpose. The following points should be noted:

(a) it is no defence for the taxpayer to establish that the fraudulent or negligent conduct was committed by the agent, not by the taxpayer. (Contrast penalties, as to which see paragraph B.16);

(b) the rules in the 1989 Act apply to assessments for all years from 1983-84 onwards. For earlier years the old rules still apply;

(c) under the old rules the Revenue could make assessments without time limit in cases of fraud or wilful default but had more limited powers in cases of neglect; and

(d) the major changes under the 1989 Act rules are that the Revenue's powers are cut down in cases of fraud (by the 20 years limitation), but conversely have been extended in most cases of what used to be neglect and is now negligent conduct.

Section 88 interest

B.7 In certain cases where a default leads to late payment of tax the taxpayer is liable to pay interest under TMA 1970 s.88 rather than s.86. Although the rates of interest are the same under the two sections, s.88 interest normally runs from an earlier date.

B.8 The kinds of default which attract s.88 interest depend on whether or not the conduct occurred before 27 July 1989 (the date of Royal Assent to the FA 1989).

(a) Before 27 July 1989 the relevant kinds of default were 'the fraud, wilful default or neglect of any person'. Accordingly all three of the old kinds of default attracted s.88 interest, and still do if they occurred before 27 July 1989. The words 'of any person' indicate that the taxpayer would be liable for s.88 interest even if the default was that of his agent.

(b) On and after 27 July 1989 the kinds of default relevant for s.88 interest are:

(i) 'failures' to give notices, make returns, etc.; and

(ii) 'errors' in information, returns etc., delivered to the Revenue.

B.9 As to what are 'failures' and 'errors' see paragraph B4(c)(ii) and (d). It is worth observing that (since the introduction of a new s.88(7) in 1989) a failure or error for which the taxpayer had a reasonable excuse is still a failure or error for the purposes of s.88. Thus reliance, however reasonable, by a taxpayer on his agent cannot by itself protect him against s.88 interest if the failure or error arises in information or documents delivered on or after 27 July 1989.

B.10 Attention is drawn to SP6/89, articles in the Revenue Tax Bulletin issues numbers 4 and 7 and TAX 8/93 issued by the Institute of Chartered Accountants in England and Wales, in which the Revenue indicate their practice as to the circumstances in which they will consider charging s.88 interest where there is delay in submitting a tax return, or an error in the return.

Penalties

B.11 The most important penalties arise in three kinds of case:

(a) where a taxpayer does not notify chargeability (see paragraph B.12);

(b) where a return is not made or is made late (see paragraph B.13); and

(c) where a return is made but is incorrect (see paragraphs B.14 to B.17).

B.12 Persons who are chargeable to tax but do not receive return forms are obliged to notify chargeability within 12 months of the end of the year of assessment or (for companies) accounting period. If they do not and their omission is a 'failure' (as to which see paragraph B.4(c)(i)) they are at risk of penalties, the maximum being equal to the tax chargeable.

B.13 Penalties for not making returns or for making them late also rest on 'failures', as to the meaning of which see paragraph B.4(c)(i). The FA 1989 (for pay and file F(No 2)A 1987) increased the amount of the penalties, especially for failures which continue for more than a year. For details see TMA 1970 ss.93 and 94. There are also penalties for 'failure' to comply with any of an extensive list of specific requirements listed in TMA 1970 s.98.

B.14 Penalties for incorrect returns may be exacted in cases of fraud or negligence. For returns delivered on or after 27 July 1989 the maximum penalty, for fraud as well as negligence, is equal to the tax on the amount by which the return is incorrect. This is a relaxation of the previous law in cases of fraud: for fraudulent returns delivered before 27 July 1989 the maximum penalty was £50 plus twice the tax.

B.15 There is no penalty for an 'innocent' incorrect return, that is a return which is wrong but where the taxpayer was guilty neither of fraud nor of negligence. This is, however, subject to TMA 1970 s.97, whereby a taxpayer may be at risk of penalties if he fails to correct an error which subsequently comes to his notice. It is the Institute's understanding, supported by the opinion of leading counsel, that if a taxpayer in good faith receives advice from a person or firm whom he reasonably believes has appropriate and relevant experience and knowledge, and who has been given full particulars of the relevant facts, that a particular item need not be disclosed (for example, because it is not taxable) or that a particular expense is properly deductible, he is not negligent if he submits a return relying on that advice.

B.16 The Institute is advised that the position as stated in paragraph B.15 remains correct even if the adviser on whom the taxpayer reasonably relied was himself negligent or even fraudulent. In cases of incorrect returns penalties are payable by the taxpayer only if the fraud or negligence is the taxpayer's own. TMA 1970 ss.95 and 96 are so worded that an innocent taxpayer cannot be required to pay a penalty for the fraud or negligence of an agent. The Revenue do not accept this view, but leading counsel's advice to the Institute is unequivocal.

B.17 However, in such a case the agent may himself be liable to a penalty under TMA 1970 s.99. The section applies where a person 'assists in or induces the preparation or delivery of any information, return, accounts or other document which (a) he knows will be, or is or are likely to be, used for any purpose of tax, and (b) he knows to be incorrect'. The maximum penalty is £3,000. A further consequence of a penalty under the section being imposed is that the Revenue obtain an extensive power under TMA 1970 s.20A to call for papers from the agent relating to the affairs of any of his clients (not just the client in respect of whom the offence was committed).

ANNEX C

INLAND REVENUE TAX DEFAULTS: CIVIL ASPECTS (SELF-ASSESSMENT)

Annex C

INLAND REVENUE TAX DEFAULTS: CIVIL ASPECTS (SELF-ASSESSMENT)

GENERAL

C.1. This Annex deals with the civil (that is non-criminal) aspects of tax defaults. Serious defaults, in particular those which involve or are alleged to involve some form of fraud, can have important implications under criminal law. Certain aspects of that topic are considered in Annex D.

C.2. The civil consequences of tax defaults arise under the TMA 1970 or subsequent statutes dealing with the same subject matter. There has been a substantial recasting of the law in the Finance Acts 1994 and later Acts to cover the self-assessment regime.

INDIVIDUALS

C.3. The FA 1994 contained the main legislation for the major reform of the tax system by the introduction of self-assessment. This was built upon in the FA 1995. For most taxpayers these changes have effect from 1996/97.

C.4. The key change is that taxpayers create the legal charge to tax by making a 'self-assessment' of their tax liability for any year. These self-assessments replace the Revenue assessments issued under the old system. There are certain limited occasions when an assessment will continue to be issued under the new regime.

C.5. Self-assessment introduces a requirement to file returns by a fixed date and to pay all income tax (from whatever source) and capital gains tax by fixed dates. Two payments on account may be required, based on the previous year's income tax liability. Then a balancing payment, comprising the balance of the income tax due and any capital gains tax, is payable by 31 January following the year of assessment. There are automatic sanctions for failure to comply with these dates.

C.6. The Revenue initially process the return (and payment) as submitted by the taxpayer subject to a statutory right to correct obvious errors. Only a limited number of formal enquiries are made. Any such enquiry must be started within fixed time limits. This is known as the 'process now – check later' system. It represents a completely new approach to the critical examination of returns and once the initial process is complete the Revenue have an explicit right to enquire into the completion and accuracy of any return, supported by new information powers.

C.7. Random selection plays an important part in the new regime but, as hitherto, the vast majority of enquiries are selected on the basis that tax is thought to be at risk. Taxpayers have a right of appeal if they do not agree with the Revenue's findings, and have the right to ask the Commissioners to issue a completion notice to bring the enquiry to an end. The Revenue also retain general investigative powers. (See also paragraphs C.19 and C.20.)

Interest

C.8 Interest is chargeable under TMA 1970 s.86 on any amount of tax unpaid at the due date for payment, whether payment on account or balancing payment. Where an amendment to a self-assessment or a discovery assessment is made after the filing date, interest runs from the annual filing date for the relevant tax year. Interest applies to all late payments of tax, surcharges or penalties.

Surcharges

C.9 In addition to interest, surcharges under TMA 1970 s.59C apply at 5% of tax still outstanding more than 28 days after the due date and a further 5% if tax is still outstanding six months later. (This does not apply to payments on account.) Unpaid surcharge attracts interest 30 days after it has been imposed.

C.10 An appeal against a surcharge may be made to the Commissioners on the grounds that the taxpayer had a reasonable excuse (other than the inability to pay) for the late payment. The Board has the power to mitigate surcharges.

Penalties

General

C.11 The Revenue have the power to mitigate penalties (TMA 1970 s.102). An appeal to the Commissioners can be made against any penalty determination made by the Revenue (TMA 1970 s.100B). For most penalties, the Commissioners can confirm, increase, decrease or set aside the determination.

Failure to notify chargeability

C.12 There is a tax geared penalty for failure to notify chargeability within 12 months of the end of the chargeable period (FA 1998 Sch 18 para 2).

Late filing

C.13 Automatic fixed penalties apply if the time limits for the filing of tax returns are not met. The initial penalty is £100 (TMA 1970 s.93(2)) and if the return remains outstanding six months after the filing date there is a further penalty of £100 unless an officer of the Board has already applied to the Commissioners for a daily penalty (TMA 1970 ss.93(3) and 4(4)). Fixed penalties apply to all cases of late filing but they cannot exceed the tax liability for the year (TMA 1970 s.93(7)).

C.14 An appeal against a fixed penalty may be made to the Commissioners but their power is restricted to confirming or, if the taxpayer has a reasonable excuse for the failure, setting aside a determination only (TMA 1970 s.93(8)).

C.15 In addition to fixed penalties a daily penalty of up to £60 per day may be imposed if leave is given by the Commissioners (TMA 1970 s.93(3),(6)).

C.16 If the failure to file the return continues for more than twelve months after the filing date an officer of the Board may impose a tax-geared penalty. This cannot exceed the tax liability for the year (TMA 1970 s.93(5)).

Incorrect returns

C.17 The existing rules for penalties following the fraudulent or negligent filing of an incorrect return continue to apply in respect of all self-assessment returns (TMA 1970 s.95). The maximum penalty is 100% of the tax not paid as a result of the incorrect return.

C.18 Under TMA 1970 s.36 an assessment for the purpose of making good to the Crown a loss of tax attributable to fraudulent or negligent conduct may be made at any time not later than twenty years after the 31 January next following the year of assessment to which it relates. Where the fraudulent or negligent assessment relates to a partnership return extended time limit assessments may be made on the partners.

Enquiries into returns

C.19 The Revenue may enquire into a return and failure to comply with a notice for this purpose under TMA s.19A requesting documents, accounts or other particulars can result in a penalty (TMA 1970 s.97AA). The initial penalty is £50 but if failure continues after the determination of the penalty additional daily penalties may be imposed. If these are determined by an officer of the Board the maximum penalty is £30 per day; if set by the Commissioners in formal proceedings the penalty rises to a maximum of £150 per day (TMA 1970 s.97AA(2),(3)).

C.20 It is emphasized that the new procedures under TMA 1970 s.19A(1),(2) apply only where formal notice of enquiry into the return has been issued and are part of the 'process now – check later' regime. They apply only where the accuracy of the return is being checked within a fixed timescale in which enquiry can be started. The general investigative powers which can be used in a wide variety of circumstances continue to apply. They fulfil two separate and distinct functions:

(a) under TMA 1970 s.20 which allows information to be sought relating to any tax liability to which the taxpayer may or may not be subject. They are not restricted to a particular return or period and can be used to obtain information from third parties; and

(b) the ability to obtain a Commissioners' precept under SI 1994/1811 (Special Commissioners) and SI 1994/1812 (General Commissioners) has been preserved.

Record keeping

C.21 TMA 1970 s.12B imposes a requirement to keep records. There is a penalty of up to £3,000 for each failure to keep or preserve adequate records (TMA 1970 s.12B (5)).

Claims and elections

C.22 Wherever possible claims and elections should be included in the self-assessment return. TMA 1970 s.42 and Schedule 1A cover claims and elections not made in the return.

C.23 The return as a whole remains subject to the 'check later' regime. The Revenue have an automatic right to enquire into claims which form part of the return or are made separately (TMA 1970 s.9A and Schedule 1A, para 5). A penalty of up to £3,000 may be charged for each failure to keep or preserve adequate records in support of a claim (TMA 1970 Schedule 1A, para 2A(4)).

Notification of liability

C.24 Under TMA 1970 s.7 taxpayers who do not receive a tax return are still required to notify chargeability to income tax or capital gains tax within six months from the end of the tax year in which tax liability arises. This does not apply if there were no gains, no liability to tax or sufficient tax deducted at source to cover the liability. The penalty for non-compliance is tax-geared.

Agents

C.25 Any person who assists in or induces the preparation or delivery of any information, returns, accounts or other document which he knows will be used for tax purposes and which he knows to be incorrect will be liable to a penalty not exceeding £3,000 (TMA 1970 s.99). The extensive powers to call for the tax accountant's papers in such circumstances remain (TMA 1970 s.20A).

Discovery

C.26 The vast majority of assessments issued by the Revenue under self-assessment are discovery assessments under TMA 1970 s.29 which has been recast to provide general rules for Revenue assessments to prevent any loss of tax, but new rules limit the right to make a discovery assessment for any period if a self-assessment has already been made by the taxpayer for that period.

C.27 Discovery assessments are limited to those where the taxpayer has been fraudulent or negligent or has failed to disclose all relevant information.

C.28 There can be no discovery assessment if the self-assessment return was made on the basis of a view of the law prevailing at the time despite the fact that opinions may have subsequently changed (TMA 1970 s.29(2)).

Revenue determinations where no return delivered

C.29. Under TMA 1970 s.28C where a self-assessment return is not filed on or before the appropriate filing date an officer of the Board may make a determination of the tax due. This determination is served on the taxpayer and treated as a self-assessment until such time as the self-assessment is filed. There is no right of appeal, but the determination is automatically displaced by the taxpayer's own self-assessment once made.

PARTNERSHIPS

C.30 The self assessment partnership return includes a partnership statement summarising the profits and losses made by the partnership in the return period, and the shares of those profits and losses allocated to each partner. This return has its own filing dates and compliance regime quite separate from that applying to the partners' personal returns. The partners have collective responsibility for the partnership return, through a partner nominated to act on their behalf. Each partner is required to include his share of partnership profit (or loss) in his own self assessment, and to pay tax accordingly.

C.31 TMA 1970 s.93A deals with failure to make a partnership return. There are fixed and daily penalties for failing to file a partnership return. If time limits are not met fixed penalties automatically arise and in more substantial cases additional daily penalties may be sought. The initial penalty is £100 for each partner who was a member of the partnership during the period covered by the return and will be charged on individual partners, not the partnership. If the return is still outstanding six months after the filing date a further penalty of £100 per partner will be due unless daily penalties are already being sought.

C.32 There is no provision for these fixed penalties to be restricted where the tax due on the partnership profits is minimal. A composite appeal against the fixed penalties may be made by the representative partner on behalf of all the partners. The penalties can be set aside only if there is reasonable excuse for the whole period of delay.

C.33 In addition to fixed penalties a daily penalty of up to £60 per relevant partner per day may be applied if leave is given by the Commissioners. A composite appeal on behalf of all the partners may be made against daily penalties by the representative partner.

C.34 Penalties are charged on individual partners, not the partnership.

C.35 Where a partner fails to file a personal return on time and the partnership return is also late that partner will be liable to two sets of fixed penalties. But there is no tax-geared penalty in respect of the late partnership return because the partnership is no longer liable for any of the tax on partnership profits. Where an individual partner's return is late the tax on the partner's share of the partnership income will be included in the calculation of the tax-geared penalty chargeable on the partner.

C.36 Self-assessment enquiry procedures apply to partnership statements under TMA 1970 s.12AC. A notice of enquiry into a partnership statement are treated as including a notice of enquiry to each of the members of that partnership who have filed their own personal returns. This does not mean that non-partnership aspects of a partner's return are automatically under enquiry. These can be reviewed only if a separate enquiry is opened under TMA 1970 s.9A or, if the time limit has passed, if the discovery rules apply. Similarly the completion of an enquiry into one part of the return (for example partnership income) has no consequence for any separate enquiry into, say, non-partnership income. An enquiry into an individual partner's return does not automatically open up the partnership statement for enquiry (TMA 1970 s.12AC(3)).

C.37 The Revenue have the same rights to call for partnership documents for enquiry purposes under TMA 1970 s.19A as it has for individuals, and the same penalties under TMA 1970 s.97AA apply for failure to file documents required.

C.38 Discovery assessments must be made on the individual partners but there are specific rules under TMA 1970 s.30B in respect of the partnership statement itself.

C.39 Where a representative partner submits an incorrect partnership return or incorrect accounts connected with that return or an incorrect statement or declaration connected with that return and does so fraudulently or negligently or as a result of fraudulent or negligent conduct by any other member of the partnership during the period covered by the return, each member of the partnership is liable to a tax-geared penalty. Any such penalty is computed on an individual basis by reference to additional tax that each individual partner is required to pay as a result of that offence (TMA 1970 s.95A).

COMPANIES

C.40 Self-assessment applies to corporation tax returns for companies with accounting periods ending on or after 1 July 1999. The principal legislation providing the administrative framework is contained in FA 1998 Sch 18.

C.41 The normal filing date for corporation tax returns is 12 months from the end of the period for which the return is made (FA 1998 Sch 18 para 14 (1A)). The penalty for late filing is £100, increased to £200 if the failure persists for a further three months. No reduction is made to the penalty if no tax is due (FA 1998 Sch 18 para 17). A tax-geared penalty of 10% applies if the return is not filed within 18 months of the end of the period (FA 1998 Sch 18 para 18).

C.42 Corporation tax is due and payable nine months and a day following the end of the chargeable period. Certain companies with larger levels of profit are required to make quarterly payments on account, the first being payable six months and 13 days after the start of the period, and thereafter at three-monthly intervals.

C.43 The Revenue may enquire into a return and the rules governing such enquiries are broadly similar to those for individuals and partnerships (FA 1998 Sch 18 para 24 et seq.).

C.44 Interest is chargeable under TMA 1970 s.87A on any amount of tax unpaid at the due date of payment, including instalment payments; it is also chargeable on late payment of penalties.

ANNEX D

INLAND REVENUE TAX DEFAULTS : CERTAIN CRIMINAL ASPECTS

Annex D

INLAND REVENUE TAX DEFAULTS : CERTAIN CRIMINAL ASPECTS

D.1 This annex deals with certain criminal aspects of tax defaults. The civil aspects are considered in Annexes B and C.

D.2 There is a wide range of criminal offences which can be committed by the taxpayer. Those offences include offences contrary to statute and common law.

D.3 The most common statutory offences charged are under the Theft Act 1968 and include:

(a) theft, contrary to s.1 (for example, in dishonestly retaining what are known to be overpayments of tax by the Revenue);

(b) obtaining property by deception, contrary to s.15, or procuring the execution of a valuable security by deception, contrary to s.20 (for example, dishonestly obtaining from the Revenue a refund of tax to which the taxpayer or member knows there is no entitlement); and

(c) false accounting, contrary to s.17 (for example, submitting or concurring in the submitting of false returns, or falsifying or concurring in the falsifying of false books of account).

D.4 Offences of forgery are also charged under the Forgery and Counterfeiting Act 1981.

D.5 It is also a criminal offence to incite a client to commit an offence whether or not it is in fact committed, or to help or encourage a client in the planning or execution of a criminal offence. If two or more people agree to commit a criminal offence, they can be charged with conspiracy to commit that offence.

D.6 A common law criminal offence that is often charged is cheating the Revenue. This covers matters as diverse as:

(a) the submission to the Revenue of what are known to be false accounts. It is irrelevant from the member's standpoint who actually signed or submitted the accounts, provided he himself:

(i) was party to their submission or their preparation;

(ii) knew that they were false; and

(iii) knew that they were to be submitted to the Revenue;

(b) the telling of a deliberate or material untruth (whether orally or in writing) to the Revenue;

(c) the submission to the Revenue by a member of a letter from the client containing what the member knows or believes to be a material untruth; and

(d) the dishonest failure to make a return to the Revenue.

ANNEX E

INLAND REVENUE'S VIEWS ON 'DISCOVERY ASSESSMENTS' STATEMENT OF PRACTICE SP8/91, 26 JULY 1991

Annex E

INLAND REVENUE'S VIEWS ON 'DISCOVERY ASSESSMENTS' STATEMENT OF PRACTICE SP8/91, 26 JULY 1991

General

E.1 This Statement of Practice explains, in relation to income tax, corporation tax and capital gains tax, the circumstances in which the Revenue seeks to recover tax when a person has not been assessed or has been inadequately assessed. The Statement does *not* cover cases where there may have been fraud or negligence by or on behalf of the taxpayer.

E.2 The Statement draws attention to the relevant statute and case law, in particular to the cases of

Cenlon Finance Co Ltd v Ellwood[1] and
Scorer v Olin Energy Systems Ltd[2]

E.3 The following paragraphs should be read as subject to the general proviso that it is fundamental to the operation of the tax system that it is for the taxpayer, who is in possession of the facts, to supply them to the Revenue so that his tax liability may be determined. Case law confirms that, if the relevant facts have not been accurately, fully and clearly disclosed by the taxpayer at the time, the Revenue should not regard agreements reached, or action taken or omitted by its officials as binding it to accept less than the full amount of tax legally due.

Inspectors' Discovery Powers

E.4 Section 29(3) of the Taxes Management Act 1970 provides that where, after an assessment has been made or a decision has been taken that an assessment is not required, an Inspector of Taxes discovers that any taxable profits have not been assessed, he may make an assessment in the amount he considers ought to be charged. Similarly, a further assessment may be made if an Inspector discovers that an assessment is insufficient or that a relief should be withdrawn. These powers may also be exercised by the Board. There are also other discovery provisions in the Taxes Acts which empower an Inspector to make assessments to recover excessive reliefs, tax unpaid and over-repayments of tax, for example Section 30 of the Taxes Management Act and Sections 252 and 412(3) of the Income and Corporation Taxes Act 1988. Normally any assessment or further assessment must be made not later than six years after the end of the chargeable period to which it relates (Section 34(1) of the Taxes Management Act).

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1 [1962] AC 782; [1962] 2 WLR 871; [1962] 1 All ER 854; 40 TC 176

2 [1985] AC 645; [1985] 2 WLR 668; [1985] 2 All ER 375; [1985] STC 218; 58 TC 592

E.5 The Courts have established that, subject to the decisions in the *Cenlon* and *Olin* cases, a change of opinion can amount to 'discovery'; that discovery can be made by an Inspector other than the one who made the first assessment; and that discovery can extend to a finding that the law has been incorrectly applied as well as the coming to light of additional facts. The word has been held to include any situation in which for any reason it newly appears to an Inspector that a taxpayer has been undercharged.

The main principles

E.6 Two main principles are relevant in considering whether a discovery assessment may be made in any particular circumstances.

First, the Revenue does not go back on a specific agreement made by an Inspector on a particular point and raise a discovery assessment in respect of that point, whether or not the Inspector correctly took account of current law and practice in entering into that agreement;

Second, in circumstances where it cannot be said that the particular point was the subject of a specific agreement, the Revenue regards itself as bound by the Inspector's acceptance of a computation if the view of the point implicit in the computation was a tenable one.

But the Revenue does not regard itself as bound by any agreement made, or considered to be made, or any decision taken by an Inspector, if any of the information supplied on which that agreement or decision was founded was misleading.

The position in more detail

(i) Specific agreement: appeal cases

Cenlon

E.7 First, there is the case where there has been a specific agreement made by an Inspector on a particular point, ie where an issue has been raised expressly by the Inspector, the taxpayer or his agent (whether orally or in writing) and agreement has been reached on the treatment of that issue for tax purposes. The decision in the *Cenlon* case established that, if an assessment has been determined on appeal in accordance with Section 54 of the Taxes Management Act 1970, a discovery assessment should not be made in respect of any particular point which had been specifically dealt with in the course of the determination of that appeal.

Annex E

Olin

E.8 The decision in the *Olin* case gives guidance on deciding whether (in the absence of express words making the position clear) a particular point has been agreed, or could be said to have been agreed, in the course of reaching an overall agreement on a person's tax liability for a particular period. The *Olin* case makes it clear that a particular point agreed may not only be an issue raised expressly by the Inspector, the taxpayer, or his agent, (whether orally or in writing), but also any point which was fundamental to the whole basis of the computation of the taxpayer's liability, and so clearly and fully described in the accounts or computations that its significance for the computation of the taxpayer's liability was clearly and immediately apparent. In these circumstances the Inspector could not reasonably be regarded as having agreed the computation without having appreciated and accepted the point. In other words the Inspector must have been clearly put on notice of the point.

E.9 The question whether a particular point is fundamental to the whole basis of the computation of the liability is one which must depend for its answer on the facts and circumstances of the particular case. At one extreme, there will be cases like *Olin* itself where the claim to set off the losses of the defunct trade against the profits of the continuing trade was fundamental in that it had a major impact on the computation of the liability and, moreover, was so clearly and fully described in the computations that the Inspector must have appreciated what was being claimed. In the House of Lords, Lord Keith concluded that the Inspector's agreement to the computations would have led a reasonable man to believe that the Inspector had decided to admit the claim. In circumstances like these, the Revenue would accept that the particular point was covered by the agreement reached and could not subsequently be the subject of a discovery assessment.

E.10 At the other extreme, there will be cases in which a point is not fundamental to the basis of the computation, in that it does not have a major impact on the liability, or it is not so clearly and fully described in the accounts or computations that its significance is clearly and immediately apparent from the information supplied. For example, in cases where the taxpayer or his agent are claiming a particular deduction in arriving at profits, and among a multiplicity of items contained in the accounts and supporting material is a piece of information which, if the Inspector had studied it in detail and thought through the implications, could have alerted him to the fact that the claim was not valid, the Revenue would not accept that a discovery assessment could not be raised in respect of the particular (incorrect) deduction. Moreover, if further information were needed before the Inspector could reasonably be expected to appreciate the significance of the point for the taxpayer's liability, the Revenue would not accept that the Inspector should be regarded as having considered and agreed that point.

E.11 The treatment of cases in between these two extremes must be a matter of judgement, depending on the particular facts. It will be necessary to decide, taking a reasonable and common sense view of the matter, whether a taxpayer or his adviser would consider that a competent Inspector, in examining the accounts and computations, must be considered to have addressed his mind to the point at issue before signifying his agreement to the computation of the liability. This will be so only if the point was both fundamental to the whole basis of the computation, and was so clearly and fully described that its significance for the computation of the taxpayer's liability was clearly and immediately apparent. In these circumstances the Inspector could not reasonably be regarded as having agreed the computation without having appreciated and accepted the point.

(ii) Specific agreement: non-appeal cases

E.12 The principles established in the *Cenlon* and *Olin* cases strictly apply only where there was an appeal against an assessment or an appeal against a decision on a claim given in accordance with Section 42 of the Taxes Management Act 1970 which was subsequently determined either by the Commissioners or under Section 54 of that Act. But, even if there was no determination of an appeal, a discovery assessment will not be made if the particular point on which the Inspector takes a revised view was, or (as in the *Olin* case, see paragraph 8 above) could be said to have been, the subject of the specific agreement of the final figures for assessment purposes. These circumstances may arise because the figures were agreed before an assessment was made, because the Inspector decided not to make an assessment, or because the Inspector's decision on the claim was accepted.

(iii) No specific agreement: appeal and non-appeal cases

E.13 There will also be circumstances in which the *Cenlon* and *Olin* principles are not applicable. Thus, the particular point on which the Inspector subsequently takes a revised view and considers making a discovery assessment may not have been the subject of a specific agreement or, because the point was not fundamental, cannot be said to have been the subject of a specific agreement (see paragraph 8 above). In these circumstances, a discovery assessment will not be made, provided that the Inspector's original decision, whether on a claim or on the proper amount of an assessment, was based on a full and accurate disclosure of all the relevant facts and was a tenable view, so that the taxpayer could reasonably have believed that the Inspector's decision was correct. And it follows that if the Inspector's original decision was consistent with a view of the law and practice generally received or adopted at the time, a discovery assessment would not be made where, for example, there is a subsequent change in that practice – eg following a court decision.

Some particular circumstances where discovery assessments will be made

E.14 The application in any individual case of the general principles described in the preceding paragraphs will, of course, depend on the particular facts and circumstances. But there are certain specific circumstances in which there will clearly be no grounds for an Inspector not to make a discovery assessment, i.e. where

- profits or income have not earlier been charged to tax because of any form of fraudulent or negligent conduct;
- the Inspector has been misled or misinformed in any way about the particular matter at issue;
- there is an arithmetical error in a computation which had not been spotted at the time agreement was reached, and which can be corrected by the making of an in date discovery assessment;
- an error is made in accounts and computations which it cannot reasonably be alleged was correct or intended, for example the double deduction from taxable profits of a particular item (say group relief).

ANNEX F

SOME FURTHER COMMENTS ON 'DISCOVERY'

Annex F

SOME FURTHER COMMENTS ON 'DISCOVERY'

F.1 In paragraphs 3.5.8 to 3.5.11 of the Report of the Keith Committee, the Inland Revenue's position on the practical application of the law of discovery was discussed, notably in the light of the decision in *Cenlon Finance Co. Ltd* v *Ellwood (HL (1962) 40 TC 176).*

F.2 The Revenue's views on certain aspects of discovery are set out in Annex E. Pending further judicial guidance on the issue, it is the opinion of leading counsel that the Revenue's interpretation of the *Olin Energy* decision as stated in Annex E is too narrow i.e. the decision could apply even where the point at issue is not fundamental to the agreement of the relevant figures, provided certain other conditions are satisfied (see next paragraph). Nevertheless, members should be aware of the Revenue's views.

F.3 Thus, it is counsel's view that the Revenue could not raise a new assessment in any case where all such facts as it is reasonable to regard as relevant to considering the point at issue were disclosed and either:

(a) the particular point had previously been raised expressly by the inspector, the taxpayer or the taxpayer's agent; or

(b) the point was so clearly presented that an 'ordinarily competent inspector' would have or ought to have taken it into account.

ANNEX G

REQUESTS FOR GUIDANCE FOLLOWING MATRIX SECURITIES

Annex G

REQUESTS FOR GUIDANCE FOLLOWING MATRIX SECURITIES

TEXT OF LETTER DATED 3 JUNE 1994 FROM MR L J H BEIGHTON CB DEPUTY CHAIRMAN OF THE INLAND REVENUE

(Reference may also be made to the Inland Revenue Code of Practice 10: 'Information and Advice'.)

Requests for Guidance: Matrix Securities

From correspondence, discussion and press comment it is clear that there is some uncertainty following the speeches in the House of Lords in the Matrix Securities case, particularly concerning the extent to which taxpayers can rely on guidance provided by the Revenue. It may be helpful if I comment briefly on the position, as we see it, in relation to the provision, by the Revenue, of 'non-statutory' guidance.

There are two things to say about the Matrix Securities case. First, it seems to us that, in the end, the Matrix case broke little new legal ground; for all their Lordships, whatever the individual differences in their reasoning, the case involved the application of established law (or legal principle) to the particular facts.

Second, however, the case does provide further endorsement at the highest level of MFK and the guidelines set out in that case. In particular, the case underlines the need for complete frankness in circumstances where taxpayers expect to rely on guidance given by the Revenue; disclosure must be full, accurate and fair as to the facts and the complete context in which the ruling is sought.

My letter of 18 October 1990 (copy attached) therefore holds good; we would not wish to withdraw the help we have undertaken, in certain circumstances, to give. Indeed, as you will have seen from the recent Press Release on Rulings, we plan to build on the proposals for a post-transactions rulings system and in due course issue a consultative document exploring the options for an advance rulings system. In the meantime, we are working on a Code setting out our present practice on the provision of advice to taxpayers. We shall wish to seek your views on a draft of that code in a few months' time.

I have been asked whether, following Matrix, taxpayers and their advisers are expected to judge for themselves the appropriate level of Revenue official to whom they should address requests for guidance. It seems to me, on the basis of the case, that the question crucially arises where those seeking Revenue guidance are already aware of views held within the Department contrary to the confirmations being sought. That fact cannot be ignored if people are intending to rely on the advice they get; apart from that there is little to add to what I said in my letter of 18 October 1990.

In the ordinary way, it may be appropriate to write to the Inspector of Taxes who handles the affairs of the taxpayer concerned; but if it is known, for example, that Head Office have recently been considering the issue the appropriate course would be either to write to the relevant Inspector, pointing out the Head Office interest and the need for its clearance or, alternatively, to Head Office direct. In either event an answer should not be sought in an unreasonable time, bearing in mind the complexity of the issues involved and the volume of material to be examined.

Similarly, I have been asked how far taxpayers and their advisers are expected to go in disclosing not only the facts but also the main legal issues arising in particular circumstances. In answering that point I would refer back to my letter of 18 October 1990 when I said that we will provide guidance in certain circumstances and in particular where the operation of the law is uncertain. We are not setting out to give our comprehensive blessing to transactions and schemes put to us but rather responding to the uncertainties in the minds of taxpayers and their advisers on the specific points on which guidance is sought. By definition, therefore, it will invariably be appropriate to spell out those uncertainties and the legal issues on which comfort is being sought as well as it being made clear for what purpose the ruling is required.

I hope this letter will be helpful as you provide advice for your members on the implications of the Matrix Securities case; and I have no objection if you wish to circulate this letter to them. We shall be reproducing it in Tax Bulletin.

TEXT OF LETTER DATED 18 OCTOBER 1990 FROM THE INLAND REVENUE

You may recall that in April 1986 my predecessor, Barry Pollard, wrote to you and to other professional bodies saying that he had advised Inspectors of Taxes at Head Office that they should respond to requests for information or guidance from practitioners only if the enquiry involved recent legislation or changes in practice. The background against which this change was being made was the continuing loss of experienced Inspectors from the Department and the priority which we had to give to giving advice for policy purposes and to local offices.

We have been reviewing experience over the four years since Barry Pollard wrote, particularly in the light of the judgement in the case of MFK Underwriting Agents [1990] 1 All ER 91. One of the factors which lay behind the matters in this case was the pressure on Head Office Inspectors at the time in giving advice to practitioners. With the benefit of hindsight the case can be seen to have justified to the hilt the change which we made in 1986. Nevertheless we are, of course, aware that the professional bodies were unhappy that we had changed the practice and with that in mind we have recently looked at it again.

Annex G

In considering this matter we have found that the practice has varied a little and that in some areas we have been able to respond to a slightly wider range of questions than Barry Pollard indicated we would. We have therefore now told our Head Office staff that they should be prepared when they can to answer requests for guidance on the Revenue's interpretation of tax law, not only where they involve the interpretation of recent legislation, statements of Practice and other published information, but also in cases where there is a major public interest in developments in an industry or in the financial sector but where the operation of the law is uncertain. In addition, local Inspectors of Taxes will of course continue where practicable to inform practitioners about the Revenue's interpretation of tax law as it applies to any case which falls within the responsibility of that office.

In no case, however, whether at Head Office or local Office, would a member of the Department seek to advise a taxpayer or a practitioner on the arrangement of a person's own affairs: that must remain the responsibility of his professional advisers. Still less of course could we advise in the area of tax planning.

Where guidance is sought, the enquirer will doubtless bear in mind the principles set out by Bingham LJ in the MFK case. In addition to providing details such as the tax district and the reference, the enquirer should bear in mind that if he wishes to rely on Revenue guidance he must

a. put all his cards face upwards on the table;

b. indicate the guidance sought;

c. make it plain that it is fully considered guidance that is being sought; and

d. indicate the use which it is intended to make of the guidance, and in particular whether he proposes to tell others of it.

Where guidance is given it should not be relied on to the extent of any qualifications it contains. Moreover the actual application of the law will depend on the precise way in which the transaction is carried out and of course on the precise terms of the law at the time.

There may occasionally be cases, in particular where a representative body would find it helpful to be given an informal view of the interpretation of new legislation, where it would be appropriate for a reply to be given on an explicitly non-binding basis. Such cases will of course be quite different from Statements of Practice on the one hand or the more formal guidance with which this letter is otherwise concerned.

I hope you will find this letter helpful. As you know, the Revenue have for a long time – as confirmed by the Taxpayer's Charter – been anxious to help taxpayers know their rights as well as their obligations. It was welcome that in the MFK case the Court did not dissent from our view that we should do so where possible, subject to the clear rules which Bingham LJ enunciated as necessary if advice is sought on which the Revenue is to be bound. Even with the welcome reduction in the loss of fully trained Inspectors to the professions and to industry, there remain limits on what we can do, but within these limits we shall continue to develop our services to the public.

ANNEX H

DISCOVERY AND DISCLOSURE UNDER SELF-ASSESSMENT

Annex H

DISCOVERY AND DISCLOSURE UNDER SELF-ASSESSMENT

Revenue Press Release dated 31 May 1996

Introductory note (not part of Press Release)

The Revenue issued a paper (reproduced below) about the operation of the discovery and disclosure rules under self-assessment. This follows discussions with representatives of accountants, tax advisers, businesses and other professional bodies. The paper addresses the concerns that have been expressed about the circumstances in which the Revenue will make assessments on the discovery of profits that have not been assessed or were inadequately assessed, or where excessive relief has been given.

It makes it clear that where a taxpayer has made a self-assessment for the relevant chargeable period, the Revenue may raise an assessment if there would otherwise be a loss of tax resulting from the taxpayer's failure to make a complete disclosure of all the relevant facts relating to his liability to tax.

The statement also makes it clear that while the new self-assessment return has been designed to enable the vast majority of taxpayers fully to disclose their liability without the need to submit accounts or computations, the Revenue will accept any additional information sent in with the return.

Introduction

H.1 The introduction of self-assessment and the electronic lodgement service (ELS) heralds a new approach to the handling of tax returns, with more realistic filing dates and streamlined procedures. In particular, the new return has been designed to enable full disclosure to be made without the need to send in accounts or computations in most cases. But concerns have been expressed that reliance on the self-assessment return, without additional information, such as accounts, might expose taxpayers to a greater risk of 'discovery' assessments under (new) TMA 1970 s.29. This paper addresses the concerns that have been raised during the Revenue's discussions with representative bodies.

Discovery

H.2 New TMA 1970 s.29 introduced by FA 1994 s.191 is designed to reproduce the current mix of law, practice, and concession on discovery set out in the Revenue's Statement of Practice SP8/91 as it applies for self-assessment.

H.3 The foundation of the principle of discovery is that the Revenue should be able to recover tax which has been under-assessed (or over-relieved) where there is fraudulent or negligent conduct or where the Revenue officer could not be reasonably expected to be aware of the under-assessment (or excessive relief) from the information provided in or with the tax return.

Disclosure

H.4 This paper is concerned only with the second of these two aspects, the concept of 'disclosure'. Where all relevant facts are disclosed to the Revenue, taxpayers can be certain (except in the case of fraud or neglect) they have gained finality at the end of the enquiry period.

H.5 TMA 1970 s.29 sets out the ways in which information is made available for the purpose of making a disclosure. These include providing details in the return or claim, or in any material accompanying the return or claim, for the year in question or the two preceding years. In addition, it is open to the taxpayer or agent to write to the Revenue explaining the existence and relevance of any particular material for the purposes of making an adequate disclosure.

H.6 A change of opinion on information that has previously been made available to the Revenue will not be grounds for a discovery assessment.

The self-assessment return and standard accounts information

H.7 Additional information takes more time to process and store, costs which by extension all taxpayers bear. The new return is designed to enable full disclosure to be made without the need to send in accounts or computations in most cases. Taxpayers and practitioners are entitled to send in additional material if they consider that it adds information of relevance to the tax liability which cannot be contained within the return. The Revenue will accept any additional information sent in with the return; see para 14 (accompanying documents) below.

H.8 The self-assessment return requires comprehensive information regarding each taxpayer's affairs. With the exception of partnerships whose annual turnover exceeds £15 million (see para 11 below), separate accounts and computations are not required to be submitted with the return. Instead specific details, including standard accounts information (SAI), are required within the return.

H.9 The majority of income tax cases involve reasonably straightforward accounts. In these cases the fully completed return and SAI will enable a full and fair picture of the taxpayer's affairs including any business to be presented. In otherwise straightforward cases there may be the odd point of difficulty which needs further explanation. Such aspects may be dealt with by providing extra information within the areas provided on the return.

H.10 In some of the larger or more complex cases the SAI details and the space provided in the return for additional information may not by themselves provide a means of adequate disclosure. The submission of further information, including perhaps the submission of accounts, may be considered appropriate by the taxpayer or agent. Such cases would include, for example large partnerships with substantial turnovers or cases where, although not large, the business is complex – perhaps because it is a highly specialised trade, or where accounts or computations are required for a proper understanding of the figures.

H.11 The SAI will have to be completed in order for the return to be accepted, even when the accounts are submitted. To leave this information to the discretion of the taxpayer would seriously undermine its value to the Revenue. The only exception is for the very largest partnerships (ie annual turnover over £15 million) where taxpayers are required to submit accounts and computations as well as the return instead of completing SAI. This difference in treatment is justified because the Revenue are likely, anyway, to require to see the accounts and computations of these large cases every year, on account of their size and inherent complexity. Tax returns will be considered to be incomplete where, at the filing date, the SAI boxes have not been completed or, in cases where partnership turnover exceeds £15 million per annum, the accounts have not been submitted.

The submission of additional material

H.12 Taxpayers and agents should be aware that the submission of accounts and computations or other documents may not provide protection against a discovery assessment beyond that arising from the submission of the return alone. The information contained in the additional material may have been fully covered within the return or, alternatively, there may be so much material that the Revenue officer 'could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware' (TMA 1970 new s.29(5)) of the particular point of liability, unless the taxpayer or agent had explained its relevance. Where voluminous information beyond the accounts and computations is sent with the return, therefore, it is recommended that there should be a brief indication of the relevance of the material.

Electronic lodgement service

H.13 The electronic lodgement service (ELS) will accommodate all the information which may be given on the self-assessment return, including any additional details in the 'white space'. Furthermore, recent developments in the design of the ELS system mean that the service will be able to cope with substantial amounts of additional information such as accounts or computations should their submission be considered appropriate by the taxpayer or accountant.

Accompanying documents

H.14 The s.29 definition of disclosure includes information in 'any accounts, statements or documents accompanying the return'. The Inland Revenue consider that any material sent in support of a return 'accompanies' the return for that purpose. Although advised that, in strictness, statutory time limits for filing a return apply equally to any documents intended to accompany it, the Revenue will accept that any documents submitted within one month of the return 'accompany' it for the purpose of making a disclosure within TMA 1970 s.29 if the return indicates that such documents have been, or are to be, submitted. Where documents have been sent outside that time limit, the Revenue will consider sympathetically any request for them to be treated as supporting the return in question for that purpose.

Conclusion

H.15 It is in everyone's interests that the new self-assessment system enables taxpayers to disclose their affairs fully. The Inland Revenue believe that this can be achieved through the return and SAI, explanations in the space provided in the return for additional information, or the submission of accounts or computations where appropriate. The self-assessment return and the guidance notes will help taxpayers to be aware of matters which should be disclosed and, where there are doubts, taxpayers can consult their tax adviser or the Revenue.

ANNEX I

INLAND REVENUE'S POWERS TO OBTAIN INFORMATION

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INLAND REVENUE'S POWERS TO OBTAIN INFORMATION

Power to obtain information on appeal

I.1 TMA 1970, Part V contains provisions relating to proceedings before the General or Special Commissioners (detailed regulations are contained in statutory instruments effective 1 September 1994). These cover appeals and proceedings which are to be heard and determined in the same way as an appeal against an assessment. The Commissioners may, before an appeal is determined, give notice to the taxpayer requiring the delivery of such particulars as they may need for the purpose of determining the appeal and to make available for inspection books, accounts or other documents in his possession or power which, in their opinion, contain or may contain information relating to the subject matter of the proceedings.

Power to call for particulars and documents of client

I.2 Irrespective of whether an appeal is pending, TMA 1970 s.20(1) and s.20 (2) enable the inspector or other authorized member of the Board to require a taxpayer by notice in writing to deliver particulars or documents. These must be in the taxpayer's possession or power, and, in the inspector's reasonable opinion, contain information relevant to any tax liability to which the person is or may be subject or to the amount of any such liability. The word 'particulars' is very broad in meaning and embraces questions seeking information about matters impacting on the taxpayer's taxation liabilities.

Power to call for documents from a third party

I.3 TMA 1970 s.20(3) enables an inspector, with the approval of a Commissioner, to obtain a notice demanding the production of documents (but not particulars) from a third party. The documents must be such as are in the third party's possession or power and as in the inspector's reasonable opinion contain, or may contain, information relevant to any tax liability to which the taxpayer is or may have been subject, or to the amount of any such liability.

Power to call for working papers

I.4 General access to papers is given by TMA 1970 s.20A. Subject to the Revenue's obtaining the requisite judicial authority, the inspector can require delivery by a 'tax accountant' (as defined) of all documents relevant to the tax liability of any client. The power under s.20A is, however, restricted to those instances where within the preceding 12 months the person concerned has been convicted of a tax offence before a UK court or has had a penalty imposed on him under TMA 1970 s.99: see Section 7.

Restrictions on powers

I.5 Except as regards TMA 1970 s.20(2) notices, an opportunity for voluntary delivery must be given (TMA 1970 s.20B(1)) and there is protection for documents relating to the conduct of a pending appeal (TMA 1970 s.20B(2)).

Falsification etc.

I.6 It is a criminal offence deliberately to falsify, conceal, destroy or otherwise dispose of documents comprised in a notice under TMA 1970 s.20 or s.20A, or in respect of which the opportunity of voluntary delivery has been given under s.20B(1): see s.20BB.

The accountant's position

I.7 TMA 1970 ss.20B(9) to (14) appears prima facie to provide protection from disclosure of a tax adviser's working papers following notices under TMA 1970 s.20(3) or s.20(8A), only to remove it on the other hand by use of an 'override' clause. Basically, except where the document is as described in paragraph I.9, the documents protected from disclosure in the accountant's hands are as follows:

(a) audit papers being the property of the auditor and created by him or on his behalf for the purposes of discharging his function under any enactment (as per s.20B(9)(a));

(b) 'relevant communications' belonging to a tax adviser (ss.20B(9)(b)); and

(c) those relating to the conduct of an appeal (see s.20B(2)).

The protection in TMA 1970 s.20B(9) to (14) does not apply to notices given under s.20A (power to call for papers of tax accountants).

I.8 Save for TMA 1970 s.20A and s.20C, the Revenue's approach to a tax adviser or auditor for access to working papers would be by way of third party notice under TMA s.20(3) in respect of the investigation of a client. 'Communications' has a wide meaning because s.20(3) refers to 'documents' under TMA s.20D(3), 'document' has the same meaning as in the Civil Evidence Act 1968, Part I. That definition is broad, embracing aides-memoire, tapes and every conceivable noted form of 'communication' save for medical and similar records.

I.9 The protections at paragraph I.7 are removed by virtue of TMA 1970 s.20B(11) in respect of any document which contains information explaining any information, return, accounts or other documents which the person to whom the notice is given has, as tax accountant, assisted any client of his in preparing for or delivery to the inspector or the Board.

I.10 In SP 5/90, the Inland Revenue has undertaken to restrict what is otherwise the broad statutory scope of the 'override' clause in TMA 1970 s.20B(11) by:

(a) confining the Revenue's access to audit and tax advice papers that contain information showing how an entry in accounts, returns or other information sent to the Revenue was arrived at;

(b) acknowledging that where a document may remain partly protected then that part 'may be kept covered up if the auditor or tax adviser wishes' enabling that part to remain undisclosed; and

(c) undertaking that the Revenue will not seek access on a routine basis and will normally do so 'only where they have been unable to satisfy themselves otherwise'.

I.11 Various other provisions of the Taxes Acts also impose obligations upon the taxpayer to provide information, for example those listed in the table of provisions included in s.98.

I.12 In summary, the Revenue is only entitled to obtain from a tax accountant 'any document which contains information explaining any information ...' (TMA 1970 s.20B(11)) as given to the Inland Revenue in one form or another, either by the client or the accountant, and which the accountant helped to prepare or to deliver to the Revenue.

Search and seizure warrant

I.13 TMA 1970 s.20C enables an officer of the Board of Inland Revenue to give information privately on oath to a Circuit judge (sheriff in Scotland or county court judge in Northern Ireland) that 'there is reasonable ground for suspecting that an offence involving serious fraud in connection with, or in relation to, tax is being, has been or is about to be committed and that evidence of it is to be found on premises specified in the information ...'. Where a judge is satisfied with the information given, he will grant a s.20C search and seizure warrant. This enables the Revenue to gain unfettered access to papers held by anyone other than those which are in the possession of a lawyer and to which a claim to privilege could be maintained. It is an offence for any person to impede the lawful execution of such an order. It is very important, therefore, that members consider carefully the content of working papers created by other professionals and held on members' premises. The point is that documents containing evidence of fraud may be innocently sited on a member's premises which could, in those circumstances, be raided.

Documents of unnamed taxpayer

I.14 Under TMA 1970 s.20(8A) the inspector may, with the consent of a Special Commissioner, require of any person documents relating to an unnamed taxpayer. The Revenue have stated that the object of this subsection is to ensure that they may obtain the relevant documentation from a practitioner where they believe that there has been tax avoidance generally or a particular legal avoidance scheme is being peddled. Subject to there being reasonable grounds, documents may be required other than those protected by legal professional privilege: see paragraphs 2.14 to 2.21.

Foreign tax authorities

I.15 Double taxation conventions between the United Kingdom and foreign states usually include provision for the disclosure of information between tax authorities. In addition a number of EC Directives which provide for mutual assistance between Member States have been enacted into UK law.

Self-assessment enquiries

I.16 The Revenue are given powers under TMA 1970 ss. 9A, 11AB and 12AC in relation to enquiries into self-assessment returns.

I.17 TMA 1970 s.19A enables the issue of a notice by an officer of the Board for the production of documents, accounts or other particulars to back up entries in the return. S.19A deals also with the form in which the evidence may be provided and the appeal mechanism leading if necessary to a hearing before the Commissioners.

ANNEX J

CONFIDENTIALITY IN VAT MATTERS

Annex J

CONFIDENTIALITY IN VAT MATTERS

HM Customs & Excise Statement of Practice dated 19 March 1993

J.1 As part of our continuing commitment to trade consultation and assisting the taxpayer wherever possible, we entered into discussions with the Tax Faculty of the Institute of Chartered Accountants in England and Wales, the Institute of Taxation and the VAT Practitioners' Group on the question of Tax Advisers and Confidentiality of VAT Matters. The following Statement of Practice is the result of those discussions.

J.2 VAT leaflet 700/47/93, available from local VAT offices, also reproduces this Statement of Practice.

Introduction

J.3 This statement outlines the legal powers and practice of Customs concerning access to business records and information. It has been issued after consultation and agreement with the Tax Faculty of the Institute of Chartered Accountants in England and Wales, The Institute of Taxation and the VAT Practitioners' Group, and deals with the position of tax advisers' confidential advice and opinion. A tax adviser (who need not be professionally qualified) is any person appointed by a client either directly by the client, or indirectly via another tax adviser, to give advice on the client's tax affairs.

Customs' Responsibilities

J.4 Customs are responsible for the proper management and collection of VAT in the United Kingdom. VAT is a self-assessed tax and in order that Customs' officers can determine whether or not a trader has properly accounted for the tax, they need to have access to his business records and accounts. Visits for control purposes are generally made by appointment during business hours, and usually to the trader's principal place of business.

J.5 Customs' practice is to deal direct with the trader, and in this respect may differ from that of the Inland Revenue. If it is the wish of the trader and the tax adviser and does not result in unreasonable delay, Customs welcome the involvement and assistance of the tax adviser, and accept that mutual benefits arise. However, the ultimate responsibility for the accuracy and timely submission of VAT returns rests with the person who is registered for VAT.

Tax Advisers' Guidelines

J.6 The Institute of Chartered Accountants in England and Wales and the Institute of Taxation each have professional ethical guidelines and lay down the procedures that members should follow, and the advice that they should give to clients, when defaults or unlawful acts concerning VAT are suspected. In the case of the ICAEW this is dealt with in the Members' Handbook at part 1.306 paras 105-126[1]. Tax advisers who are not members of the ICAEW or the CIOT may wish to follow the guidelines of either body.

Customs' Powers and the Law

J.7 Customs' powers concerning the provision of information and the keeping and production of records and accounts are set out principally in the Value Added Tax Act 1983[2], Schedule 7 (as amended), and The VAT (Accounting and Records) Regulations 1989 (SI 1989/2248)[3] which are described by Customs' in Section 8 of VAT Notice 700. This notice is issued to all VAT registered persons.

J.8 Persons concerned (in whatever capacity) in the supply of goods or services in the course of furtherance of a business or to whom such a supply is made, and persons concerned (in whatever capacity) in the acquisition of goods from other Member States or in the importation of goods from places outside the Member States, in the course of furtherance of a business, are required by law to provide information relating to the goods or services or to the supply, acquisition or importation as Customs' reasonably specify, and to produce for inspection documents relating to the goods or services or to the supply, acquisition or importation.

J.9 Notwithstanding their legal powers, Customs' policy is to seek access to information and records selectively and on a voluntary basis, and their formal powers are used only where all else fails.

Customs Confidentiality

J.10 Customs are aware that a great deal of the information to which they have access is of a confidential nature. They take great care to ensure that respect for confidentiality is maintained.

Notes (not part of the Statement of Practice)

[1] Superseded by these guidelines

[2] Now in VATA 1994, Schedule 11 (as amended).

[3] As amended.

Categories of information

Information relating to goods or services, or to the supply, acquisition or importation.

J.11 Customs need access to information relating to goods or services or to the supply, acquisition or importation, to enable them to check the amounts of VAT payable/recoverable by businesses, and to ensure that such VAT liabilities are accounted for at the correct time. See paragraph 64(a), part VIII of Notice 700 (The VAT Guide).

Confidential Advice

J.12 As part of their services to clients, tax advisers communicate with clients or other tax advisers for the purpose of giving or obtaining opinion or advice from clients' past or future VAT affairs. Such communication can include notes of meetings and telephone calls, internal memoranda, letters and faxes and management letters. Depending on their content, such communications may or may not be subject to Customs' statutory powers of access.

J.13 Customs recognise that tax advisers have a duty of confidentiality to their clients. Whilst the duty of confidentiality may sometimes be over-ridden by legal requirements, Customs will not normally request the tax adviser or the trader to produce a communication relating to confidential opinion or advice of the type described above. Auditors' working papers and management letters, except to the extent that they contain information relating to goods and services or supplies, acquisitions or importations, fall into this category.

Mixed information

J.14 In those cases where a document, such as a management letter or an auditor's working papers, contains both information of the type set out under Information Relating to Goods or Services and advice of the type set out under Confidential Advice, Customs will normally accept an extract from the document, supported by a written statement from the tax adviser or auditor that in his opinion Customs do not have the power to see the other part or parts of the document. The extract would include information about the origin of figures in accounts and returns and other information submitted to Customs, or the relationship of those figures with the books and records of the trader. In this context, tax advisers might find it beneficial when corresponding with clients to distinguish between the information set out under Information Relating to Goods or Services and confidential advice, perhaps sending separate correspondence depending on the category into which they consider the material falls.

J.15 In some instances Customs may request access to material to which they consider they may not have statutory power of access. When making such a request, Customs will make it clear to the trader that they are asking for something which may not be demandable as of right. However, the trader or his tax adviser may wish to consider whether access could be in the interest of the trader, for example by facilitating the speedy resolution of his tax affairs.

Disputes

J.16 Where there is a dispute about the information or records sought by Customs, requests for access will be made in writing to the trader, stating the reasons why Customs consider that such information is relevant, and the statutory power(s) under which they seek access.

ANNEX K

CUSTOMS' POWERS TO OBTAIN INFORMATION

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CUSTOMS' POWERS TO OBTAIN INFORMATION

K.1 Customs have extensive powers to require the production to them of information or documents in relation to a supply of goods or services or an acquisition or importation of goods.

K.2 In particular, VATA 1994 Sch 11, para 7(2) states that every person concerned (in whatever capacity) in the supply of goods or services in the course of a business, or in the acquisition of goods from another member State or the importation of goods from outside the Member States shall, as regards that transaction, supply the Commissioners with such information as they may require and make relevant documents available for inspection.

K.3 Paragraph 7(3) empowers Customs to require others in possession of such documents to produce them and this would include members particularly in view of paragraph 7(4) which says that documents 'relating to the supply of goods or services' include any profit and loss account and balance sheet. Customs would not normally require a member to produce a letter that gives advice to a client, auditors' working papers or management letter, unless it deals specifically with a supply, acquisition or import as stated above (see Annex J): Customs have said that 'normally' does not apply to cases where tax avoidance is considered an issue.

K.4 Paragraph 7(2) is obviously required in order to permit Customs to require production of a trader's normal records in the course of a control visit. However, in conjunction with paragraph 7(3) it appears to cover papers held by a professional accountant as well as by the client. Indeed, the words 'in whatever capacity' imply that people with only a remote connection with a business can be required to produce documents they hold.

K.5 Customs have outlined in the Statement of Practice in Annex J the circumstances when they would normally demand information and the type of information they would require and members should produce the statement to Customs officers if they feel that unreasonable requests are being made.