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## Amending HMRC's Civil Information Powers – draft Finance Bill legislation

### Comments by the Chartered Institute of Taxation (CIOT)

#### 1 Introduction

- 1.1 The draft legislation<sup>1</sup> introduces a new Financial Institution Notice (FIN) that will be used to require financial institutions to provide information to HMRC when requested about a specific taxpayer, without the need for approval from the independent tribunal that considers tax matters. It also gives HMRC a new power to issue an information notice for the purposes of collecting a tax debt. In addition, it corrects a drafting error in Schedule 36 Finance Act 2008 that governs the issuing of increased daily penalties for failure to comply with an information notice. It also introduces a rule to prevent a third party telling the taxpayer about a third party information notice, where the tribunal has decided that is appropriate.
- 1.2 These measures were originally consulted on by HMRC in the consultation document 'Amending HMRC's Civil Information Powers'<sup>2</sup> which was published on 10 July 2018.
- 1.3 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 1.4 Our stated objectives for the tax system which are relevant to this draft legislation include:
- A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.
  - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
  - Greater certainty, so businesses and individuals can plan ahead with confidence.
  - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
  - Responsive and competent tax administration, with a minimum of bureaucracy.

<sup>1</sup> <https://www.gov.uk/government/publications/amendments-to-hmracs-civil-information-powers>

<sup>2</sup> <https://www.gov.uk/government/consultations/amending-hmracs-civil-information-powers>

## 2 Executive summary

- 2.1 The CIOT is pleased to note that a number of the proposals that were originally put forward in HMRC's consultation document 'Amending HMRC's Civil Information Powers' are not being developed, particularly Option 1 ('Aligning with Taxpayer Notice') which would have involved removing the requirement to obtain tribunal approval in all cases. In the CIOT's response<sup>3</sup> to HMRC's consultation dated 25 September 2018 we said that we thought this would have gone significantly further than is needed for HMRC to cope more promptly with requests for information from overseas jurisdictions. Instead, Option 2 ('Financial Information Notice') is being developed. In our consultation response, we said that we saw the value in a limited power that relates to certain information that financial institutions will hold and supported this option in principle, but we were concerned about the loss of independent tribunal oversight, particularly in cases which involve requests for information about UK taxpayers.
- 2.2 As HMRC notes in the policy paper that accompanies the draft legislation, the driver for change is requests for financial information from overseas tax authorities. If the new FIN was only for international information requests from other tax authorities, then we would be less concerned about the removal of the requirement for HMRC to obtain tribunal approval for issuing third party notices. However, the consultation response explains that HMRC is not able to have a different notice for international requests. UK law, and some international treaties, requires them to obtain information in the same way for both domestic and international requests. Therefore, the FIN will be available for use for both international and domestic requests for information. This raises questions about how the new power will operate in practice which we set out in more detail below.
- 2.3 Overall, we think the consultation process has worked relatively well in this instance because the consultation took place during Stage 1 of the process 'Setting out objectives and identifying options' and it appears that HMRC has carefully considered the responses it received when deciding what proposals to develop further. However, we note that there has been no Stage 2 'Consultation to determine the best option and develop a framework for implementation including detailed policy design', and instead the process has moved straight to Stage 3 'Drafting legislation to effect the proposed change'. Although we now have this opportunity to comment on the draft legislation, there is limited scope at this stage to make any changes of substance to the policy design.
- 2.4 The CIOT would be happy to provide feedback on HMRC's proposed guidance on the legislation if HMRC would like to share it with us in advance.

## 3 No right of appeal against the issue of the FIN

- 3.1 Unlike the position for existing third party information notices<sup>4</sup>, the draft legislation suggests that there is to be no right of appeal by the financial institution against the issue of a FIN even if it would be unduly onerous for it to comply with the notice.

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<sup>3</sup> <https://www.tax.org.uk/sites/default/files/180925%20Amending%20HMRC%27s%20Civil%20Information%20Powers%20-%20CIOT%20comments.pdf>

<sup>4</sup> Para 30 Sch 36 FA 2008

- 3.2 We appreciate that the draft legislation does contain some other safeguards, including that the information must be reasonably required and a notice may only be issued if the information is, in the reasonable opinion of the authorised HMRC officer giving the notice, of a kind that it would not be onerous for the institution to produce or provide. However, in our view HMRC are not best placed to make this assessment.
- 3.3 It appears that the first opportunity that the financial institution will have to appeal is at the point a penalty for non-compliance with the notice is imposed, although we understand that there may be some legal uncertainty over whether it is permissible to argue about the legitimacy of an information notice at a penalty appeal hearing<sup>5</sup>. Furthermore, it is a wholly unsatisfactory position that the financial institution must first be non-compliant with the notice before it potentially has a legal route to argue against the legitimacy of the information notice.
- 3.4 This lack of a formal appeal route in the draft legislation combined with the lack of independent tribunal oversight for issuing the notice in the first place is concerning. We suggest the financial institution is given a formal right of appeal if it would be unduly onerous for them to comply with the notice (as is the case under para 30 Sch 26 FA 2008 for third party notices at present). If HMRC are not persuaded to grant this, perhaps due to concerns about how much time an appeal would take, then they must explain in their guidance how they will deal with complaints from financial institutions where obtaining the information is unduly onerous.
- 3.5 We also note that the proposed new para 4A(8) will, if enacted as drafted, enable HMRC to remove the taxpayer's name from the FIN, albeit with the tribunal's consent. We cannot think of any situation where this would be necessary. Also, we cannot conceive how a financial institution would be able to identify their client and reply to the notice without the taxpayer's name or some other unique identifier (eg account number) being provided by HMRC. We therefore suggest that para 4A(9) is removed from the draft legislation before enactment.

#### **4 Use of the FIN in domestic cases**

- 4.1 The draft legislation does not restrict the new FIN to requests for information from overseas jurisdictions about non-UK taxpayers, so it is likely that it will be used to obtain information about UK taxpayers and that HMRC will be using the new FIN for requests for information about UK taxpayers as well, for example during the course of a domestic tax enquiry. We would like to understand how this will work in practice given that now, under existing Schedule 36 powers, HMRC must obtain tribunal approval before requesting the information unless the taxpayer has agreed to HMRC contacting the third party for information, **and** there is a right of appeal if it would be unduly onerous to comply with the notice. Will HMRC approach the taxpayer first, for example, before issuing a FIN in cases involving UK taxpayers? Will cases involving domestic enquiries be dealt with differently to international requests for information? What type of information will HMRC use the FIN for? Will HMRC use the new FIN in domestic cases as a risk-assessing tool, or will it be reserved for use during tax enquiries? Please can HMRC's intended approach be covered in guidance.

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<sup>5</sup> See PML Accounting Limited [2018] EWCA Civ 2231 <https://files.pumptax.com/wp-content/uploads/2018/10/11144559/PML-Accounting.pdf> and also David Beadle {2017} UKFTT 0829 (TC) <http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j10192/TC06224.pdf>

## **5 Power to give information notice for purpose of collecting a tax debt (Part 3)**

- 5.1 Please can HMRC provide information in their guidance about what sort of information will be requested under this new power and provide some examples of when it might be used.

## **6 Acknowledgement of submission**

- 6.1 We should be grateful if you would acknowledge safe receipt of this submission.

## **7 The Chartered Institute of Taxation**

- 7.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation

10 September 2020