Amending HMRC's Civil Information Powers: HMRC Consultation Document Response by the Chartered Institute of Taxation

1 Introduction

1.1 This consultation document is exploring the effectiveness and efficiency of HM Revenue and Customs' (HMRC) information powers under Schedule 36 Finance Act 2008 and considering some amendments to the provisions. The document in effect argues that HMRC's existing powers to obtain information from third parties (which require either taxpayer agreement or Tribunal approval) are insufficient. This is mainly due to the length of time it takes to obtain Tribunal approval, which HMRC are concerned will make it difficult for the UK to meet international standards for requests for information from other jurisdictions.

1.2 The consultation document puts forward two options as possible solutions. These are:

a) Aligning the issue of third party notices with taxpayer notices; and
b) Introducing a new 'financial institution notice'.

In our response we analyse both these options and suggest some alternative means of achieving the same objective which we feel would be more targeted and proportionate. This builds on the discussions we had with HMRC when we met with them in August.

1.3 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the Chartered Institute of Taxation (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 relevant to the proposals in this consultation document include:

- A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.

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- 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.

2 Executive summary

2.1 Domestically, it is right that HMRC have appropriate powers to enable them to exercise their functions but also that there are suitable safeguards over HMRC's ability to access sensitive private information. Internationally, the exchange of information with other countries' tax authorities on a timely basis is an important aspect of the way in which the modern global tax system needs to work, but we also need to recognise that the standards to which different national tax authorities operate are not identical. Care is needed in getting the right balance as to what information is exchanged and when. Retaining appropriate Tribunal oversight would allow legitimate concerns about confidentiality in overseas jurisdictions to be taken into account when considering the approval of contested notices.

2.2 In our opinion, HMRC's information powers under Schedule 36 currently provide a coherent balance between the right of HMRC to obtain information and the protection of taxpayers and third parties against unwarranted intrusion and cost. However, in this consultation paper, HMRC are proposing to remove the existing independent oversight by the Tribunal in certain cases and, in our view, the proposals risk changing the balance of power too far in the direction of disclosure which may not be appropriate or necessary..

2.3 The consultation document refers to the driver for change as requests for predominantly banking information from overseas jurisdictions. If the proposed options for change were focussed only on this then we would be less concerned about the removal of the requirement for HMRC to obtain Tribunal approval for issuing third party notices.

2.4 Overall, we prefer Option 2 ('Financial Information Notice') to Option 1 ('Aligning with Taxpayer Notice'), although we have reservations about both options, which we explain in more detail below. We believe that both options could be adapted to take account of our reservations.

2.5 On Option 1, we think that removing the requirement to obtain Tribunal approval in all cases goes significantly further than is needed for HMRC to cope more promptly with requests for information from overseas jurisdictions. Where HMRC have not agreed the request with the first party, or where they do not want to engage with the first party, Tribunal approval should be retained.

2.6 On Option 2, we see the value in a limited power that relates to certain information that financial institutions will hold and support this option in principle. Our concerns relate to the details: which institutions and which records.

2.7 We think that a system that would best balance the interests of HMRC and taxpayers would be one where Tribunal approval for issuing third party notices should **not** be required only in three limited situations:

a) Where the request for information has come from an overseas jurisdiction for information about a first party not based in the UK (the 'financial institution' exception);
b) Where the first party has been approached and has no objections to HMRC contacting the third party for information;
c) Where the first party has been approached and has made representations which HMRC have either accepted or an agreement has been reached between them.

There should be a statutory obligation on HMRC to approach the first party before approaching the third party for information in b) and c). Tribunal approval should be required in all other circumstances.

2.8 In our view, international comparisons (see Part 3 of the consultation paper) can be unreflective of the totality of the situation if they are insufficiently nuanced. Just knowing that a jurisdiction has different information powers than the UK is not enough to make a comparison without knowing the wider background of the relationship between the taxpayer and the tax authority in the tax jurisdiction. To give a crude example, a jurisdiction may have more information powers, but balanced by a shorter limitation period on looking at a taxpayer's past position. We also note that a mere 18 countries have been compared whereas there are 100+ that have signed up to the Common Reporting Standard (CRS). Some of the countries are clearly comparable to the UK in at least some respects, but some clearly are not.

2.9 We accept there is a case for updating the rules in some other areas, but we are disappointed with the way that these subsidiary proposals have been tagged onto the consultation (see question 7 onwards). In our view they justified a fairer airing than that provided by this document.

2.10 There are several aspects of HMRC's proposals for updating the rules in other areas that we find sensible and hence support, such as:

- The proposal to amend the wording in para 49A FA2008 to clarify that the Tribunal grant permission for HMRC to assess daily penalties;
- The proposal to make amendments to prevent the third party from notifying the taxpayer.

But there are other aspects which we do not support, such as the proposal to extend information powers to other functions of HMRC.

2.11 Finally, we are pleased to note that this consultation is being conducted in line with the 2011 Tax Consultation Framework, with its five-stage approach to tax policy making and taking place at Stage One of the process: 'Setting out objectives and identifying options.' Starting consultation at an early stage wherever possible is something the CIOT recommended in the report it produced with the Institute for Government and Institute for Fiscal Studies 'Better Budgets: Making tax policy better'[1] published in January 2017. It has the benefit of allowing stakeholders to engage and contribute on a range of possible options, leading to better policy.

[1] https://www.instituteforgovernment.org.uk/sites/default/files/publications/Better_Budgets_report_WEB.pdf

3 OPTION ONE – ALIGNING WITH TAXPAYER NOTICE

Question 1: Do you have any views on the suggested change to align third party notices with taxpayer notices?
Question 2: Do you think any further internal processes, or safeguards, prior to issuing the notice, would be required?
Question 3: Should there be any further restrictions on the type of information that could be requested under this notice?

3.1 In our view this option goes much further than is needed to cope with the reasons why HMRC say they need this change – ie to comply with requests for information from overseas jurisdictions more quickly – because it will mean that HMRC will no longer be required to obtain Tribunal approval for third party notices in all cases, not just those involving requests from international partners for predominantly banking information. It is not clear why this option cannot be restricted to non-domestic matters, especially since this is the driver for the change.

3.2 Even if restricted to non-domestic matters, the proposal to remove Tribunal approval is troubling where HMRC may be acting on behalf of a foreign jurisdiction when a UK resident will be put to expense in circumstances where the foreign tax authority is acting with no UK oversight.

3.3 In the year to 31 March 2017 there were 215 requests for Tribunal approval of third party notices[2], and HMRC expect the number to increase but remain low even after CRS data starts to be analysed. If HMRC's expectation is that numbers will remain low, we would have thought that cases could actually be dealt with by a much more limited extension of powers, meaning that a very wide extension of powers is disproportionate and unnecessary. What is needed is a legislative power that deals only with the problem that HMRC have identified rather than a broad proposal for change that will have much wider effect.

3.4 There is a risk that removal of the need for Tribunal approval will actually lead to an increase in third party notices. We note that the FA 2008 provisions have led to a significant increase in formal notices being issued to taxpayers, following the abolition of the former section 20 TMA 1970 procedures which all required Tribunal (Commissioners') consent. It seems very likely that HMRC (if given the new powers they seek) will use them both for domestic and overseas matters, even if the stated reason for them is only the latter.

3.5 We understand that HMRC are not intending to change their current approach in practice of discussing the draft third party notice with the taxpayer first before approaching the third party for the information, but that this is not going to be set out in legislation. So, we are relying on HMRC's word that their approach will not change, at least in the short term. This is unsatisfactory. HMRC should be legally obliged to request the information from the taxpayer in the first instance.

3.6 Furthermore, we note disturbing developments in relation to the existing powers in the context of investigations outside a formal enquiry. During the review of HMRC Powers which led to the enactment of Schedule 36, we recall that the HMRC powers team which was responsible for the provisions acknowledged, when asked, that (even though the protection was not expressly stated in the statute) they would abide

[2] See paragraph 3.16 of the consultation document.

by the principles stated by Mr Justice Stanley Burnton in *R (on the application of Johnson & Ors) v Branigan (HM Inspector of Taxes)*[3] and seek information only where 'there is a sensible or reasonable possibility of [a discovery assessment]'. It is not unheard of for HMRC to issue information notices when they are not strictly entitled to do so[4]. The removal of independent Tribunal oversight before the issue of third party notices could lead to more such instances.

3.7 The condition that information must be 'reasonably required' to check the taxpayer's position provides less of a safeguard where the taxpayer cannot appeal to the Tribunal against the issue of the third party notice. The third party is very unlikely to know whether a request is 'reasonably required' or not, it has little incentive to incur costs standing up for the first-party's rights, and its appeal rights are limited in any event. Ultimately this means that it is HMRC's judgement alone whether something is 'reasonably required'. This represents a significant increase in HMRC's information powers.

3.8 The safeguards being proposed in the consultation paper, such as authorisation by an HMRC officer, are no more than further internal HMRC processes – a weak replacement for the independent scrutiny of the Tribunal.

3.9 Currently, with the requirement to go to the Tribunal for a third party notice, the Tribunal can take 'onerousness' into account, but with no Tribunal approval required, no account would be taken of 'onerousness' by anyone independent of HMRC before the notice is issued. Whilst the third party would still be able to appeal the notice on the grounds of it being too onerous, in fact given that there is no case law on this, and that it may be easier just to comply, the appeal right may not in practice be as effective a safeguard as the Tribunal being able to consider 'onerousness' in approving a notice (especially for smaller third parties, who could be faced with a choice of complying with something they think onerous and costly, or undertaking what, particularly to a small third party, would be an onerous and costly process of appealing).

4 OPTION TWO - FINANCIAL INSTITUTION NOTICE

Question 4: Do you think there should be a separate rule for third party notices for banking information?

Question 5: Should this power be subject to any restrictions or safeguards? If so, please state the restrictions or safeguards.

4.1 This option seems more balanced than the first option, in that it is more measured and recognises that most third party information requests received by HMRC are requests for banking information. This option thus has the benefit of retaining the current safeguards and requirement for Tribunal consent for the situations where the third party is a non-financial institution and / or an individual.

[3] [2006] EWHC 885 (Admin)
[4] See *K Betts v HMRC* [2013] UKFTT 430 (TC) where the Tribunal held that HMRC cannot issue a notice seeking further information to try to find a reason to suspect the taxpayer had income on which tax would be due. In this case none of the information HMRC already held gave reason to suspect there was outstanding income that should have been assessed to tax.

4.2 There are two key points to be addressed for the purposes of this option:

a) The definition of 'financial institution'; and
b) The definition of 'statutory records'.

4.3 By 'financial institution', we would take this typically to include banks and deposit-takers. There is a discussion to be had whether the definition should be limited to these types of institution or whether it should extend further than this. We note, for example, that the scope of financial institutions required to report under the CRS definition covers not only banks, but other financial institutions such as brokers, certain collective investment vehicles and certain insurance companies[5].

4.4 We note that HMRC are including information such as bank statements, information about transactions on the account and information held about the legal and beneficial ownership of the account, within a definition of 'statutory records' for this purpose[6]. In our view this is a much too broad definition of 'statutory records'.

4.5 Given that there will be no need for HMRC to seek Tribunal approval for the issue of a 'Financial Institution Notice', we are relying on HMRC's judgement as to whether the request for, say, bank statements is 'reasonably required' – in other words this is a one-sided power in favour of HMRC. In many cases there may be no argument about whether this threshold has been met, but we are aware that HMRC do make requests for bank statements and other banking information which taxpayers (and their advisers) believe to be unreasonable. The costs involved in complying with such requests for information can also be disproportionately high. One common example is requests by HMRC for directors' private bank statements where HMRC are investigating a company's tax affairs. Furthermore, much information on a taxpayer's personal bank account statement would be personal information which would ordinarily be capable of redaction if the subject of an appeal by the taxpayer. Under the proposals outlined in paragraphs 4.7 – 4.11, there would not be a mechanism for the taxpayer to object to HMRC's requests to financial institutions for this sort of information, nor any independent judicial oversight.

4.6 There should continue to be a Tribunal approval safeguard for UK taxpayers who would otherwise object to HMRC's requests. As mentioned, objections are likely to revolve around what financial records are considered to be 'reasonably required'. One way to provide a safeguard within this option would be to include a restriction on HMRC requesting 'fourth party' information in the notice (ie such as in the situation referred to in 4.5 where in a company enquiry, a director's personal bank statements are asked for (although there is no enquiry into their personal return)).

4.7 Another safeguard would be to restrict the 'financial institution notice' to requests from overseas jurisdictions only, and not to apply it to domestic cases.

5 OTHER OPTIONS

Question 6: Do you have any other ideas for options that could deliver both the objective of speeding up the process and providing appropriate safeguards?

[5] https://read.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition_9789264267992-en#page1 – see paragraph 9 'Scope of financial institutions required to report'.
[6] Paragraph 4.9 of the consultation document.

5.1 Our view is that Tribunal approval should not be necessary / required in the following situations before HMRC approach the third party:

a) Where the request for information has come from an overseas jurisdiction for information about a first party not based in the UK (the 'financial institution' exception);
b) Where the first party has been approached and has no objections to HMRC contacting the third party for information;
c) Where the first party has been approached and has made representations which HMRC have either accepted or an agreement has been reached between them.

We think that in scenarios b) and c) (and in d) below) there should be a statutory obligation on HMRC to approach the first party before approaching the third party for information.

5.2 However, we believe that Tribunal approval should still be required:

d) Where the first party has been approached and has objections to HMRC contacting the third party for information which HMRC do not accept. It is this category of taxpayer for whom current safeguards are going to be eroded disproportionately under the proposals outlined in the consultation document; and
e) Where HMRC consider that to notify the taxpayer might prejudice the assessment or collection of tax.

5.3 We believe that both the options suggested in the consultation document could be adapted to reflect the above.

5.4 Whichever model is chosen, the current restrictions on HMRC's information powers contained in paragraph 21 Schedule 36 (taxpayer notices following tax returns) should continue to be recognised, in that HMRC can only ask for information pertinent to the year under enquiry (Condition A paragraph 21) and that Condition B will only be used for years where there is a genuine and objectively reasonable suspicion of discovery before the notice is issued.

6 Question 7: What are your views on extending information powers in this way?

6.1 We do not support the options as currently formulated. We think a stronger case needs to be made as to why HMRC should not continue to use the same powers as every other creditor in the County Court to obtain information for debt collection purposes; and for any options pursued to reflect the extent of this case more closely.

6.2 We are also concerned that HMRC are not providing enough information in their consultation document to explain what they mean by 'Other Functions' and what information they want to access. Without knowing more, we are very reluctant to lend any support to giving HMRC what could, in effect, be a blanket power to access all sorts of information from taxpayers and third parties.

6.3 Where a person has 'hidden assets' (as referred to in paragraph 3.18 of the consultation paper), we doubt whether extending information powers will help, due to

the *Jimenez*[7] case and also since the assets are likely to be in false names. As regards the example of a contrived company (paragraph 4.12), HMRC's criminal investigation powers are already sufficient where fraud is suspected.

6.4 If information powers are extended as proposed they must be restricted to HMRC's **tax** function and the current requirement for the information to be 'reasonably required' must be adapted for the purposes of their tax functions. The interaction of extended powers with the law on bankruptcy and insolvency will also need to be carefully considered to ensure there are no unforeseen adverse consequences.

6.5 We would therefore suggest that, if HMRC want these sorts of extended information powers, there ought to be further consultation specifically on the proposal so that the pros and cons can be adequately addressed and debated.

7 Question 8: Do you have any views on amending the legislation in this way?

7.1 The proposal to amend the wording in Paragraph 49A FA 2008 to clarify that the Tribunal grant permission for HMRC to assess increased daily penalties (for failure to comply with a notice which requires information about a person whose identity is unknown) seems to us to be sensible, although we think that this point should have been given a fairer airing. It seems odd to make a change to the legislation to make it work, presumably as originally intended, and then propose that increased daily penalties should apply to all Schedule 36 information as well (see Question 9).

8 Question 9: Should the increased daily penalties apply to all Schedule 36 information notices?

8.1 Subject to our comments in paragraph 7.1 above, we agree, but as with all daily penalties there should be adequate notification to the person concerned before they are imposed. Giving the taxpayer or third party the right to attend the Tribunal hearing would provide an additional safeguard.

9 Question 10: Do you have any views on making amendments to prevent the third party from notifying the taxpayer in this way?

9.1 We agree that this is a sensible amendment to the legislation.

10 Question 11: What form of sanction should be imposed on the third party for a breach of this rule?

10.1 We agree that there should be consequences for a third party who notifies the taxpayer about the notice in breach of this rule.

10.2 It would be appropriate to have a scale of financial penalties which will depend on the seriousness of the breach. We can envisage that some breaches may result from

[7] R (oao) Tony Michael Jimenez v The First-tier Tribunal (Tax Chamber) & CRC [2017] EWHC 2585

simple error rather than wilful or deliberate acts so the financial penalties available should be flexible enough to penalise whatever breach is involved in a proportionate way.

10.3 There should be a right of appeal to HMRC and the Tribunal against any sanction imposed.

10.4 Where criminal behaviour by the third party is suspected the Corporate Criminal Offence may apply. The sanctions for 'tipping off' under Anti-Money Laundering legislation may also be relevant in devising sanctions where criminal behaviour is involved.

11 Acknowledgement of submission

11.1 We would be grateful if you could acknowledge safe receipt of this submission and ensure that the CIOT is included in the List of Respondents when any outcome of the consultation is published.

12 The Chartered Institute of Taxation

12.1 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 18,000 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
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