THE CITY OF LONDON LAW SOCIETY

4 College Hill
London EC4R 2RB

Telephone 020 7329 2173
Facsimile 020 7329 2190
DX 98936 – Cheapside 2
mail@citysolicitors.org.uk
www.citysolicitors.org.uk

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HMRC Review of Powers
Room 1/72
100 Parliament Street
London SW1A 2BQ

By Email:
powers.review-of-hmrc@hmrc.gsi.gov.uk

Dear Sirs

Re: Comments on HMRC Consultation Document: "Modernising Powers, Deterrents and Safeguards: Working with Tax Agents"

We are grateful for the opportunity to comment on the proposals relating to the relationship between HMRC and tax agents as set out in the "Working with Tax Agents" consultation document dated April 2009. You have included in that document at Annex A a summary of the questions for consultation, and our comments address those questions in turn.

Chapter 2

1. Have we identified the correct design principles? In applying these principles, are there any other matters that we need to take account of?

We support the aim of ensuring greater accuracy in tax returns. If this is achieved, it will clearly lead to benefits for the vast majority of taxpayers who seek to pay the right amount of tax, as well as to HMRC.

Given that promoting greater accuracy in returns is an entirely uncontroversial aim, we would suggest that the guiding principle behind any initiative around the relationship between HMRC and tax agents should be to ensure better tax compliance. Any legislative or procedural change should not be treated as an opportunity to raise extra revenue by levying penalties in a greater variety of situations involving only innocent mistakes.

We believe it is accepted that taxpayers should not be penalised for innocent errors in their returns caused by the receipt of properly sought, but wrong, advice – this principle is certainly reflected in the current law. A regime enabling HMRC to penalise advisers in the case of such errors, even if the powers to do that were limited, would be a significant increase in the scope of penalties.

We would question most strongly whether such a regime would promote tax compliance: honest tax advisers are already strongly incentivised to do a good job, as if they do not they are liable to face the loss of clients, damage to reputation and ultimately professional negligence claims. The possibility of a further financial penalty is therefore unlikely to lead to any behavioural change by honest advisers who, as now, will strive to do a good job for their clients. Dishonest advisers, on the other hand, are unlikely to be dissuaded by such a new penalty given that they would already be liable to criminal prosecution. Also, criminal behavioural studies consistently show that additional penalties have only a minimal deterrent effect (in stark contrast to measures which materially increase the likelihood of being caught).

Subject to this overriding principle, however, we would acknowledge that HMRC is uniquely well placed to identify tax agents who do not meet minimum standards of competence, since HMRC is likely to be the only organisation that would have sight of the collective body of work of each tax agent. A mechanism for HMRC to identify such agents might well be of benefit, but the question of the application of sanctions should in our view be left to the appropriate professional bodies.

As the consultation document recognises, HMRC has existing powers to notify professional bodies in cases of professional misconduct, subject to safeguards including the need for the approval of two Commissioners. We would note that, contrary to the statement on p.32 of the consultation document, there is no requirement in s.20(3) CRCA that a breach of professional conduct must be "serious" in order for disclosure to a professional body to be permitted, although we would acknowledge that innocent errors may not amount to professional misconduct, even if frequent.

We do not believe that any new regime allowing the imposition of penalties by HMRC, whether financial or not, on advisers will lead to behavioural change for the reasons set out above. As such we do not believe that it would be useful, and the potential issues raised by the extremely robust safeguards regime which would be needed would be so significant that our view is that such a regime would be counter-productive for both HMRC and taxpayers.

Furthermore, we would be extremely concerned about any additional power to penalise advisers resting on a discretionary basis with the executive which was not subject to the sanction of the courts. Regrettably from time to time under the present regime we see HMRC officials taking positions or making allegations against taxpayers which are not eventually upheld. When this happens, it is difficult for a taxpayer but normally the judicial system will ultimately provide proper recompense. However, for a tax adviser, the mere allegation of negligence or, worse, dishonesty, can be enough to cause serious damage to their business, even if it is subsequently disproved.

Chapter 4

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

HMRC must monitor errors in returns as part of their risk assessments, and identify which tax agents were responsible. This will enable HMRC to identify whether particular agents have a particularly poor level of competence in any given field or generally, and adjust the risk weightings of taxpayers advised by those agents accordingly.

2. How can HMRC and professional bodies work to ensure risks are resolved for the future?

This question presumes that tax agents are part of professional bodies: as the consultation document identifies, while most are, many are not. It is hard to see how any process of working together as between HMRC and professional bodies could have any impact on agents which are not members of any body.

It would appear to us that it will often be appropriate for a professional body to be notified by HMRC if a particular tax agent for which that body is responsible performs consistently poorly. However, we believe the introduction of robust safeguards to be necessary if HMRC is to do this.

3. What safeguards would be needed?

Any notification by HMRC to a professional body of inadequacy by a tax agent would inevitably lead to serious consequences for that agent, as the consultation document recognises. Even if the agent was ultimately found not to have failed in any of its professional duties, it would be likely to face regulatory scrutiny which would be difficult and potentially costly to deal with. Furthermore, in a case where the agent is a large firm but the problem rests with a particular individual or small team, effectively singling out the entire firm for criticism will often not be appropriate. In such cases HMRC could (as now) bring the matter to the attention of the firm in question's senior management.

One approach would be to build on the existing HMRC power to notify professional bodies in cases of professional misconduct, so that such notification can occur as a result of habitual poor performance. We would however urge that any criteria used to trigger notification to a professional body on this basis must be objective: we would suggest that there would have to be more than a minimum number of returns containing errors submitted by that agent in a given year, that that number of returns would represent more than a minimum percentage of the agent's total returns for the year, and that the amount of tax at stake was more than a minimum amount. Likewise if only one individual, or a small team, within a large organisation was responsible for the failings we would expect HMRC to have taken the matter up with the agent's management as a first step. It is imperative to be sure that any system for the notification of failings to professional bodies cannot operate when it is not appropriate for it to do so.

Even a system such as this would not be free of difficulty. It would need to be absolutely clear, for example, that the adoption of a defensible filing position which was subsequently either agreed between HMRC and the taxpayer, or found by a tribunal, to be incorrect, was not an error which should count towards the tally. Similarly, the kind of minor errors which are inevitably picked up in a PAYE or VAT audit of any substantial business should not be counted. This latter example also highlights the point that in many cases it may be difficult to identify whether any given error was the responsibility of the tax agent or his client.

4. What guidance should HMRC produce…?

We do not consider a regime which made such guidance necessary would be appropriate. We think that the basis of the regime should be that any sanctions should be limited to notification of professional bodies and/or clients, and should be triggered by the meeting of objective criteria indicating a failure to act to a reasonable standard.

5. What methods would be appropriate…?

See above. Where a tax agent's failings are persistent, and objectively identifiable, they should be reported to their professional body (if they are a member of one).

In more isolated cases of innocent error (i.e. where the agent is not complicit in a fraud either in their own right or in conjunction with their client), commercial/client relationship pressure should be more than sufficient to encourage improvement by the agent. It would certainly in our view be appropriate for any correspondence with a tax agent to be copied to the underlying client (as we believe is generally the case now), in order that HMRC could be sure that the client would have sight of errors being made on its behalf.

Where the agent is not a member of a professional body, the position is more difficult. In such circumstances the most appropriate first step would probably be for HMRC to notify the tax agent that it had committed a number of errors that would lead to notification to a professional body if it had one, and that in consequence its clients would all be considered high-risk taxpayers. If failure persisted, it might eventually become appropriate to notify the agent's clients of this.

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

No. Honest tax agents are already strongly incentivised to do the best job possible in order to keep their clients and build a reputation leading to the acquisition of more clients. A potential tax penalty will make no difference. This goes back to our preferred core principle: any measures in this area should aim solely to improve tax compliance, not to raise revenue through a broader penalty regime.

If advisers were exposed to financial penalties from HMRC in cases of innocent error, they would inevitably in many cases insure themselves against the risk of those penalties. This would to some degree increase their costs (as a professional indemnity policy covering a new category of risk would be more expensive). This cost would in turn be passed on to clients to some degree. We would submit that any measure which is likely to increase the cost of hiring tax compliance advisers is also likely, however marginally, to reduce the overall quality of tax compliance as it will incentivise taxpayers to either take no advice or to use a less high quality adviser than they might otherwise have done.

Dishonest tax agents should be prosecuted in the courts under existing law. The imposition of a penalty by HMRC implying dishonesty on, for example, a qualified solicitor will have implications way beyond the imposition of the penalty itself. It may lead to striking off and loss of livelihood. Whilst this is entirely appropriate where the agent has in fact been dishonest, the severity of the consequences beyond the quantum of the financial penalty in our view demand that the criminal burden of proof must be satisfied.

A case where an agent's conduct is on the borderline, and so where there would be real doubt whether a criminal prosecution had a reasonable chance of success, would even under current rules be appropriate for referral to a professional body as a possible serious breach of the relevant professional conduct rules, even if it was an isolated example.

7. If financial penalties are appropriate…?

For the reasons set out above, we do not believe that they are.

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

We refer you to various answers above: in summary, yes, but we would urge that it is only used subject to robust safeguards including the setting of objective criteria to trigger the disclosures.

9. What safeguards would be needed?

See above. We would emphasise again the importance of objective criteria. It must be impossible, for example, for a tax agent involved in a dispute with HMRC to be credibly threatened with penalties (whether financial or in the form of a report to a professional body) as a negotiating tactic. Such a threat, as well as being unjustified, would immediately create a conflict of interest between the tax agent and his client such that it would be difficult for the agent to provide continued impartial advice on the dispute.

Whilst we note the point raised by HMRC in paragraph 2.10 of the consultative document, we consider it entirely inappropriate for HMRC to contact a professional regulatory body on the strength of a single mistake where there is no suggestion that that mistake is anything other than innocent. Isolated mistakes which are not indicative of systemic problems can occur in any organisation (not least HMRC), but regulators cannot always be relied upon to react proportionately. HMRC in is by far the best position to identify systemic problems with tax agents. If it considers monitoring for such problems to be important, it should take advantage of its uniquely advantageous position and do it itself.

However, even a single instance of dishonest behaviour or other serious breach of professional conduct rules should legitimately be considered sufficient to trigger a notification to a tax agent's professional body, as would be the case today.

10. Could there be a wider role for professional bodies…?

If a regime is introduced where HMRC can notify a professional body of the persistent failures of a tax agent, any response to that notification should be a matter for the professional body and its conduct rules. It would be appropriate in such circumstances for HMRC to enter into a dialogue with professional bodies as to whether conduct rules should deal with the tax agent function explicitly, and to discuss appropriate sanctions. However the imposition of those sanctions should be a matter for the professional bodies.

Chapter 5

1. Is a form of registration for tax agents needed in the UK?

Registration would be of no value of itself; it would only potentially be of use if it formed part of some element of regulation (with the ultimate sanction of deregistration for persistent failure). The wide range of different tax agents would inevitably make such a regulatory system complex. As the consultation document notes, tax agents range from high street conveyancing solicitors who prepare entirely straightforward SDLT returns as an incidental part of their businesses to huge accounting firms handling the tax affairs of multinational corporate groups. It cannot be correct to submit agents of these different types to the same level of regulation. Additionally, a new system would provide unwelcome extra bureaucracy for those tax agents which are already subject to regulation via their professional bodies.

If a registration/regulation system were to be introduced it should be limited to those tax agents which are not already regulated via, for example, the legal and accountancy professional bodies. Such a system would need to be completely independent of HMRC in order that it could consider complaints objectively. It would appear questionable whether the cost of such a system would be justifiable when measured against HMRC's incremental costs in dealing with the small number of agents who are not otherwise regulated and whose conduct is sufficiently poor that a regulator might impose sanctions on them. The cost of the system should not be passed on to the agents – if it was this would inevitably increase the cost of tax compliance advice and hence likely reduce its quality by incentivising taxpayers to take either no, or less good, advice.

Again, we would emphasise that honest tax agents are already under intense commercial pressure not to make mistakes, whilst dishonest ones will likely continue to be dishonest whatever additional penalties are introduced. We think that a system of registration would lead to additional cost and bureaucracy for both taxpayers and HMRC without delivering any material benefit.

2. What benefits for tax agents and taxpayers could a registration system deliver?

See above – we do not believe a registration system would be helpful.

3. Would there be a benefit in defining "tax agent" in legislation…?

If legislative measures raising the possibility of sanctions against tax agents were to be introduced, it would be absolutely necessary to define what was meant by a tax agent. The extent to which the definition should distinguish between different types of tax agent would depend on the nature of the measures to be introduced.

4. How wide should the definition of tax agent be…?

Again, this would depend on the nature of the measures to be introduced.

5. What additional issues need to be considered in respect of tax agents who are not based in the UK?

Where overseas agents are members of overseas professional bodies, similar reporting rules could be put in place as apply to UK agents. We suspect that the number of UK taxpayers represented by locally unregulated overseas agents is probably small and likely to remain so. As a result it may well be unnecessary to address these cases.

Annex C

1. Are there any other international models that we should consider?

We do not believe that the question of potential liabilities for tax agents can be looked at in isolation from the wider framework of tax penalties and criminal and civil law. It is but one aspect of the much wider relationship between the state and its taxpayers, which in all developed jurisdictions is complex and nuanced. Simply comparing one set of rules relating to agents with another cannot give the full picture.

Instead we believe that the proposed regime should be considered within the UK's wider taxing framework, in the light of the rights and powers already available to HMRC, and the safeguards for taxpayers in dealing with HMRC.

Summary of conclusions

We consider the key points are as follows:

- any new measures should be directed solely at increasing the quality of tax compliance, and should not be regarded as an opportunity to raise revenue by broadening the range of entities subject to tax penalties;

- financial penalties for agents will not assist in increasing the quality of tax compliance, and may even have the opposite effect by increasing insurance costs for agents and hence fees; as a result they should not be introduced;

- a system where agents can be reported by HMRC to their professional bodies in cases of persistent poor performance short of professional misconduct would have merit as long as the criteria for making a report were objective;

    - a registration system is likely to be complex, expensive, and only offer any potential benefit in relation to those agents which are not already members of professional bodies; a better way to deal with the issue of unregulated agents found to be of poor quality would be to adjust upwards the risk weighting of taxpayers who are advised by them; and

    - if a registration system were to be introduced and the cost passed to tax agents, this would increase the cost of advice to some degree and so potentially undermine the purpose of the new measures by decreasing the quality of tax compliance.

Yours faithfully

Bradley Phillips
Chair
Revenue Law Committee

THE CITY OF LONDON LAW SOCIETY
4 College Hill, London EC4R 2RB
Tel: 020 7329 2173, Fax: 020 7329 2190
E-mail: mail@citysolicitors.org.uk

THE CITY OF LONDON LAW SOCIETY
REVENUE LAW COMMITTEE

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Norton Rose LLP

Hilary Barclay
Macfarlanes LLP

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Lovells LLP

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