

**Amending HMRC's Civil Information Powers
Response from the Low Incomes Tax Reform Group (LITRG)**

1 Executive Summary

- 1.1 We welcome the opportunity to respond to this consultation on amending (increasing) HM Revenue & Customs' (HMRC) civil information powers under Schedule 36, Finance Act 2008.
- 1.2 We understand that HMRC consider that their existing powers do not enable them to carry out their functions efficiently and effectively, in light of their international obligations with other countries, to tackle offshore tax avoidance and evasion. They consider that the statutory safeguard of obtaining the agreement of either the taxpayer or an independent tribunal before a third-party notice can be issued means that they cannot meet these obligations in a timely manner. It is proposed that this important safeguard is removed.
- 1.3 In addition, the consultation proposes extending the scope of information notices beyond checking a taxpayer's tax position, specifically to include debt collection. HMRC also wish to change the wording of the legislation, which they consider to be misleading, so that daily penalties of up to £1,000 may be assessed more easily and across a wider set of circumstances. Finally, they wish to be able to require that a third party is prevented from notifying the taxpayer of an information notice in cases where a tribunal has decided that such action could prejudice the assessment or collection of tax.
- 1.4 On behalf of the low-income taxpayer, we are concerned that the proposals from HMRC are one-sided and disproportionate and we are not convinced by the arguments to support them. Put simply, the reasons for the existing statutory safeguards relating to third-party notices are no less valid today than they were when they were originally introduced. As

such, we do not consider that the 'drivers for change' or the international comparators given in the consultation document warrant the abolition of these important safeguards.

- 1.5 Should the proposals be taken forward, we would recommend restricting the scope of the changes to deal solely with the cases where HMRC would otherwise fall short of international standards in meeting their treaty obligations. We feel that a 'Financial Institution Notice' model, whereby tribunal approval is bypassed only for limited types of banking information and only in limited cases, would be a fairer and more effective option than allowing HMRC to issue third party notices in all cases without the scrutiny of an independent judge.
- 1.6 We also suggest that the Government should consider streamlining or simplifying the existing process of obtaining tribunal approval, for example by looking at the aspect which allows third parties to make representations before tribunal approval is granted, rather than abolishing it altogether. This would offer a better balance between safeguarding the taxpayer and ensuring HMRC are able to respond to requests from overseas jurisdictions more efficiently.
- 1.7 We also feel that expanding HMRC's debt collection powers using Schedule 36 is likely to have a negative impact on low-income taxpayers. We would favour a more collaborative approach which recognises that the threat of penalties is unlikely to incentivise those without the means to pay.
- 1.8 Finally, we are concerned that the proposals which seek to increase the scope of the daily penalties regime of up to £1,000 a day, and to prevent third parties from sharing information with taxpayers, may place the third party in a conflict of interest. Accordingly, we would caution against increasing powers in this way and in the very least advocate that the third party should have a clear right of appeal in each case.

2 About Us

- 2.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HMRC and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more

efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 Aligning With Taxpayer Notice

Q1. Do you have any views on the suggested change to align third party notices with taxpayer notices?

Q2. Do you think any further internal processes, or safeguards, prior to issuing the notice, should be required?

Q3. Should there be any further restrictions on the type of information that could be requested under this notice?

- 3.1 If HMRC are able to issue a third-party notice without taxpayer agreement or independent tribunal approval, doing so under their own jurisdiction and determining themselves whether the notice is 'reasonably required', they become both judge and jury in a matter of their own interest. This remains so even in cases where the issue of such a notice needs to be approved by an 'authorised officer' – a weak replacement for the scrutiny of an independent judge.
- 3.2 We are concerned that as a result of the changes, more third-party notices will be issued (because it will be quicker and easier to do so) and more of these notices may be issued in circumstances which a tribunal might have rejected. The consultation document even suggests that HMRC have attempted to make illegal information requests¹ in the past and the low-income, unrepresented taxpayer is very unlikely to have the means or ability to challenge such a notice. While the third party itself is able to challenge such a notice on the basis of the information being unduly onerous to obtain, this offers no protection for the taxpayer. We do not consider this to be acceptable.
- 3.3 The fact that HMRC have only had one case of rejection by a tribunal where a third-party notice which has arisen through the exchange of information process does not mean that the safeguard can be abolished. The existence of this safeguard of itself is likely to have an impact on the care that HMRC take in choosing which cases to pursue; if you remove the safeguard, the incentive to take this care is also removed.
- 3.4 In particular, we see no reason why the age of the existing safeguards and the increased digitalisation of the economy have any bearing on whether or not the existing powers are appropriate. If anything, the fact that financial records can be shared with greater ease than ever before should mean that information can be supplied more quickly and easily, meaning that the safeguards are less of a burden now than when they were originally introduced.
- 3.5 Furthermore, it is accepted that a physical inspection of a person's business premises is an intrusive act, so it is right that a person cannot be penalised for obstructing such an

¹ Paragraph 3.17. We note that this statistic only relates to third party notices which have arisen through the exchange of information process, rather than the figure of 215 given in paragraph 3.16.

inspection unless tribunal approval has been obtained.² But intrusion may occur in other ways, not just physically. In our opinion, obtaining an individual's financial information is just as intrusive as inspecting their documents on their premises, if not more so when it is done furtively. Surely, the nature of the information obtained has more bearing on whether or not there is an invasion of privacy, rather than simply the means of obtaining it. Accordingly, we feel that the same safeguards should apply.

- 3.6 The consultation document states that HMRC's ability to obtain information on behalf of international treaty partners is hindered by the tribunal approval process.³ However, it goes on to state that there were only 215 requests for tribunal approval of a third-party notice in the year to 31 March 2017 and that the numbers of third-party notices are expected to remain low after the introduction of the Common Reporting Standard (CRS).⁴
- 3.7 Consequentially, we do not consider it justified to remove the requirement to obtain taxpayer agreement or tribunal approval in all cases, including domestic cases which have not arisen through the exchange of information process. If the new powers are to be introduced, we recommend that they are restricted to deal with the cases which HMRC have identified, i.e. international cases which fall short of timescales expected by overseas jurisdictions.
- 3.8 An alternative option which might streamline the existing process, rather than removing tribunal approval, would be to remove or reduce the ability for third parties to make representations, or to restrict the length of time allowed for them to do so. Such a change may provide the taxpayer with sufficient comfort that the powers are not being abused by HMRC but at the same time achieve HMRC's objective of making it easier to obtain information from third parties where it is valid and reasonable to do so.
- 3.9 Indeed, it would be surprising if there were no opportunity to make the existing process, in terms of obtaining and delivering the information required to support tribunal approval for a third-party notice, more efficient. This would also go some way to alleviating the concerns raised by the OECD in respect of the time needed for HMRC to respond to requests for banking information for other jurisdictions.
- 3.10 Finally, we question the use of international comparators in determining what is reasonable in these cases, rather than attempting to determine what is best for the UK taxpayer and tax authority.

² Paragraph 3.15

³ Paragraph 3.8

⁴ Paragraph 3.16

4 Financial Institution Notice

Q4. Do you think there should be a separate rule for third party notices for banking information?

Q5. Should this power be subject to any restrictions or safeguards? If so, please state the restrictions or safeguards.

Q6. Do you have any other ideas for options that could deliver both the objective of speeding up the process and providing appropriate safeguards?

- 4.1 We would favour this option as an alternative to 'Aligning With Taxpayer Notice' on the basis that it would be more streamlined and limited in scope. However, our comments above on the ongoing validity of the existing safeguards still hold.
- 4.2 In particular, we feel that such a power should be limited to deal with cases where HMRC require information in order to comply with an international exchange of tax information, because they would otherwise fall short of international standards. We do not consider that there is enough justification given in the consultation document to widen the power beyond this.

5 Obtaining Information for Other Functions of HMRC

Q7. What are your views on extending information powers in this way?

- 5.1 We are concerned about the impact on the low-income taxpayer of extending the scope of the information notices beyond checking a taxpayer's tax position, to access information reasonably required for all tax functions, including obtaining information for debt collection purposes. While we support the principle of all taxpayers paying the tax they owe, the prospect of a statutory demand for information about assets for paying these debts, with the possible threat of £1,000-a-day penalties for non-compliance, is not the right approach for the low-income taxpayer. The Government should remember that the third party may be a low-income taxpayer themselves, as opposed to a large financial institution.
- 5.2 Indeed, the penalties may make a taxpayer insolvent and a taxpayer may be unable to pay them in any event. Such an approach might disincentivise taxpayers from engaging with HMRC. We do not consider that there is any real justification for extending HMRC's powers in this way; HMRC should instead focus on how to help people pay their tax debts rather than seek to obtain information to seize assets, or otherwise restrict these powers to protect those whose livelihoods would be at stake.
- 5.3 If HMRC proceed with this change then it is important that communications and processes are designed to ensure that taxpayers understand what is happening, and why, and that they are given the opportunity to engage with HMRC. This is especially important in cases where there may be some degree of taxpayer vulnerability.

6 Schedule 36 Penalties

Q8. Do you have any views on amending the legislation in this way?

Q9. Should increased daily penalties apply to all Schedule 36 information notices?

- 6.1 We do not object to clarification of the law surrounding the 'imposition' of penalties under paragraph 49A, Schedule 36, Finance Act 2008.⁵
- 6.2 However, the current restriction of such increased daily penalties to cases where the identity of the taxpayer is unknown represents a safeguard to the taxpayer. If penalties of up to £1,000 a day are issued to a third party in respect of a known taxpayer's information, it is reasonable to suppose that the third party will hold the taxpayer accountable in some way or it may create a conflict of interest for the third party.
- 6.3 Furthermore, we would comment that the assessment of penalties of up to £1,000 a day on a third party seems unduly harsh where it is ultimately not that third party who is suspected of having not paid the right amount of tax. Accordingly, we would not support broadening their scope.

7 Third Party Notices – The Requirement to Notify the Taxpayer

Q10. Do you have any views on making amendments to prevent the third party from notifying the taxpayer in this way?

Q11. What form of sanction should be imposed on the third party for a breach of this rule?

- 7.1 We follow the logic in placing an obligation on third parties not to inform the taxpayer about an information notice where the tribunal has agreed to waive HMRC's obligation to do so on the basis that it might prejudice the assessment or collection of tax.
- 7.2 However, given the taxpayer and third party have no right to attend the hearing, we would prefer the third party to have a right of appeal against such an obligation in case doing so puts it in a conflict of interest. Serious money laundering cases aside, in general we would prefer a system which encouraged openness and transparency rather than one which allows HMRC to 'go behind the taxpayer's back' and force the third party, who may be a trusted accountant or tax adviser with whom the taxpayer has a long and personal relationship, to do the same.

LITRG
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⁵ <http://www.legislation.gov.uk/ukpga/2011/11/schedule/24/paragraph/4#schedule-24-paragraph-4-1>