

## LOW INCOMES TAX REFORM GROUP

### WORKING WITH TAX AGENTS: THE NEXT STAGE RESPONSE TO HMRC'S CONSULTATIVE DOCUMENT

#### 1. Executive Summary

- 1.1. We are interested in this consultation to the extent that proposals might impact on third sector/pro bono advisers, informal 'representatives' and taxpayers on low incomes – thus unable to afford professional advice – who might engage a less reputable high volume agent ('HVA').
- 1.2. The draft legislation on 'deliberate wrongdoing' raises significant concern. Our comments on this will be submitted separately.
- 1.3. In terms of HVAs we do not agree with the assumption that people who use them only have themselves to blame when things go wrong. HMRC could, for example, provide guidance to the public in choosing a tax agent. We discuss HMRC's responsibility to consumers, suggesting how improved HMRC practice could obviate the need for taxpayers to use HVAs at all (matching data to facilitate taxpayer claims and repayments).
- 1.4. Where a taxpayer has used a HVA which becomes subject to a direction under the proposed new powers, HMRC must allow people to lodge revised claims themselves; so they need to inform taxpayers where they can and allow time for them to take action.
- 1.5. It is illogical that the consultation proposes a power to 'name and shame' individual agents but no such power is proposed for HVAs – a key weapon in the battle for consumer protection.
- 1.6. HMRC must improve their working with third sector/pro bono advisers and other representatives. We recommend that a working party is set up to discuss the issues, for example reviewing the current authorisation process for agents and how HMRC could recognise an informal representative in the way they do for tax credits.

#### 2. Introduction

##### 2.1. *About us*

- 2.1.1. The Low Incomes Tax Reform Group (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.

- 2.1.2. 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.

## 2.2. ***Our response – general comments***

- 2.2.1. This second consultation document states (para 2.15) that 'HMRC remains of the view that a full system of registration for all tax agents, with accompanying regulation, would not be feasible'. In so doing, it allays some of the fears outlined in our response to the first round of consultation<sup>1</sup> as regards the impact on pro bono advisers and the voluntary sector.
- 2.2.2. We do, however, have significant concerns in relation to the draft legislation proposed on 'deliberate wrongdoing', on which we will submit comments separately. Generally, as it is currently drafted, we think that the definitions of what is a tax agent and what constitutes a loss of tax are far too broad, meaning that there could be significant adverse (albeit perhaps unintended) consequences on third sector organisations and indeed on ordinary people trying to help another comply with a tax obligation.
- 2.2.3. Coming back to the main consultation document, we also have concerns that the proposals in the consultation document do not go far enough to address two key areas:
- The problem of certain 'high volume agents' and taxpayer protection, particularly taxpayers on incomes too low to be able to afford professional advice (see section 3 below); and
  - How HMRC works with tax agents working pro bono and other – perhaps informal – taxpayer representatives and the administrative problems which can arise from current practice (see section 4 below).
- 2.2.4. Our CIOT colleagues are also responding to the consultation and will be addressing the questions raised from the perspective of members and more formal 'paid' agent relationships.

## 3. **High volume agents ('HVAs')**

### 3.1. ***Our areas of concern***

- 3.1.1. The consultation document correctly identifies (Chapter 10) that there is a range of HVAs – from what we might term the 'genuine', through to those deliberately committing large scale fraud. Our concerns fall into two broad categories:

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<sup>1</sup> [http://www.litrg.org.uk/uploadedfiles/document/1\\_681\\_WorkingWithAgents-responsebyLITRG-TOPfinalAug09.pdf](http://www.litrg.org.uk/uploadedfiles/document/1_681_WorkingWithAgents-responsebyLITRG-TOPfinalAug09.pdf)

- Consumer protection for low-income and potentially vulnerable taxpayer groups (3.2ff); and
- Safeguarding the rights of taxpayers who have engaged a HVA which then becomes subject to sanctions under any proposed additional HMRC powers (3.3ff).

### 3.2. **Consumer protection**

- 3.2.1. We believe that HMRC have a duty to taxpayers to help protect them against the activities of certain 'refund organisations'. They also have the capability to do so by using and matching records and other information about individual taxpayers. Our research has shown that there is a spectrum of refund organisations; some charge significant sums of money to deal with very straightforward refund claims that could just as easily be made by the claimant directly to HMRC at little or no cost.
- 3.2.2. Whilst HMRC might argue that engagement of an agent by a taxpayer is a matter of free choice and in turn that taxpayers should 'face the consequences' of such choice (para 10.20), we would strongly argue that people do not always have sufficient knowledge or sophistication in tax matters to choose wisely. People can be easily influenced by companies promising to get them a tax refund; particularly if they are on low incomes, unfamiliar with the tax system, and are persuaded that they could be missing out on money that is rightfully theirs.
- 3.2.3. HMRC can help in a number of ways, as set out below.
- 3.2.4. First, they can deliver their 'Vision'<sup>1</sup> of making the tax system feel simple for individuals. In so doing, fewer people might feel the need to engage a refund company through having the confidence to instead engage direct with HMRC. As a minimum, all taxpayers should at least have the opportunity to deal with their tax affairs without fearing that matters or processes are so complex that they cannot navigate their own way through.
- 3.2.5. Second, where refund companies are shown to be sending out incorrect messages to the general public, for example by using HMRC's logo when promoting their services via websites, HMRC should take swift action to address the matter. Whilst there may well be an element of 'phoenix' behaviour amongst those companies at the most dubious end of the market, this should not deter HMRC from seeking to rectify problems as they are uncovered.
- 3.2.6. Third, last year's consultation on bulk information powers proposed to allow HMRC to obtain third party data *en masse*, which could then be matched to taxpayer records. We indicated in point 3 of our response<sup>2</sup> to that consultation that HMRC could use the information obtained to identify cases where individuals might have overpaid tax and either repay them automatically or alert them to the possibility of making a claim. In the same vein, HMRC's new National Insurance and Pay As You Earn System ('NPS') ought also to play a significant role in facilitating repayments, by reconciling a taxpayer's sources of PAYE income in a single record. If successful, this could obviate taxpayers' need to employ an agent – HVA or otherwise – to claim a refund (examples include students, pensioners and itinerant workers with multiple PAYE income streams). Whilst this may not be for the Powers Team specifically to consider, it should be part of wider HMRC's agenda particularly in view of creating

<sup>1</sup> <http://www.hmrc.gov.uk/about/hmrc-vision.htm>

<sup>2</sup> <http://www.litrg.org.uk/reports/submissions.cfm?id=702>

efficiency savings, as automated claims must create greater efficiency in the long term than processing forms.

- 3.2.7. Fourth, while full automation may be possible in the future, help could be provided in the meantime, for example in the form of toolkits made available to the general public, such as those HMRC are currently piloting for the agent community. Checklists often form part of the tax credits process and we see no reason why they could not also be put to good use in tax.
- 3.2.8. Fifth, we understand that HMRC are working with trade bodies to raise awareness of possible claims for certain industry groups. In addition, we think that more work could be done with third sector organisations – for example to promote potential tax claims which might arise around certain life events, such as retirement or dealing with bereavement. See for example our reports: ‘Older people on low incomes – the case for tax reform’<sup>1</sup> and ‘Bereavement and the tax system’<sup>2</sup>.

#### *‘Naming and shaming’ HVAs*

- 3.2.9. As part of consumer protection, we believe that HMRC should implement a ‘naming and shaming’ power against HVAs. Under the proposed powers in this consultation, an individual agent might be named and shamed for deliberate wrongdoing, but HMRC do not propose similar powers to use against HVAs who in effect might be guilty of fraud. Why should HMRC not have power to make the taxpaying public aware of such offences?

#### *Guidance for taxpayers when choosing an agent*

- 3.2.10. This leads us to suggest that HMRC ought at least to consider publishing guidance to taxpayers on what to look for in an agent.
- 3.2.11. HMRC’s Compliance Handbook<sup>3</sup> on the Sch 24 FA07 penalties regime sets out HMRC’s position on a taxpayer’s reliance on an agent to avoid a penalty for an inaccurate return. ‘Your Charter’ also says ‘You should always check that your representative has the right experience and knowledge to help you’ (‘your rights’, point 8). How can HMRC expect ordinary taxpayers to make such judgments without assistance?
- 3.2.12. If taxpayers do fall victim to a poor HVA, HMRC have a responsibility in considering penalties under the Sch 24 provisions to examine the taxpayer’s own abilities and circumstances. This is very different to applying the objective test of what is reasonable for the ‘man on the Clapham Omnibus’ to have believed or how he would have behaved. The Sch 24 provisions are still very much in their early days of operation and we think that frontline decisions ought to be monitored to ensure HMRC’s guidance is rigorously followed. HMRC’s new internal review system will provide useful information as to whether the guidance in its current form is adequate.

### **3.3. *Safeguarding individual taxpayers’ rights***

- 3.3.1. Whilst we understand that HMRC are proposing new powers (para 10.7ff) primarily to serve as a deterrent rather than for regular use, we are keen to ensure that individuals’ rights are preserved when they are used.

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<sup>1</sup> <http://www.litrg.org.uk/reports/reports.cfm?id=437>

<sup>2</sup> <http://www.litrg.org.uk/reports/reports.cfm?id=714>

<sup>3</sup> CH84540

*Use of the First-tier Tribunal as a safeguard*

- 3.3.2. We understand that Tribunal approval will be necessary before the proposed powers are used against the HVA (para 10.14ff). But as we understand there is no intention to allow individual taxpayers whose claims might be affected by the action to make representations at the Tribunal, we feel that HMRC need to give further consideration as to how affected taxpayers will be made aware of the Tribunal's direction and the consequent impact on their claim. HMRC should have agent details noted on their system so as to enable them, as a minimum, to contact taxpayers and advise that their agent is subject to such a direction and what they might then need to do. Stakeholders should be consulted as to the process and the wording of any standard letters to be used.
- 3.3.3. If it is difficult for HMRC to identify claimants affected by the direction using current agent data on their systems, this further reinforces the argument for a wider review of how agents are appointed (see comments under 4.2 below).
- 3.3.4. Where there is reason to doubt the validity of claims, we understand that HMRC will aim to engage with the HVA before seeking a direction (para 10.8). If the HVA fails to engage with HMRC or does not comply with this request, HMRC will seek a direction from the Tribunal. On non-compliance with the direction, the individual claims will lapse. On partial compliance with the check (or subsequent direction), we think that there should be provision for claims to be adjusted and a revised repayment issued, but para 10.12 of the consultation does not appear to allow for this, and suggests an 'all or nothing' approach.

*Lapsed claims*

- 3.3.5. Taxpayers should always have the opportunity to pursue the lapsed claim themselves if and to the extent that they can satisfy HMRC of the validity of their claim. We understand that it is intended for the direction to apply to the HVA submitting the claim, or any further agent appointed, or to the taxpayer himself. The taxpayer could therefore review his or her own claim and comply with the terms of the direction to that extent, or submit a different/revised claim later. But in order to do so, the taxpayer will of course need a copy of the direction.
- 3.3.6. HMRC should therefore ensure that this is made available (on request, if not distributed automatically) and guide taxpayers as to what they need to do to review their claim and make sure that they are paying the 'right tax'. Even if the original claim may have been over-inflated – say, by a rogue agent wishing to increase their commission on a successful refund – the taxpayer may have some legitimate claim which should not be ignored.

*Recovering overpayments from HVAs*

- 3.3.7. We agree that agents subject to a direction from the Tribunal should be jointly liable for the tax, up to the amount of their fees. In cases where, for example, the agent has absconded or become insolvent, then the taxpayer should not be pursued for the irrecoverable amount of repayment used to cover those fees; except perhaps in cases where it can be proved the taxpayer was party to deliberate wrongdoing, taking into account factors such as the complexity of the claim and the taxpayer's own abilities and understanding.

- 3.3.8. We understand this would only be relevant in rare cases as para 10.12 says: ‘Where **exceptionally** HMRC considered a repayment should be made...’. We therefore assume in most cases of doubt, HMRC will withhold repayment until they are satisfied of the claim’s validity.

*‘Taxes’ or ‘duties’ to be included*

- 3.3.9. In the context of the HVA proposals, the consultation asks (question 22) if there are any taxes or duties which should be specifically excluded. As noted by our CIOT colleagues in their response, we see no reason to limit the application in terms of revenue-raising taxes and duties; but tax credits or other ‘benefits distribution’ aspects of HMRC’s work should most certainly not be included without further detailed consultation. We are working on the assumption that this is not the intention of the current consultation to include them.

#### **4. Working with pro bono advisers and other taxpayer ‘representatives’**

- 4.1.1. We still feel there is a strong case for reviewing HMRC’s approach and processes with regard to what we might term “informal representatives”, ie the myriad relationships we see between taxpayers and various helpers which fall outside HMRC’s traditional approach to appointing a professional tax agent by means of a 64-8.

- 4.1.2. Whilst the focus in this consultation document is on driving through legislation where HMRC believe it is needed, this concentration of effort must not be at the expense of addressing the ‘softer’ administrative issues. The two streams of work go hand in hand and HMRC must therefore aim to address and implement them together. We urge the Powers Team to work together with the other parts of HMRC to ensure this happens.

#### **4.2. Agent authorisation**

- 4.2.1. We would like to see a review of the agent authorisation process, currently based around form 64-8.
- 4.2.2. Following on from our comments on HVAs above, there is a specific concern that the current process is too inflexible and can put taxpayers at risk; for example, through confidential information being shared with less trustworthy agents who might in turn use it for nefarious purposes.
- 4.2.3. It is therefore vital that, when signing an authority in favour of an agent, the taxpayer understands: what it means; what papers and information the agent will receive (or be capable of obtaining from HMRC); how long it will remain in place; and how to revoke it.
- 4.2.4. On its own, the current 64-8 is inadequate for a number of reasons:
- It is open-ended. This may of course be desirable in the ordinary course of professional agent/taxpayer relationships, but in some cases it will not be. For example, where a refund is being claimed, it might be a one-off event and the taxpayer should be able to appoint an agent (including an assisting

voluntary sector organisation, such as TaxHelp for Older People<sup>1</sup>) for that single and finite purpose.

- Individuals also encounter problems where they have more than one agent for different purposes, as the 64-8 does not cater adequately for this.
- The form does not explain its open-ended nature to the signatory and there is no instruction on the form as to how it can be revoked at the end of a relationship. Why is there a clear process for appointing an agent, but none for removing one (for example a '64-9')?
- It does not cater for informal representation situations. In tax credits, however, there is a form which covers this – the TC689<sup>2</sup>.

4.2.5. A working group should be set up to discuss these issues, to put something in place that works for all concerned – professional agents, pro bono and voluntary sector advisers, and others. The group should include representatives across the board from interested stakeholders, and link in to HMRC's Disabled Customers Consultation Group as representation issues often arise in that area in particular.

4.2.6. Real progress on the issues raised here would go some way towards meeting the objective stated on page 16 (para 2.47) of the consultation document, that HMRC intend to 'work alongside, and not cut across, "not for profit" activities'.

#### 4.3. ***Deliberate wrongdoing (Chapters 5 to 9)***

4.3.1. It would be rare indeed for third sector advisers to be engaged in 'deliberate wrongdoing'. If, however, the draft legislation is not amended, the broad definitions of 'tax agent' and 'loss of tax' contained therein could mean far more people come within its ambit. As noted above, we will submit comments on those issues separately.

4.3.2. Exceptionally, if a volunteer for (say) TaxHelp for Older People were to be engaged in deliberate wrongdoing (by which we mean fraudulent activity) in their commercial practice, this could have repercussions on their charitable work. We would hope in the event of such an unlikely occurrence HMRC would engage with the parent organisation as they would, in any event, wish to take action to review the cases dealt with by such a person.

4.3.3. The reputation of a charity such as TOP might be endangered if a volunteer was 'named and shamed' under the proposals in Chapter 8 for deliberate wrongdoing in the course of their business activities. In such an exceptional situation, it would be desirable for both parties for HMRC to work with the organisation concerned prior to publication so as to mitigate this risk.

4.3.4. It is also possible to conceive of a situation where a pro bono adviser could be an innocent dupe in a fraud. Once the agent had cleared himself or herself of any

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<sup>1</sup> TaxHelp for Older People ('TOP') is the operating name of Tax Volunteers, a company limited by guarantee, company no. 4894491, Registered charity no. 1102276

<sup>2</sup> <http://www.hmrc.gov.uk/forms/tc689.pdf>

deliberate wrongdoing, we trust that would be an end of the matter; we would not wish to see additional powers used against the innocent agent in such cases.

LITRG

3 March 2010