Direct recovery of debts consultation document

Response from the Low Incomes Tax Reform Group (LITRG)

1 Executive summary

1.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. We take a keen interest in this consultation because we believe that the courts provide the only effective remedy against any misuse of executive power, and that the unrepresented and the vulnerable would suffer the most from the removal of that safeguard.

1.2 We have no sympathy with those who can well afford to pay their tax debts in full and on time but wilfully refuse to do so. We believe that HM Revenue & Customs' (HMRC) existing power to satisfy a debt by taking money from a debtor's bank account pursuant to a court order is appropriate, proportionate, fair and balanced by a robust and crucial safeguard – the independent oversight of the court.

1.3 The power now sought by HMRC proposes to oust the jurisdiction of the court, and in its place proposes a range of 'safeguards' which are really little more than internal checks.

1.4 It is also necessary to consider the interaction of this proposed HMRC power with the claims of other creditors. Giving HMRC the exclusive power to bypass the courts and recover what they think they are owed directly from debtors' accounts would be to steal a march on other creditors, effectively reinstating Crown privilege by the back door. That would be quite wrong. Vulnerable debtors may owe money to many creditors of whom HMRC may be only one. In an extreme case, the most vulnerable debtor may be forced to choose between eating or staying warm, once HMRC had helped themselves to what they thought they were owed.

1.5 Even if HMRC made very few mistakes (and the evidence does not support this view), to strip away independent oversight of the use of such a power would still be unacceptable because of the potentially catastrophic effect, financially and emotionally, on any individual wrongly targeted or their household. The fact that HMRC are error-prone gives added force to that objection. We cite a

number of cases known to us where HMRC have erroneously sent letters to the wrong address, or chased debts that did not exist, had already been paid, or were wrongly calculated, all of them involving elderly, sick or otherwise vulnerable taxpayers (para 3.13). That is proof enough that the use of such draconian powers should be resisted.

1.6 For HMRC to be given a power to collect, or freeze accounts to secure, what they think they are owed directly from a taxpayer's bank account with no prior recourse to the courts when so many mistakes are being made would be to go against the rule of law and pose unacceptable risks both to any taxpayer wrongly targeted and to HMRC's reputation. It would only take a handful of vulnerable or innocent taxpayers or tax credit claimants being wrongly targeted for public trust in HMRC to be damaged irreparably.

1.7 Tax credit claimants are especially vulnerable to official error and it is particularly disturbing to see tax credit overpayments in the list of debts in respect of which direct recovery of debts (DRD) may be applied.

1.8 It is equally disturbing that for a debt to be 'established' and therefore susceptible to direct recovery, it is only necessary that HMRC should have sent a demand for it, and the alleged debt should have passed its due and payable date. There are far too many situations in which a demand for payment outstanding on the due date for payment may not represent the actual debt owed, and most of them will involve a significant number of vulnerable taxpayers or tax credit claimants.

1.9 It is unclear what safeguards will protect the debtor against mistakes by banks or deposit takers called upon by HMRC under the proposed power, and what compensation would be payable for such errors, however minor.

1.10 We do not see how it would be possible to put in place adequate safeguards against inadvertently taking money that was earmarked for other purposes, but that would not necessarily show up on the details forwarded to HMRC by the deposit taker. This would include for example money transferred by a local authority to the account of an older or disabled individual in order to pay their carer, or money in a nominee account where the debtor was the nominee rather than the person to whom money belonged. The proposals in respect of joint accounts fail to give anything like adequate protection to the non-debtor account holder, particularly where that individual provides most or all of the funds held in the account.

1.11 Our recommendation is that HMRC retain that feature of the existing process of direct recovery that requires prior application to the court, and if they find that unduly onerous then they should seek ways of streamlining and expediting that procedure. We suggest how such a streamlined and expedited process might work in paragraph 6 of this Response.

2 Who we are

2.1 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. 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 HM Revenue & Customs (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 General comments

3.1 We have no sympathy with those who can well afford to pay their tax debts in full and on time but who wilfully refuse to do so, and we support robust measures to deter such behaviour. HMRC currently have power, under the Civil Procedure Rules, Part 72 (Third Party Debt Orders), to apply to a court to allow them to take money from a debtor's bank account to discharge the debt. This power, we believe, is appropriate, proportionate, fair and balanced by a robust safeguard – the independent oversight of the court.

3.2 The power now sought by HMRC goes a very great deal further. They propose to oust the jurisdiction of the court, but give no good reason for doing so apart from the time and expense involved in an application to the court. In its place they propose a range of 'safeguards' which are really little more than internal checks. If this extended power were introduced in its present form there would be virtually no independent oversight of HMRC's exercise of it, leaving the way open to almost certain abuse.

3.3 The Minister says in his Foreword: "The Government recognises that there are concerns about the impact of this change on vulnerable members of society. We must ensure that there are strong safeguards in place so that this is only targeted at the truly non-compliant." We welcome the Government's concern about the effect on the vulnerable, but unless there is independent oversight of the power before it is exercised (as there is now), any other safeguards however strong will only work so long as HMRC observe them in every particular. We are not confident that HMRC will always be sufficiently resourced to do this properly.

3.4 The advantage of a court is that it is independent and impartial, and can step in if HMRC fail to carry out any of the procedural safeguards or meet the standards they has set themselves. Without that oversight, there is effectively no redress for an individual aggrieved by an act or omission of HMRC that breaches those safeguards, whether carried out deliberately or accidentally. Any such breach or inappropriate exercise of the power could catch the innocent or the vulnerable; and as soon as that happens, public trust in HMRC will be damaged, perhaps irrevocably. A court will look at the totality of circumstances, not just what the creditor knows. That is the true safeguard – for both parties.

3.5 In this response, we set out in detail our objections to the proposed extension of HMRC's power to recover debt directly from the debtor's bank account, with reference to the consultation document itself, and we explain why we believe the proposed safeguards are insufficient. We then answer the questions posed in the consultation document, and conclude by suggesting a way in which the essence of these proposals could proceed but with the essential safeguard of prior oversight of the court.

Main objections

3.6 Our over-riding objections to the proposed extension of the existing power can be grouped under two headings:

1. constitutional; and
2. operational.

Constitutional objections

3.7 On the proposal to remove the prior jurisdiction of the courts, we can do no better than quote Professor Jonathan Schwarz (Barrister, Temple Tax Chambers) who said in his speech to the ICAEW Tax Faculty's Wyman Symposium on 2 July 2014:

> "Self-help is not generally permitted for creditors seeking payment and for good reason. The court's function is to ensure that all the correct procedures are followed, that the claim is justified and that all relevant circumstances are taken into account. Courts may refuse an order if it would be inequitable to grant it. This would take into account all relevant facts, not just those HMRC might. These factors include the insolvency of the debtor. To do otherwise may be to grant a preference to the creditor. Similarly, certain payments such as state pensions and benefits cannot be attached, and it would be inequitable to allow this to happen indirectly.
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> "There is a second and more fundamental reason where the state is a creditor. It is a fundamental principle of justice that nobody should be a judge in their own cause. This goes back to Roman law – *nemo iudex in re sua*. Thus while the courts provide only one method of dispute resolution between citizens, it is one that is critical where the government or the executive is involved and independence is necessary."

3.8 He went on to quote Lord Mustill in *R v Home Secretary ex parte Fire Brigades Union* [1995] 2 AC 513, at 567:

> "It is a feature of the peculiarly UK conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain."

3.9 It is also necessary to consider the interaction of this proposed power with the claims of other creditors. Giving HMRC the exclusive power to bypass the courts and recover what they think they are owed directly from debtors' accounts would be to steal a march on other creditors, effectively reinstating Crown privilege by the back door.

3.10 We draw attention to this not so much out of concern for the other creditors, as for vulnerable debtors who may owe money to many creditors of whom HMRC may be only one. Others may include public utilities on whom they rely for light and heat; or the local authority who already have considerable powers to recover unpaid council tax. It may not be the intention of the Government to target such debtors with this new power, but mistakes can and often do happen, and the consequence of targeting the wrong person with such a power could be catastrophic to a debtor in this position. In an extreme case they may be forced to choose between eating or staying warm, once HMRC had helped themselves to what they thought they were owed.

Operational objections

3.11 Even if HMRC were an organisation that made very few mistakes, to strip away independent oversight of the use of such a power on the grounds there is no merit for it would still be totally unacceptable because of the potentially catastrophic effect, financially and emotionally, on any

individual wrongly targeted or their household. The fact that HMRC are error-prone gives added force to that fundamental objection.

3.12 Besides, the year in which the Adjudicator upholds 90% of complaints against HMRC, recommends they pay triple the amount of last year's compensation to complainants for worry, distress and poor complaints handling, and that they write off nearly £1.9m in tax debt and more than £2m in tax credit overpayments, is hardly a good year for HMRC to be asking to be excused independent oversight of their debt collection activities. While again we applaud government's concern for vulnerable debtors, we seriously worry that HMRC may not recognise vulnerability when they encounter it (to quote the Adjudicator's Foreword to her report: "I am again disappointed to see HMRC staff still overlooking the needs of some vulnerable customers"). These comments are damning of HMRC in their treatment of the most vulnerable taxpayers in society.

3.13 That HMRC make mistakes, sometimes egregious mistakes, is illustrated time and time again by the cases drawn to our attention by Tax Help for Older People. We cite a selection of examples below.

- Mr B received a demand for £3,000 which included penalties for not having filed self-assessment returns for three years running. This gentleman would have been a prime candidate for DRD because HMRC had written to him 'repeatedly' over a number of years. On investigation, however, it transpired they had been writing to the wrong address. Mr B had informed HMRC of his change of address in 2002 but they had not registered the change until 2013. In the event, but only after Tax Help had intervened, the penalties were cancelled and the original underpayment was found to be below HMRC tolerance levels, so nothing was owed.
- Mrs K, a 78-year old lady with incurable cancer who cared for her husband with Alzheimer's, received similarly threatening demands. She had moved house without informing HMRC (she saw no need to because her income was below the tax threshold) so missed the self-assessment returns sent to her old address. In the event, HMRC owed her money, not the other way around.
- In the case of Mr C, HMRC's letters over a period of four months went unacknowledged because they were sent to the wrong address. Mr C had been moved to a care home. Matters were further complicated by the fact that Social Services had to apply to the Court of Protection for a Deputyship because there was no power of attorney, and HMRC were reluctant to accept either that the taxpayer now lacked capacity, or that appointing a Deputy would take time.
- Mrs P filed a paper self-assessment return from an HMRC office, having received help with its completion from HMRC staff. It was subsequently lost so she received penalty notices. She consulted Tax Help and the adviser contacted HMRC, who on investigation found the tax return had indeed been filed and vacated the penalties. Nevertheless, for several months afterwards DMB continued writing to her threatening further action if she did not pay the non-existent debt.
- Mr R paid his tax liability in good time using online banking yet received a collection letter a month later demanding payment. He called the helpline which explained there would be a one-month wait while they 'traced the payment' and he should ignore any letters sent out meanwhile. Letters continued to arrive, and finally when threatened with the bailiffs a very frightened Mr R consulted Tax Help, who finally resolved the matter after several more calls to the helpline.
- Mr O's payment by cheque was intercepted and fraudulently cashed. Telephone calls to HMRC to explain what had happened were ignored and a debt collector's notice was issued.

A further call to the helpline by the Tax Help adviser was met with the response that the payment was not received on time. This client was elderly and had a seriously ill wife to support.

- Mr Y (aged 60, awaiting an organ transplant and suicidal) was pursued for a debt based only on a determination from 2004/05 and found to be incorrect. It took the Tax Help adviser several attempts to get the debt recalled.

3.14 The above is only a selection of letters going to the wrong addresses and debts being chased that did not exist, had already been paid, or were wrongly calculated, all involving elderly, sick or otherwise vulnerable taxpayers. Tax Help's case histories are replete with others. For HMRC to be given a power to collect what they think they are owed directly from a taxpayer's bank account with no recourse to the courts when so many mistakes are being made would be at best dangerous, at worst outright madness. It would only take a handful of vulnerable or innocent taxpayers being wrongly targeted for public trust in HMRC to be damaged irreparably. These examples on their own are sufficient proof that HMRC should not be permitted to have such a draconian power without any oversight.

4 Specific matters raised in the consultation document

Tax credits

4.1 We are particularly concerned by the suggestion (para 2.2) that tax credits overpayments would be included among the debts subject to this new power. Tax credit claimants who are on lower incomes tend to have higher awards, and the higher the award the greater the possible overpayment. Tax credit debt can mount up significantly through no particular fault of the claimant – a few days' delay in reporting a change of circumstances, or a few days' delay by HMRC in processing a change, can establish or increase an overpayment. Similarly, an increase in income in-year that is not protected by the annual disregard[1] can bring about an overpayment which does not crystallise until the end of that year; and because of the way tax credits entitlement accrues evenly day by day throughout the year, an overpayment could already have accrued by the time the claimant reports the increase, however promptly.

4.2 For those reasons, the hideous complexity of the tax credits system for both claimants to understand and HMRC to administer, and the general vulnerability of many claimants on low incomes, the oversight of the courts is more than ever an absolute necessity if the power to seize money in a claimant's bank account is to be applied to tax credit debt.

Penalties

4.3 We are also concerned by the likelihood that self-assessment late filing penalties will be subject to DRD in a case where the debtor could apply to HMRC within two years under FA 2013, Sch 51 to have the notices to file returns withdrawn and all associated penalties cancelled. If the penalties had already been collected by DRD, there would be the worrying situation where a debtor had been subject to an intrusive administrative power to collect money that turned out not to be due. The

[1] Where income rises up to £5,000 above the level of preceding year income, the increase is disregarded in calculating tax credits entitlement for the current year. However, the disregard does not apply when income in the current year falls below the level of the previous year, then rises again. Women going on maternity leave, then returning to work in the same year, are particularly vulnerable to this quirk in the system.

debtor would have to be fully compensated not only by the return of the money, but the making good of any consequential loss.

Can't pays versus won't pays

4.4 A distinction is drawn (para 2.5) between two groups of debtors. On the one hand are the 'can't pays' who would pay if they could but have short term financial difficulties, or those with more serious financial difficulties who may never be able to pay. On the other hand are the 'won't pays' who can pay but choose not to, or to delay paying for as long as they can, and those who deliberately avoid engaging with HMRC. But how will HMRC distinguish between the two? Any mistake could result in a vulnerable taxpayer being wrongly targeted.

4.5 In para 3.13 of this response we give many examples of individuals who must appear to HMRC to be deliberately avoiding engaging with the Department, but in fact they had not received any of the communications HMRC had sent them because they had been incorrectly addressed. Others may be reluctant to deal with their debt for the very reason that they have serious financial problems and they simply do not know what to do. Yet others have developed a mental health condition accompanied by a horror of official-looking communications (sometimes referred to as 'brown envelope phobia'). The fact that these people neither pay nor engage with HMRC about their non-payment is not an exercise in brinkmanship, it stems from a genuine fear of what will happen to them if they openly admit that they cannot pay.

Domestic and international comparators

4.5 Many references are made to other jurisdictions which allegedly use a similar power, but we struggle to see their relevance. They are not described in any detail in the consultation document so it is difficult for us to comment. We would need to know a lot more about the way in which, and the wider context within which, each power was operated before we could offer any informed opinion.

4.6 In principle, we see no reason why the UK should adopt a practice that most right-thinking citizens would regard as objectionable, just because certain other jurisdictions do so. Different countries have different laws and often the differences exist for good reason. To take an extreme example, certain states of the USA inflict the death penalty for certain degrees of murder, but the UK has chosen not to do so, and few argue that because it is done in parts of America it should also be done here. We make our own decisions about what powers we give the organs of state based on our own constitution and our own liberal and democratic values, not those of other states.

Distraint

4.7 The passage in the consultation document comparing the proposed new power with existing powers of distraint (para 2.28ff) is largely specious. Distraint can only be levied within a debtor's premises if the debtor allows the bailiff or other officer in, or has done so on a previous occasion (although distraint may still be levied on goods outside the premises, such as a car or van). There are restrictions on what goods may be taken – for example the tools of the debtor's trade must be left. Normally, distraint is not levied immediately, but the debtor is left in possession of the marked goods pending payment of the debt by other means – he or she may use them but not sell or otherwise dispose of them.

4.8 To argue that DRD is 'less invasive' (para 2.32) is to ignore the fact that coming face-to-face with a bailiff or HMRC officer levying distraint may be the first opportunity the debtor has had to speak to an officer about the debt, and often such a conversation may lead to recovery of the debt by other

means. There is no suggestion in the consultation document that a debtor will have had such an opportunity before DRD is operated on his or her account.

Contact with HMRC

4.9 Para 3.4 of the consultation document says that a debtor with a good history of compliance will have been 'contacted' around nine times, and a debtor with a poor compliance history a minimum of four times, before DRD is operated. 'Contact' here seems to mean that HMRC have sent a letter to, or left a telephone message at, the address or telephone number it has for the taxpayer; it does not appear to be necessary that the taxpayer should have received the letter, or heard or understood the telephone message, or that any personal interaction had taken place between the debtor and an HMRC officer. Indeed the taxpayer may have tried to telephone HMRC but been among the 20% of callers who are unable to get through – and of course it is no longer possible to engage with HMRC by going to an enquiry centre because they have all been closed.

4.10 One might question whether operating DRD is really appropriate for someone with a good compliance history rather than attempting to find out why they have unexpectedly become non-compliant. Maybe what is required is a proper debt management plan put in place by an experienced debt adviser in full knowledge of all the relevant facts.

4.11 Or, for example, a taxpayer with no history of non-compliance becomes unresponsive because of the onset of old age or a disability (cf the case of Mr C at para 3.13). Perhaps a power of attorney exists, in which case procedures may be in train to instruct the attorney to deal with the person's affairs about which HMRC will know nothing. If there is no power of attorney, it will be necessary to appoint a Court of Protection deputy which could take up to a year. It is simply unacceptable that HMRC, alone of all potential creditors, should be allowed direct access to the elderly person's bank account at such a time, simply because the procedures involved in setting up the legal structures to deal with the debt are necessarily lengthy and time-consuming.

4.12 But leaving that point aside, if there is no personal contact between HMRC and the debtor, and letters go unacknowledged and no response is received to telephone messages, how will HMRC know that they have the right address or contact details? The taxpayer may have moved and told HMRC, but HMRC may not have updated their records (as illustrated at para 3.13 above). Mobile numbers tend to change frequently, and not all taxpayers have land-lines. Even assuming that HMRC have the right contact details, will any serious attempt be made to call on the taxpayer to discuss why they are in arrears and ask them face-to-face how they propose to settle the debt? If not, how will HMRC know whether contact has actually been achieved before proceeding?

'Established debt'

4.13 The concept described here of an established debt amounts to any tax demand HMRC have sent to the taxpayer where the due date for payment has passed, no matter whether the demand represents tax that is legally due.

4.14 Para 3.4 of the consultation document states: "if the taxpayer does not pay or contact HMRC to arrange payment of what is owed by the due date, a debt is established". Para 4.3 explains the significance of an 'established' debt in the following terms: "only established debts of £1,000 or more will be subject to DRD". To complete the syllogism, DRD can be applied to demands for payment where the taxpayer has not paid or contacted HMRC by the due date to arrange payment. There is no suggestion that the demand has to be correct before it becomes an 'established' debt and susceptible to DRD.

4.15 There are many situations in which a demand for payment outstanding on the due date for payment may not represent the actual debt owed by the taxpayer, and most of them involve vulnerable taxpayers. These include cases where notification of the debt has been sent to the wrong address; or where the taxpayer has paid (or time-to-pay has been agreed) but HMRC's debt collecting function has not been informed of that so that they continue to pursue the debt (as shown in many of the examples in para 3.13 of this response). It also includes cases where the debt or part of it has been appealed and the taxpayer has applied to postpone the disputed part; or cases where the taxpayer owes HMRC a sum in unpaid tax but HMRC also owes the taxpayer an amount of overpaid tax, and the latter is not reflected in HMRC's demand (indeed the latter might exceed the former).

Right of appeal

4.16 Para 3.5 of the consultation document states that if the taxpayer does not agree with the amount of tax that is due (or stated to be due, as it should more accurately be), they have a right to appeal to a Tribunal. That is not always true – for example, there is no right of appeal against a P800 notice, and the P2 which does carry a right of appeal may not always be forthcoming; a tax credit decision notice intimating an overpayment is not always appealable; and a notice of determination can only be overturned by submitting a self-assessment or, if the time limit has passed, by special relief. Even where a right of appeal does exist many unrepresented individual taxpayers are unaware of it, and are apt to pay up if they can, or – if they cannot – to avoid contact.

Contacting the debtor's bank or building society

4.17 We do not know whether the banks and other deposit takers will be able or willing to discharge the additional administrative burdens HMRC's proposals will place upon them. It would be interesting to know whether they think that they have enough systems and capacity in place to enable them to carry out HMRC's wishes promptly and accurately.

4.18 That apart, while the consultation document makes much of the safeguards HMRC are supposed to observe, nothing is said about the safeguards required of the deposit takers. We have come across cases where customers have needed their bank to obey specific instructions about which account to draw money from or transfer money to (because of non-domicile status) but they have found that their careful planning has been upset by the bank failing to carry out the instructions properly. There are a number of issues that could arise: firstly, the institution could in fact recover money for HMRC from the wrong account (but the right person); secondly, the institution might 'recover' money from the wrong person entirely – as, for example, where two or more similarly named individuals hold an account with the same branch of the same bank, perhaps members of the same family.

4.19 What safeguards will there be to prevent that happening and what compensation in such a case? Because the second case in particular could perhaps be seen by the 'victim' as a 'crime' perpetrated by the state and their institution.

5 Safeguards

5.1 Regarding the safeguards listed in Chapter 4 of the consultation document:

- On contacting the debtor (para 4.2), please refer to our remarks at 4.9 above.
- On established debts (para 4.3), please see our critique at para 4.13 above.
- On the length of time allowed to the debtor to object to the freezing of funds in their account, please see our answer to question 5 below.

5.2 We make the following additional points.

Safeguard against removing funds needed for business/living expenses

5.3 Para 4.1 of the consultation document states that HMRC will put in place 'robust safeguards' to ensure that DRD 'does not cause undue hardship by removing funds from accounts that are required to meet immediate and essential day to day business and/or living expenses'.

5.4 We do not see how it would be possible to safeguard against inadvertently taking money that was earmarked for other purposes, but that would not necessarily show up on the details forwarded to HMRC by the deposit taker. Nor is it clear what tools HMRC would use to distinguish money that appears to be used for savings from money that appears to be used for day-to-day expenses (para 3.15 of the consultation document refers).

5.5 For example, a care and support employer (a disabled or elderly person who engages a carer or personal assistant to look after their day-to-day needs and enable them to live independently) is put in funds by a local authority to pay their carer or personal assistant, and is forbidden on pain of prosecution from using those funds for any other purpose. But the funds are not designated or ring-fenced when they arrive in the employer's account. Similarly, money paid into a person's account by way of loan for a specific purpose may not be visible as such.

5.6 Alternatively, money in a business account might be set aside to pay wages. Money in a joint account may not belong to the debtor, or money in a nominee account may belong to the person on whose behalf the account is held rather than the person who operates it and who is named as the account holder.

5.7 Is it intended that money held in an offset mortgage account or an ISA mortgage which is earmarked to discharge a larger debt should be subject to DRD?

'Judicial appeal'

5.8 On the right to 'judicial appeal' referred to in para 4.4, it is impossible for us to comment as we are not told what kind of appeal is envisaged. If judicial review is meant, the process is far too lengthy and too expensive for any ordinary taxpayer to be able to access, as HMRC must know. Any judicial process needs to be speedy, procedurally straightforward and inexpensive so as to avoid unnecessary cost for both the taxpayer and the state.

5.9 What is fundamentally wrong with these proposals is that the right of appeal comes out of sequence – it is not exercisable until after the debtor's bank account has been frozen, whereas in almost every other case in which attachment is sought, the court order precedes the recovery action. That is also the case with HMRC's current procedure, and nothing in this consultation document explains why that is now thought to be inadequate. If it is the time and expense involved in going to court that is seen as the obstacle, the solution is an expedited procedure such as we recommend at para 6 below.

5.10 Little is said about how a taxpayer wrongly targeted by this power would be compensated. We are concerned by the suggestion that only direct losses would be compensated. On the contrary, any compensation would need to make full recompense for financial costs incurred as a result of HMRC's mistake. This would include bank interest for charges for overdrafts, penalties for non-payment of debts which were due to other creditors, penalties for misappropriation of earmarked funds (eg where care and support employers had been put in funds to pay their carers' wages, or where nominees had had money extracted from HMRC out of accounts they held on behalf of others). It would also be necessary to compensate the taxpayer for worry and distress occasioned by HMRC's

blunder. If a person's ISA had been wrongly targeted, compensation would need to be paid for lost capital gains on shares the taxpayer might otherwise have purchased. If money in an account wrongly targeted had been ear-marked to pay employees, any losses caused to those employees by not having been paid that month should be brought within the scope of the compensation.

Joint accounts

5.11 It is proposed to limit access to a joint account to 50% of the funds held in it. This is supposed to be adequate protection for the other account holder who does not owe HMRC money, but it is wholly inadequate. Some joint accounts are fed by only one account holder even if they are drawn on by both. Others are fed in unequal proportions by the two account holders. Yet others may be held by more than two account holders. Some nominee or trustee accounts may be held in the joint names of the nominees or trustees, or may be held in the joint names of the nominee and the person to whom the money in it belongs – that enables the account to be operated by the nominee while the true owner of the funds is also named. For HMRC to access such an account to help themselves to a debt allegedly owed to them by the nominee would constitute misappropriation.

5.12 The consultation document states that notice would be sent to both or all joint account holders so that non-debtors could object (assuming HMRC had details of the address of the non-debtor account holder). But there is no guarantee that HMRC would uphold their objection, and then they would be subject to the vague and unsatisfactory 'judicial appeal' referred to above. There appears to be no appreciation of the effect of such action by HMRC on the credit rating of the non-debtor.

5.13 It is also stated (para 3.31): "If HMRC did not apply DRD action to joint accounts, this would provide an obvious opportunity for debtors to circumvent paying what they owe". But there are all sorts of ways, even if the current proposals became law, that debtors could circumvent paying what they owe. They could keep less than £5,000 in cash in their bank accounts; they could hold cash offshore; they could switch accounts into the sole name of their spouse or partner; and so forth.

6 The questions

6.1 We do our best to answer the questions posed by the consultation document, given that they are leading questions which presuppose agreement with the proposals and merely seek confirmation that the safeguards are sufficient when they are not.

6.2 Question 1: Is 12 months' worth of account information appropriate for HMRC to establish how much the debtor needs to pay upcoming regular expenses?

6.2.1 No. If the account is new, there will not be 12 months' worth of account information to be had. Or if the individual or business whose account it is has taken on new commitments, any amount of research into account movements in the past will not give HMRC any indication of present or future commitments. For example, an older taxpayer may be about to incur care home charges that will dramatically increase their drawings; they may be selling their house to fund their care home expenses and this will increase the presence of funds in their account, but not necessarily their ability to draw on them for any other purpose.

6.2.2 For a self-employed business, twelve months is not long enough to consider its financial requirements, especially if they are seasonal. One of the hardest cashflow periods for most self-employed businesses is when they have to start paying Payments on Account for the first time as well as tax for the submitted tax year.

6.2.3 In any case, reports by banks to HMRC of interest earned in one tax year is no basis for predicting that a specific sum will be held in deposit, current and other accounts at a point in time in a subsequent tax year.

6.3 Question 2: Is five working days sufficient time for deposit takers to comply with account information requests?

6.3.1 That can only be answered by the deposit takers themselves, but we would be very surprised if they did not object.

6.4 Question 3: By leaving a minimum balance in a debtor's account, HMRC needs to strike a sensible balance between avoiding putting taxpayers into hardship and collecting money owed to the Government in an efficient manner. Is £5,000 an appropriate and proportionate sum to meet these expenses?

6.4.1 We do not see how it would be possible to safeguard against inadvertently taking money that was earmarked for certain purposes, but that would not necessarily show up on the details forwarded to HMRC by the deposit taker. Day-to-day living expenses are not the only purpose for which money is held in an account.

6.5 Question 4: What changes will deposit takers need to make to their systems to administer this policy and will this impose any administrative burdens?

6.5.1 We do not know; we imagine they will be substantial.

6.6 Question 5: Is 14 days an appropriate length of time for the debtor to object to HMRC or to pay by other means?

6.6.1 No. It naively assumes that the letter notifying the debtor will not be subject to HMRC's byzantine postal procedures whereby it can easily take 14 days for a letter to leave the department, leaving no time at all for the recipient to act. It is less than half the amount of time that would be allowed to a taxpayer to appeal to a Tribunal against a decision by HMRC or to ask for an internal review. Besides, it takes no account of possible postal delays, or of temporary absences of the debtor from home.

6.7 Question 6: What would be a suitable time limit for the deposit taker to comply with an order to release funds, either to the debtor or to HMRC?

6.7.1 As we are not a deposit taker we make no comment.

6.8 Question 7: What sort of sanction should fall on deposit takers who do not comply either with the initial notice to supply account information or the instruction to release the held amount to HMRC?

6.8.1 Again, we make no comment.

6.9 Question 8: Is protecting a proportion of the credit balances of joint accounts the best way to protect non-debtor account holders?

6.9.1 No, for the reasons discussed above (para 5.11).

6.10 Question 9: Are these safeguards appropriate and proportionate?

6.10.1 No, as we explain at para 5.1 to 5.11 above. They are not so much safeguards as internal checks designed to minimise the likelihood of error, provided they are followed. They offer the debtor no remedy in the event that they are not followed. The only adequate safeguard for the taxpayer is

oversight by the courts which these proposals seek to remove. Although the question does not ask for this, we propose a safeguard that we believe would go at least some way towards making the rest of the process appropriate and proportionate.

An additional but vital safeguard – prior court oversight by means of a streamlined or expedited procedure

6.11 As we make clear above (paras 3.4), our principal objection is to the removal of the safeguard of a court order prior to taking action. In fact our main objection to the proposals would be removed if the application to the court came before the freezing of the account and seizure of funds, instead of after.

6.12 That is what happens now, and HMRC's only real objection to the court process seems to be that it is too slow and expensive. The answer seems to us to be to streamline and expedite that process rather than jettison it altogether.

6.13 A streamlined process would involve specialist judges who would probably be drawn from the First-tier Tax Tribunal. Tribunal judges could be assigned to this work and, if necessary, sit regularly, say weekly, to hear applications for direct recovery of debt. This would not only deal with the constitutional objection of HMRC putting their hand into the taxpayer's pocket without the appropriate checks and balances but also provide an appropriate forum in which HMRC could be examined on relevant matters, including for example whether or not this was in fact giving them undue preference, in cases where the taxpayer was in fact nearly insolvent, whether or not there is evidence that that the taxpayer has actually received and understood the communications that HMRC believe that they have sent and whether this is truly a tax debt or is in fact a symptom of some more fundamental issue, of which a tax tribunal member will be aware in a way that a county court judge may not.

6.14 Such a process would constitute a vital safeguard and would not be subject to the objection we raised earlier that the safeguards set out in the current consultation document are no more than internal checks designed to ensure that HMRC do the right thing, but offers no remedy for the debtor if any of the checks are not carried out.

6.15 If it were really necessary to impose some temporary freeze on a part of a bank account, that could also be the subject of oversight by the tax tribunal, perhaps with a time limit of say five working days after which an application for renewal would have to be made.

LITRG

29 July 2014