Professional Conduct in Relation to Taxation

Amended Section 7.3 (formerly section 1.308) of the Members Handbook of the Institute of Chartered Accountants in England and Wales effective from 1 September 2006

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FOREWORD TO THIS EDITION

The previous edition of Section 7.3 (formerly Section 1.308) of ICAEW Members Handbook was published as TAXGUIDE 1/04 on 30 April 2004 jointly with other tax-interested professional bodies. The full text of the ICAEW Members Handbook is at *www.icaew.co.uk/membershandbook*.

Effective from 1 September 2006 of the Members' Handbook, ICAEW has published a new Guide to Professional Ethics as Section 3 to replace the former Section 1.2 (see *http://www.icaew.co.uk/index.cfm?route=135959*) and the contents of the Members' Handbook have been reorganised.

The text of this edition of Section 7.3, effective from 1 September 2006 and published as TAXGUIDE 7/06, is the same as the previous version save that the cross references to other ICAEW Members Handbook Statements have been amended following the reorganisation of all its contents and some secretarial amendments and annotations made, shown generally in *italics*. As all the changes are minor, HM Revenue and Customs have not been asked to review this edition.

We also include in this memorandum fifty questions which are intended to help members find the answers to queries and which were originally published in June 2004 in TAXline Tax Practice No.7 with the text of the previous version of this Handbook Statement.

We are in the preliminary stages of undertaking a review of this Handbook Statement to update it for developments since April 2004.

PCB
30.8.06

AIMS AND OBJECTIVES

The purpose of these guidelines is to assist and advise members, whether in practice or employment, about their duties and responsibilities when dealing with:

- those whom they advise;
- the tax authorities; and
- other professional advisers.

SUMMARY

- These guidelines represent the joint views of the bodies involved in their preparation (see paragraph 1.3). They are intended to assist members both

generally in dealing with clients and the tax authorities and specifically in relation to irregularities and errors.

- A member's primary duty is to ensure that his actions comply with the law. He owes a contractual duty to the client to act for him with the requisite degree of skill and care, and the contractual relationship should be governed by a letter of engagement. The member also has duties to the tax authorities, notably of compliance with the law and the honest presentation of his client's circumstances.
- It is the taxpayer's responsibility to ensure that returns made to the tax authorities are correct and complete. It is for the member to assist him to decide on the extent and manner of disclosure of facts in relation to his tax affairs.
- Where a member becomes aware that irregularities have occurred in relation to a client's tax affairs, he should advise the client of the consequences, and the manner of disclosure. If necessary, appropriate specialist advice should be taken.
- Where a client refuses to follow the advice of a member in relation to issues involving disclosure, the member should consider whether he should continue to act. If appropriate, specialist advice should be taken.
- If mistakes are made by the tax authorities there may be a need, and in some cases a duty, on the part of the client and sometimes the member, to put matters right.
- Members may have statutory duties of disclosure where they have suspicions of criminal activity.
- When approached for information on a client's affairs by another adviser the member should ensure that he has his client's authority before making any disclosure.
- These guidelines apply equally to members in employment.

FIFTY QUESTIONS

Answers to the following 50 questions are all contained in this guidance note. The relevant paragraph numbers are provided in each case. However, members are advised to review Sections 1 and 2 of these guidelines and the opening comments to each Section in addition to the highlighted paragraphs when considering the answers to particular questions.

1 What is your most important duty as a tax adviser? (paragraphs 2.1 and 2.2)

2 What is your duty towards the UK tax authorities? (paragraphs 2.4 and 2.5)

3 What is your duty to overseas tax authorities? (paragraph 2.6)

4 How should the terms of your contractual relationship with clients be established? (paragraphs 2.7–2.9)

5 What should you do if a client refuses to make full disclosure to you? (paragraphs 2.10, and 2.11)

6 What should you do if you can foresee the imminent cessation of a client relationship? (paragraph 2.12)

7 Should you keep notes of meetings and telephone conversations regarding clients' tax affairs? (paragraph 2.13)

8 Should you record all oral advice given to clients? (paragraph 2.14)

9 What should you do if asked to advise on matters that go beyond your own level of competence? (paragraph 2.15)

10 What is the difference between tax avoidance and tax evasion? (paragraphs 2.17–2.19)

11 Why should you keep some working papers separate from others? (paragraph 2.21)

12 What general obligations are you under when you receive requests for client information from the Revenue authorities? (paragraphs 2.22–2.27)

13 What should you do if you receive official requests for information concerning an ex-client? (paragraph 2.28)

14 What should you do if faced with a situation in which the tax authorities are seeking to remove documents from your office? (paragraph 2.31)

15 What should you do if consulted about or if you receive an official request for the disclosure of material that you or your client believes qualifies for legal professional privilege? (paragraphs 2.34 and 2.49)

16 What should you do if consulted about or if you receive an official request to disclose material that you or your client believes to be privileged at common law? (paragraphs 2.38 and 2.49)

17 What should you do if you become aware of irregularities or errors in a client's tax affairs? (paragraphs 2.39, 2.43, 4.5, 4.9–4.11)

18 If a client refuses to make or permit a disclosure to the tax authorities, can you consider the materiality of the amount involved? (paragraph 2.42)

19 Why should clients be encouraged to make adequate disclosure to the Revenue? (paragraph 3.2)

20 What are the Revenue's powers of discovery? (paragraph 3.3)

21 What reasons are there for encouraging clients to make fuller disclosure than is strictly necessary? (paragraphs 3.6 and 3.9–3.17)

22 Should you provide the same level of disclosure when seeking a statutory clearance? (paragraph 3.19)

23 For what categories of offence can the Revenue seek penalties? (paragraph 4.2)

24 What should you do when the Revenue allege that an irregularity may have occurred? (paragraphs 4.12–4.14)

25 What should you do when the Revenue's Special Compliance Office (SCO) takes an interest in a client's tax affairs? (paragraphs 4.15–4.23)

26 What should you do if your client is unwilling or refuses to make a full and prompt disclosure? (paragraphs 4.24–4.43 and 4.47)

27 Should you volunteer information about a former client to their new adviser? (paragraph 4.44)

28 What should you do when you receive a request for information from a new adviser? (paragraphs 4.45–4.46)

29 To what extent should you consider indirect taxes when preparing accounts (paragraphs 4.48–4.50)

30 What should you do if you become aware that the Revenue have made an error in dealing with the affairs of a client? (paragraphs 5.5, 5.6 and 5.17)

31 Why should you consider taking legal advice if a client does not give permission for you to inform the Revenue that an excessive tax refund has been made? (paragraphs 5.8 and 5.11)

32 Why should you keep a written record of all advise given to clients in connection with Revenue errors? (paragraph 5.9)

33 What are the offences for which you might be at risk of prosecution in connection with excessive tax refunds? (paragraph 5.13)

34 Do you have a legal obligation to press the Revenue to issue an assessment before the limit for so doing expires? (paragraph 5.19)

35 What will a Revenue investigator consider if you (as a chartered accountant) are personally investigated? (paragraphs 6.3 and 6.5)

36 What should you do if the Revenue indicate that they intend to investigate you (a chartered accountant)? (paragraph 6.4)

37 What do the Revenue have to prove before they can impose a penalty on you (a chartered accountant)? (paragraph 6.7)

38 What should you do if asked by the Revenue to disclose information or to provide access to certain working papers? (paragraphs 6.12–6.13)

39 What should you do if you believe that the Revenue may investigate criminal proceedings against you? (paragraphs 6.14–6.21)

40 To whom are you responsible for the accuracy of VAT refunds prepared on behalf of a client? (paragraph 7.1)

41 Why should you seek indemnities from overseas clients for whom you act as a 'tax representative' for VAT purposes? (paragraph 7.2)

42 How much information do you need to supply to Customs in order to be able to rely on any unequivocal ruling received in writing? (paragraph 7.5)

43 In what circumstances can you rely on the 'Sheldon Statement' (VAT ESC 3.5 in Notice 48, March 2002)? (paragraphs 7.6–7.10 and 7.17)

44 What should you do if a written ruling from Customs appears to be incorrect? (paragraph 7.13)

45 What are the limits as to the extent to which Customs are bound by undertakings and statements of policy which they have given or issued? (paragraphs 7.15 and 7.16)

46 What can you do if you obtain a ruling from Customs with which you disagree? (paragraph 7.18)

47 How extensive are Customs powers to seek information? (paragraphs 7.19 and 7.22–7.24)

48 What should you do if unsure as to the implications of any question posed by Customs? (paragraph 7.21)

49 What should you do if you suspect a client may have defrauded the Crown of tax or have been negligent with regard to VAT matters? (paragraphs 8.1–8.8 and 8.37–8.39)

50 What should you do if a client admits an irregularity in connection with his VAT affairs? (paragraphs 8.9–8.36)

INTRODUCTION

1 PRELIMINARY

Purpose of Guidelines

1.1 These guidelines have been prepared for the assistance of members and include practical advice about a range of legal and ethical issues. In some instances the guidance put forward goes beyond strict rights and duties. In following the guidelines, it should be particularly borne in mind that each case

depends upon its own circumstances and that a member who is in doubt about his position or responsibilities should seek advice from his professional body and, where appropriate, his legal advisers.

1.2 The guidelines are of general application and are intended as guidance in a range of circumstances. Chapters 3 onwards are primarily directed towards direct taxes and VAT. However, the principles are equally applicable to other taxes.

1.3 The guidelines have been prepared in conjunction with the Chartered Institute of Taxation, the Association of Taxation Technicians, the Institute of Indirect Taxation, the Institute of Chartered Accountants of Scotland and the Association of Chartered Certified Accountants.

1.4 The Revenue have reviewed Chapters 2 to 6 and Chapters 2, 7 and 8 have been reviewed by Customs. Whilst not necessarily agreeing with all the views expressed, both bodies acknowledged that the parts reviewed are an acceptable basis for dealings between members and the tax authorities.

1.5 The guidelines supersede all previous editions, the last of which was issued in 2000. They should be read in conjunction with the introduction and general principles set out in Section 7.1 'Professional conduct and disclosure in relation to defaults or unlawful acts'. (see *http://www.icaew.co.uk/membershandbook/*). (*Note: Members whether in practice or business should refer to the Code of Ethics effective from 1 September 2006 – see http://www.icaew.co.uk/index.cfm?route=135959*).

Interpretation

1.6 In these guidelines, 'client' includes, where the context requires, 'former client'. 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof. 'The Revenue', 'Inland Revenue', 'Customs' and 'tax authorities' mean HM Revenue & Customs. The masculine gender imports the feminine gender throughout this document.

Abbreviations

1.7 The following abbreviations have been used:

CEMA 1979	Customs and Excise Management Act 1979
CoP	Code of Practice
FA	Finance Act
GAAP	Generally Accepted Accounting Principles
HRA 1998	Human Rights Act 1998
LPP	Legal Professional Privilege
NCIS	National Criminal Intelligence Service (*now absorbed into Serious Organised Crime Agency* ('SOCA'))
PACE 1984	Police and Criminal Evidence Act 1984
POCA 2002	Proceeds of Crime Act 2002
SCO	Inland Revenue Special Compliance Office

SP	Statement of Practice
STC	Simons Tax Cases
TA 1988	Income and Corporation Taxes Act 1988
TMA 1970	Taxes Management Act 1970
VATA 1994	Value Added Tax Act 1994

2 PRINCIPLES APPLICABLE TO ALL TAXES

Generally

2.1 A member's most important duty is to ensure that his actions comply with the law. This requires that he complies with any direct obligation imposed upon him by statute or common law to do or refrain from particular actions (for example compliance with a TMA 1970 s.20(3) notice) and that he does not assist his client in the commission of any act which breaches the client's legal obligations (for example the provision of inaccurate accounts or misleading representations on transactions). Subject to that overriding duty, he owes a contractual duty to carry out the tasks that he has agreed to do with the requisite skill and care.

2.2 The discharge of this duty will often require the member to advise the client of the client's obligations under the relevant tax legislation and the consequences of non-compliance. Whether the client follows the member's advice is ultimately the client's decision. If, however, the client decides not to act in accordance with the member's advice as to his obligations, then the member must ensure that he does not take any steps which assist the client in that non-compliance because that would be in breach of the member's duty not to assist in what is likely to be an unlawful act and would in itself be an unlawful act; see for example TMA 1970 s.99.

2.3 Subject to the foregoing, the member owes his client a duty to act in his best interests in carrying out his client's instructions. In so doing a member has 'one client at a time' and he should not feel precluded from acting for a client in a particular manner which is lawful simply because such a practice, if it became widespread, might make the tax authorities' job more difficult or would not be a manner in which other clients would wish to act.

2.4 A member's duty towards the tax authorities is to comply with the appropriate legislation and the common law when dealing on behalf of a client with a matter which is governed by tax law. In all dealings relating to the tax authorities, a member must act honestly and do nothing that might mislead the authorities.

2.5 A member may disclose information to the tax authorities without his client's consent only when required to do so by law. It would only be where the member would render himself liable to civil penalty or criminal sanction that the member is under a legal duty to disclose to the authorities. Such obligations, which are mainly imposed by statute, override the contractual duty of confidentiality and loyalty which a member owes to his client. Otherwise a

member does not have an obligation, as a matter of law, to disclose to the tax authorities information which has been given to him in confidence even though it may be potentially relevant to some tax issue. See also paragraphs 2.43–2.47: 'Fiscal offences and money laundering'.

Overseas taxes

2.6 A person who is acting as a tax agent for a principal who is subject to the tax jurisdiction of another country could well be subject to different obligations in relation to confidentiality or disclosure depending on the tax law and general law of that country. Subject to that caveat, members should apply the principles set out in these guidelines in dealing with issues relating to overseas taxes. See also paragraphs 2.43–2.47.

Relationship with the client

2.7 In dealing with a client's taxation affairs, a member's role is often that of agent but he may be acting as principal in an advisory capacity. The contractual relationship should be governed by an appropriate letter of engagement in order that the scope of both the member's and the client's responsibilities are made clear: see Section 9.1: 'Managing the professional liability of accountants' (*http://www.icaew.co.uk/membershandbook/*). For reasons explained elsewhere in these guidelines (see in particular paragraph 4.32), members are strongly urged to include in the letter of engagement a statement to the following effect:

> 'We will observe the professional rules and practice guidelines of our professional Institute and accept instructions to act for you on the basis that we will act in accordance with those guidelines. In particular you give us authority to correct HM Revenue &Customs errors.'

Members should refer to the guidance issued in August 2001 as TAXGUIDE 2/01: 'Engagement letters for tax practitioners' (see *http://www.icaew.co.uk/index.cfm?AUB=TB2I_42967,MNXI_42967*). (*Note: currently being updated.)* Members should bear in mind that an engagement letter once agreed with a client is a contract and should be aware and make a note of any variations that have subsequently been made, whether orally or in writing.

2.8 Every contractual relationship should be covered; if the member acts for a partnership and also for one or more of the partners, then the partnership and each partner acted for are separate clients for the purposes of these guidelines. Likewise, if the member acts for a husband and wife, each is a separate client.

2.9 If the client is a body corporate, the client is the company and not the directors. Where a default of any kind is discovered, the matter should be raised at the appropriate level in the client organisation. Where the directors' actions have resulted in the company's defrauding the Crown, references in these guidelines to the 'client' should be regarded in the first instance as referring to the directors. For example, where the member has to advise a client to make a

full disclosure to the tax authorities, the advice should be addressed to the directors. If it is believed that this advice will not be brought to the attention of the board as a whole, it should be given to each director, and then, if appropriate, to shareholders.

2.10 A member should deal with taxation work only on the basis that the client is prepared to make full disclosure to him. Such disclosures are governed by confidentiality as an implied contractual term.

2.11 These guidelines explain the position of members if a client refuses to act in accordance with the member's advice, for example where the client has unreasonably delayed either the production of information needed for the preparation of returns or accounts or full disclosure of irregularities. The member should consider whether to continue to act for the client but should note the recommendations contained in Chapters 4 and 8 of these guidelines regarding termination of relationships with the client.

2.12 If a member believes that a relationship with a client has been or is likely to be terminated, whether by the client or by the member, the member needs to take extra care to make clear to the client in writing what matters within the terms of the engagement have been dealt with and what remains to be done, and by what date it should be done, and also what further action the member will, or will not, take.

2.13 A member is advised to keep detailed notes (preferably typed) of meetings and telephone conversations with his clients, the tax authorities and any other third parties regarding his clients' affairs. By this means the member may protect himself in the event of a subsequent dispute over what was said at the time and, in the case of what the member perceives to be important meetings and conversations, he should consider ensuring that such notes are signed and dated by the originator.

2.14 It would be prudent for a member either to write to the client confirming oral advice as a matter of course or at least to make a note on file of advice given and he should consider sending a copy of that note to the client for his information and comment. This will allow the client a chance to correct any mistaken assumptions set out in the note and to have a written record of the advice given. Exceptionally, where it is felt that the note is of particular importance, it may be sensible to have the creation of the file note witnessed.

2.15 Members will from time to time find themselves having to advise on matters which require specialist knowledge. In such circumstances, they should be careful not to go beyond their own level of competence and, if necessary, should seek help from a specialist in the field.

2.16 Members may also find it helpful to refer to Section 7.1 'Professional conduct in relation to defaults or unlawful acts' (see *http://www.icaew.co.uk/membershandbook/*).

Tax avoidance

2.17 Tax avoidance is legal and is to be distinguished from evasion which is illegal. All taxpayers have the right to arrange their affairs under the law to minimise their liability to tax. The member should consider carefully the merits of arrangements which may be considered artificial by the tax authority concerned. Such schemes should be considered in the light of the client's wider interests because of the risk that they may be challenged by the tax authorities. A scheme which depends fundamentally on concealment from the tax authorities may very well amount to tax evasion, or at least may be viewed in that light by the tax authorities.

2.18 The tax authorities say that they object to arrangements set up for no purpose other than to avoid tax. They see such artificial arrangements as fundamentally different from choosing one commercial approach which generates a lower tax bill than another, or the mere organisation of a taxpayer's affairs in such a way as to minimise the tax bill. This is a difficult and controversial area, where the approach of the Courts has changed over time. Members may find it helpful to bear in mind the dicta of Lord Hoffman in *MacNiven v Westmoreland Investment* [2001] STC 237 at page 257:

> 'If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work (*Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1) or they do not (*Furniss v. Dawson* [1984] A.C. 474). If they do not work, the reason, as my noble and learned friend, Lord Steyn, pointed out in *Inland Revenue Commissioners v. McGuckian* [1997] 1 W.L.R. 991, 1000, is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes.'

2.19 For a helpful exploration of Inland Revenue attitudes, members may like to refer to an article in Tax Bulletin Issue 49 issued in October 2000. The article is concerned with FA 2000 section 144 which introduced a new criminal offence aimed at tax fraud and includes the following passage:

> 'The borderline between avoidance and evasion
>
> 'In the same [parliamentary] debate at least one member raised the subject of the impact of the new offence on tax advisers, especially those involved in advising on arrangements which could be characterised as tax avoidance. We do not consider that the new offence has led to any change in the law in this area.
>
> 'Where a scheme labelled as "avoidance" by its participants and their

advisers admittedly fails, the key issue as a matter of criminal law would be whether they have been dishonest in the unsuccessful effort to reduce the relevant tax liability. It would be for the courts to decide as a question of fact whether that is the case.

'Concern has been expressed in some quarters that as a result the decision will not normally be taken by those with professional experience of tax matters and, given the highly technical nature of much tax law, that state of affairs may lead to injustice. That is an issue well beyond the scope of this article, but it may be helpful to remember that possible dishonesty becomes a consideration in this context only in certain circumstances. That is where there is some suggestion that the participants in an avoidance scheme are not merely relying on the intrinsic technical soundness of the arrangements actually put in place to reduce the liability but also on concealment of the facts from the inspector. If so, then, if the scheme fails, it is perfectly possible that the criminal courts may find there has been an offence. But conversely, where there is no trace of any concealment of the true facts of arrangements for which there is a respectable technical case, it is hard to imagine how a criminal offence can have been committed.'

Disclosure

2.20 In all tax matters, the member must act in good faith in dealings with the tax authorities: in particular the member must take reasonable care when making statements or asserting facts on behalf of a client. However, the member's duty to try to ensure that the information provided is accurate and that relevant facts are not withheld is not always simple to achieve, especially if the client does not cooperate. See Chapters 3 (direct tax) and 7 (indirect tax).

Files and working papers

2.21 Members should keep copies of returns etc. and organise their working papers to separate matters such as the preparation of accounts and tax returns from those on which audit and other opinions may be expressed, because the latter are normally protected from disclosure.

Responses to official requests

2.22 The starting point is that a member owes his client a contractual duty of confidentiality. Although the client's consent to the disclosure of relevant information is normally implied, if there is a real doubt about the information which the member proposes to disclose, it is wise to obtain the client's consent expressly. When doing so, the member will normally be able to advise the client whether it is in the client's best interests to disclose such information. This Section deals with the circumstances in which the member or the client can be compelled to provide further information.

2.23 A distinction must be made between a request for information informally ('informal requests') and those requests for information which are made in exercise of a power to require the provision of the information requested

('statutory requests'). In general, only the latter form of request is capable of overriding the member's contractual duty of confidentiality to his client. Informal requests may be merely forerunners of statutory requests compelling the disclosure of such information. Consequently, it will normally be sensible for the client to comply with such requests or persuade the tax authority that a more limited request would be appropriate. The member should advise the client as to the reasonableness of the informal request and likely consequences of non-compliance and let the client make his decision. As regards, statutory requests addressed to the client the member should advise the client about rights of appeal.

2.24 In relation to statutory requests, a distinction should be drawn between requests addressed to the client and those addressed to the member. Again, only the latter type of request is capable of overriding the member's contractual duty of confidentiality because the former type of request imposes duties on the client and not on the member. In relation to the former category of request, the member should provide the client with advice concerning the validity of the request, appropriate methods of complying with the request and the serious consequences of non-compliance. Normally, the client in receipt of such advice will consent to the member providing such information on his behalf.

2.25 A statutory request addressed to the member, if valid, imposes a set of legal obligations directly upon the member. Failure to comply with such obligations can expose the member to serious civil and criminal penalties. Save in relation to limited categories of information (for example information covered by legal professional privilege), a member can and should decide how he complies with a valid information request without requiring the consent of his client. Normally, he will be able to discuss such matters with the client, although certain powers may preclude communication between the member and the client; for example, TMA 1970 s.20BA & Sch.1AA and POCA 2002 s. 333.

2.26 Whether the statutory request is addressed to the client or the member, it will normally be helpful to answer the following questions:

(a) Was the notice validly issued; for example did the officer making the request have the necessary authority to issue the notice and did he act in accordance with the various procedural safeguards?
(b) Do one or more of the pieces of information requested qualify as information which are either expressly or impliedly excluded from the ambit of the power authorising the request? For example, a client who receives a notice under TMA 1970 s.20(1) is not obliged to disclose otherwise relevant information if it is covered by LPP and a barrister, solicitor or advocate who receives a notice under TMA 1970 s.20B(3) is not obliged and, therefore, not authorised, to disclose LPP material without his client's consent.

Given the complexity of the some of the rules relating to the scope of particular information powers, it may be appropriate to take specialist legal advice.

2.27 Where a category of documents falls outside the scope of the statutory request, the member remains under a duty to preserve the confidentiality of his client.

2.28 Where the member has ceased to act for a client, he remains subject to the duty of confidentiality. In relation to general and statutory requests which are addressed to the former client, the member should refer the enquirer either to the former client or his new agent. In relation to statutory requests addressed to the member, the termination of his professional relationship with the client does not affect his duty to comply with that request.

2.29 Advice given by a member to his client is not normally disclosable by the member to the tax authorities because it is normally not relevant to the tax treatment of the underlying transaction. But this may not always be the case: for example, where the tax treatment depends upon whether the client had a tax avoidance purpose, the advice the client was receiving at the time about the alternatives open to him might be relevant. Subject to particular common law and statutory exceptions, the member might be compelled to disclose such advice although this is a difficult and contentious area.

2.30 As regards Revenue taxes only, an inspector may, under certain conditions, obtain access to documents in a member's possession or power relevant to tax liabilities: TMA 1970 s.20(3). However, this excludes documents which are the property of a member and were either created in relation to certain audit functions or relate to tax advice: TMA 1970 s.20B(9) and (10). The powers included in TMA 1970 s.20BA and Sch.1AA need also to be borne in mind. As regards the powers of Customs, see paragraph 7.19. As to ownership of documents, when in doubt the member should consider taking legal advice.

2.31 A member should be aware of the powers of the tax authorities in relation to the removal of documents; he may also find it helpful to have identified a lawyer or other practitioner with relevant specialist knowledge of both civil and criminal law from whom he can obtain advice. If a member is faced with a situation in which the tax authorities are seeking to enforce disclosure by the removal of documents, he should consider seeking immediate advice from such a source before permitting such removal. Since there may be little time to take advice, the member should consider putting in place a protocol giving guidance to his colleagues and staff as to what preliminary steps should be taken in the event that the member's premises are subject to a raid.

Legal professional privilege

2.32 LPP is related to but not quite the same as the general duty of confidentiality owed to a client. LPP, a part of the common law, was originally developed in the context of court proceedings, whether civil or criminal. In court or tribunal proceedings, the rule operates to exclude privileged material from having to be disclosed to the other party or, if known to the other party, being brought into evidence by him. Until recently, it was thought that the rule might not apply outside court or tribunal proceedings. However, the English

Courts have recognised that the public policy behind LPP can be achieved only if the confidentiality of such material is protected from information-gathering powers which are exercisable even when no court or tribunal proceedings are pending. Consequently, the protection given to LPP material potentially applies to limit the scope of the tax authorities' investigation powers.

2.33 Until the House of Lords' decision in *R (on the application of Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2002] STC 786, the Revenue contended that TMA 1970 s. 20(1) impliedly overrode the right to confidentiality conferred on LPP material. The House of Lords held that the right to communicate in confidence with a legal adviser was a fundamental constitutional right. It could be overridden by Parliament but only if the statute did so expressly or by necessary implication. General words of wide meaning are not enough to found such an inference. None of the statutory language relied upon by the Revenue was considered by the House of Lords to be sufficiently compelling to justify the conclusion that Parliament had decided to override such an important right. Since the terms of the other information powers offer less support for an implied override argument, it is considered that this decision is of general application and all Revenue and Customs' investigatory powers take effect subject to the client's right to confidentiality in respect of the LPP material.

2.34 It is, therefore, of critical importance to ascertain whether the documents requested qualify as LPP material because the protection given to such material is more extensive than that conferred by the statutory exceptions. Due to the complexity of the common law rules on what qualifies as LPP material, specialist legal advice is likely to be required, particularly if the member or the client is minded not to disclose a document on the ground that it is privileged.

2.35 At common law, the concept of LPP is complex. The protection it provides has significant limitations. It is not the case that every communication, of whatever nature, by or to a lawyer (barrister, Scottish advocate or solicitor) is privileged. At common law, the two significant situations in which privilege arises are as follows:

(a) *Litigation privilege*

Documents created for the dominant purpose of litigation are privileged. The privilege covers not only documents prepared by the lawyer, but also documents brought into existence by third persons for the predominant purpose of litigation. The existence of a second significant purpose will prevent the document from being privileged. Therefore, once litigation has started or is contemplated, documents prepared by non-lawyer advisers (including tax advisers) may be privileged. It is considered that litigation for this purpose includes a tax appeal, although there appears to be no case in which this point has been expressly confirmed.

Scots law similarly provides for the privilege of communications post litem motem. Though there is doubt as to when the privilege begins to attach to

a communication prepared in advance of litigation, which would include a tax appeal, there is a strong argument that the protection arises as soon as anything occurs to indicate that the Revenue are querying the tax liability of the taxpayer. For example, where the Revenue challenge the completeness of a return or the correctness, in fact or law, of the basis upon which a self-assessment has proceeded.

(b) *Advice privilege*
Documents passing between a client and his legal advisers are privileged if they are written for the purpose of obtaining or giving legal advice. Who is a legal adviser for this purpose is not entirely clear. The description is not restricted to lawyers in private practice and can include employed lawyers. On the present state of the authorities (many of which date from an era where the range of services offered by non-lawyers was much more limited), this type of privilege does not normally extend to documents recording communications to or from non-lawyers, even though such advisers may regularly advise on a particular area of the law and have professional qualifications to do so. So tax advice (not obtained for purposes of litigation) from a non-lawyer adviser is not privileged at common law. Nor are commissioned reports or investigations of companies. If a member is in any doubt in this very complex area he should seek legal advice.

2.36 LPP should not be confused with the protections from disclosure to the Revenue given to tax advisers by some subsections of TMA 1970 s.20B. These latter protections arise from express statutory provisions and are protections of the adviser restricting the powers of the Revenue to require information or documents from him. LPP, on the other hand, exists under the common law and is the privilege, not of the lawyer, but of the lawyer's client. The general common law rule is that the client, unless he waives the privilege, cannot be required to produce documents or answer questions where the subject matter is protected by privilege; nor can the lawyer produce the documents or answer the questions without the client's consent. There are exceptions, one of which is where a document came into existence as a step in criminal or illegal activity in which case the document is not privileged. (*Note: Whilst common law LPP applies only to clients of lawyers, with effect from 21 February 2006 a form of statutory privilege in relation to the reporting of money laundering applies also to clients of other 'relevant professional advisers'*.)

2.37 Members should bear in mind that, even if material is not protected by LPP or a statutory exemption, there may be recourse to the HRA 1998, although the position is uncertain and controversial.

2.38 If a member is consulted about, or receives himself, a request from the tax authorities, in the form of a statutory notice, which calls for the disclosure of material which he believes to be privileged at common law and which the client does not agree to disclose, it is suggested that the member should consider seeking specific legal advice. There is little guidance on these questions in reported cases. It is, however, not uncommon for members, or their clients, when asked for some particular document or item of information by the tax

authorities, to reply to the effect that, because the document or information is privileged, it is not being disclosed. If a member is consulted about, or receives himself, a request from the tax authorities (whether in the form of statutory notice or not) which calls for disclosure of material which he believes to be privileged at common law and which the client does not agree to disclose, it is suggested that in the first instance the member should reply along the lines mentioned, briefly setting out the grounds on which privilege is claimed. The tax authorities may not pursue the matter: frequently they do not. If they press the request for the documents or information, it may be appropriate for either the member or client to commence proceedings to determine the status of the material in advance of any penalty proceedings for non-compliance.

Irregularities and errors

2.39 In the course of a member's relationship with the client, whether as agent or principal, he may become aware of irregularities or errors in the client's tax affairs. The client should be informed at once, normally in writing. Tact may be required and immediate corrective action may be difficult but the member should be seen to have acted correctly at the outset (see also Chapters 4 and 8). See also paragraphs 2.43–2.47.

Materiality

2.40 Counsel has advised that the concept of a 'true and fair view' incorporates the concept of materiality. Accordingly the effect of FA 1998 s. 42 (1) (which requires profits to be computed in accordance with GAAP) is to permit a trading entity to disregard non-material adjustments in computing its profits for tax purposes; s.42 is extended to the profits of a Schedule A business by TA 1988 s.21A. However, members should bear in mind that in other contexts tax law does not explicitly recognise the concept of materiality.

2.41 Whether an amount is to be regarded as material depends upon the facts and circumstances in each case. An amount which is not regarded as material for audit purposes may still be material for tax purposes. The tax authorities are not prepared to indicate whether there is an absolute minimum which they are prepared to disregard as not material. In the context of direct tax a figure of £100 or less might reasonably be seen as not material in the majority of circumstances.

2.42 In considering whether or not he must cease to act because a client refuses to make or permit a disclosure to the tax authorities, a member may reasonably have regard to the materiality of the amount involved. See also paragraph 5.2 regarding Revenue errors and Chapters 4 and 8 as regards a situation in which a member must cease to act.

Fiscal offences and money laundering

2.43 Where members become aware of tax irregularities, they should also bear in mind that under the money laundering legislation, fiscal offences can amount to money laundering.

2.44 Tax-related offences involve evasion and not avoidance and are not in a

special category. Tax evasion is a crime, the proceeds of which have to be treated in exactly the same way as those from drug trafficking, terrorist activity, theft, fraud, etc. Offences may relate to direct tax such as income tax or corporation tax, or they may relate to indirect tax such as VAT. Whilst not all tax-related offences are indictable, most are, including frauds against the Revenue or Customs. (*Note: there can be no money laundering until there are proceeds of crime, in other words, in respect of tax evasion, until the tax has become due and has not been paid.*)

2.45 A member who has knowledge of or reasonable grounds for suspecting money laundering should consider whether he has an obligation to make a report to the appropriate authorities (the Money Laundering Reporting Officer in his organisation or the Serious Organised Crime Agency). (*Note: formerly reports were made to the National Criminal Intelligence Service; NCIS has been absorbed into SOCA.*)

2.46 Where a report has been made to SOCA, the client should not be informed where this would be considered tipping off under the terms of the Money Laundering legislation. (*Note: advice on tax matters to a client to persuade him to stop breaking the law by evading tax is not tipping off.*) Members should also note that a report made to NCIS is not a substitute for a proper disclosure to the tax authorities.

2.47 This is an important subject and can involve the member in criminal penalties. There have been recent changes in EU and UK law. Members should familiarise themselves with the required rules and procedures in Part 7 of POCA 2002 and the Money Laundering Regulations 2003 (SI 2003/3075) (*Note: both as amended, for example, with effect from 21st February 2006, s. 330(6) POCA 2002 was amended by The Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006 (SI 2006/308) to extend exemption from reporting knowledge or suspicion of money laundering formed in privileged circumstances to a new but limited category of 'other relevant professional advisers' – see TECH 2/06 at* http://www.icaew.co.uk/index.cfm?route=125055) and should read carefully the current professional guidance on the avoidance, recognition and reporting of money laundering (see Section 7.2 'Anti-money laundering (Proceeds of Crime and Terrorism): second interim guidance for accountants' at www.icaew.co.uk/membershandbook (currently being updated) and CCAB and ICAEW Advisory Service and Tax Faculty guidance at www.icaew.co.uk/moneylaundering). Members who are in any doubt about their responsibilities in this area should seek appropriate advice (for example from the Institute's money laundering helpline).

Members in employment

2.48 Whilst these guidelines are addressed primarily to members in practice, they apply equally to members employed in professional practice and in business. Additional assistance for such members will be found in Section 7.1 'Professional conduct and disclosure in relation to defaults and unlawful acts'; see www.icaew.co.uk/membershandbook/.

Human Rights

2.49 The tax authorities are constrained by HRA 1998. UK legislation should be construed if possible in a manner which is consistent with the European Convention on Human Rights. Similarly, public authorities are, subject to limited exceptions, obliged to act consistently with Convention rights, in particular in the exercise of their discretionary powers. Under Article 8 of the European Convention, everyone, including legal persons, has the right to respect for his private life and is entitled to privacy in relation to both his personal and business correspondence. A breach of that confidentiality is permitted only if and to the extent that it is authorised by law or it is in pursuit of a legitimate aim which must constitute a pressing social need, and the breach is no more than is proportionate to the social need which is sought to be advanced. See *Foxley v United Kingdom* (2000) 31 EHRR 637, 647, paragraph 44 in relation to a breach of the right to confidentiality sought to be advanced. Against this background, all requests for access to information held by a professional adviser should be considered carefully. In cases where doubts arise, members should seek guidance from a suitably-qualified adviser.

FORMER INLAND REVENUE TAXES

Chapters 3 to 6 should be read in conjunction with Chapters 1 and 2.

3 DISCLOSURE

Generally

3.1 The taxpayer has primary responsibility to submit correct and complete returns to the best of his knowledge and belief.

3.2 In general, it is likely to be in a taxpayer's own interest to ensure that factors relevant to his tax liability are adequately disclosed to the Revenue. The reasons for this are twofold:

(a) his relationship with the Revenue is more likely to be on a satisfactory footing if he can demonstrate good faith in his dealings with them; and
(b) he is likely thereby to be protected from the raising of a discovery assessment under TMA 1970 s.29.

Disclosure and discovery

3.3 Under TMA 1970 s.29(1), an officer of the Board is given powers to make an assessment to make good a loss of tax if he discovers that income has not been assessed, or has been under-assessed, or that excessive relief has been given. However, no such assessment may be made unless:

(a) the loss of tax is attributable to fraudulent or negligent conduct on the part of the taxpayer or his agent; or
(b) at the expiry of the period during which the officer is entitled to enquire into the taxpayer's return (normally 12 months from the filing date) the

officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation giving rise to the loss of tax.

3.4 Information under TMA 1970 s.29(6) is to be regarded as made available to the officer if:

(a) it is contained in the return for the relevant year, or in any accounts, statements or documents accompanying the return or produced in the course of an enquiry into the return; or
(b) it is contained in any claim for the relevant year, or in any accounts, statements or documents accompanying the claim or produced in the course of an enquiry into the claim; or
(c) it is information the existence of which, and the relevance of which, could reasonably be expected to be inferred by the officer from the foregoing, or which is notified in writing to the officer.

3.5 Under TMA 1970 s.29(7), in determining the extent of the information that is to be regarded as available to the officer in considering a return or claim for a particular year, there is to be included information made available to the officer in respect of returns for the two preceding years.

3.6 For the most part, the Revenue do not anticipate that it is necessary for a taxpayer to provide supporting documentation in order to satisfy the taxpayer's overriding need to make a correct return. The view expressed in the notes accompanying the return is that, where it is necessary for that purpose, explanatory information should be entered in the 'white space' provided with the return. However, the Revenue do recognise that the taxpayer may wish to supply further details of a particular computation or transaction in order to minimise the risk of a discovery assessment being raised at a later time (see in particular the Revenue Press Release dated 31 May 1996 reproduced in Tax Bulletin 23 in June 1996: see http://www.hmrc.gov.uk/bulletins/discoveryand). The member's duty is therefore not only to assist his client to make a return that is correct and complete but also to ensure that the client is aware of the factors involved in making a fuller disclosure than is strictly necessary, in order to minimise the risk of a subsequent discovery assessment. Among those factors are:

(a) the terms of the applicable law;
(b) the view taken by the member;
(c) the extent of any doubt that exists;
(d) the manner in which disclosure is to be made; and
(e) the materiality of the item in question.

3.7 In dealing with the tax authorities or other third parties in relation to a client's tax affairs, a member should bear in mind that he is acting as the agent of his client. He has a duty to present his client's case to the best of his ability and in the best possible light. Although a member is not required to verify information provided by a client, he should take reasonable care to ensure that the facts presented are correct and that no attempt has been made to mislead.

3.8 A member owes a duty of confidentiality to the client. Thus, in general,

a member should not disclose any information received in a professional capacity without the consent of the client whether in the engagement letter or elsewhere (see paragraph 2.7).

3.9 In their Press Release dated 31 May 1996, the Revenue indicated their views as to the manner in which taxpayers should make their own disclosures. While this guidance may be adequate for taxpayers with straightforward affairs it is not considered that it can be regarded as satisfactory for more complex cases, which probably encompass the majority of taxpayers who are represented by agents.

Accompanying documents

3.10 In the preparation of a tax return, there is no duty to provide more information to the tax authorities than the return requires simply because some pieces of information known to the member might support a different tax treatment from that which the member, after due consideration of all the information available to him, honestly considers to be the tax treatment. On the other hand it may be in the client's best interest to furnish more information than he is strictly required to do because this is likely to lead to a more reasonable approach by the tax authorities, thereby saving money and time in the long run and giving greater certainty.

3.11 The member should discuss with the client the extent to which documents are to be submitted to accompany the return. For companies, accounts are required in almost all cases. For traders there is no such requirement but it is likely to be good practice to send them in all but the simplest cases, because they supplement the self-assessment information contained in the tax return. In such cases it is also likely to be desirable to:

(a) supply computations linking the accounts to the figures in the tax return;
(b) supply analyses of major items contained in the accounts, with explanations of disallowances; and
(c) refer to these on the face of the return.

3.12 In non-trading cases it is likely to be desirable to supply further information where the identity of figures is not readily apparent, for example:

(a) computations of chargeable gains including valuations where appropriate; and
(b) lists of investment income.

3.13 Where the taxpayer has undertaken a significant transaction in the year, it may be desirable to provide documentation, for example a sale agreement. However, in so doing the member should consider whether the relevance of the document could 'reasonably be expected to be inferred' without further amplification, particularly in the context of a lengthy document. It would be sensible, therefore, to indicate why the taxpayer considers it relevant to the return.

3.14 In considering the extent to which the relevance of accompanying

documents needs to be explained, the member is entitled to assume that the Revenue are broadly familiar with, but not expert in:

(a) normal accountancy terminology;
(b) generally-accepted accounting principles and financial reporting standards;
(c) generally-accepted auditing principles and auditing standards;
(d) the requirements of the Companies Acts; and
(e) the background to, and the relevance of, the usual wording of auditors' reports and accountants' reports.

3.15 The Revenue have indicated that they will regard documents as accompanying the return if they are sent in support of the return and within one month of its submission.

Additional disclosure

3.16 Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases the member ought to consider carefully what disclosure, if any, might be necessary. For example, additional disclosure should be considered:

(a) where the Revenue have published their interpretation or have indicated their practice on a point, but the taxpayer proposes to adopt a different view, whether or not supported by legal opinion; and
(b) where there is inherent doubt as to the correct treatment of an item, for example expenditure on repairs which might be regarded as capital in whole or part.

3.17 A member who is uncertain whether his client should disclose a particular item or its treatment should consider taking further advice before reaching a decision and should ensure that the client understands the issues and implications and the proposed course of action. Such decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including contemporaneous notes of discussions with the client or with other advisers, copies of any second opinion obtained and the client's final decision.

Requests to the Revenue for guidance including clearance applications

3.18 The Revenue have made it clear that they require a high standard of disclosure if a taxpayer is to be able to rely on a Revenue clearance or on guidance provided in response to a request from a taxpayer or his agent. In their own words, the taxpayer 'must put all his cards face upwards on the table' in such circumstances and indicate the use which it is intended to make of the guidance. It is implicit that in so doing the taxpayer would need to indicate those areas where he is doubtful about the correct interpretation of the law or the application of Revenue practice.

3.19 It is, however, considered that a distinction should be drawn between situations where the client is seeking the ruling of the Revenue pursuant to a statutory clearance procedure and those situations where the client is asking

the Revenue for a ruling on the tax treatment of a particular transaction. In the former case, the relevant information for an effective clearance will normally be prescribed by the statute creating the clearance procedure. In the latter case, the client is seeking to attach to a ruling by an officer which he is not obliged to give a finality normally accorded to the decisions of the tax tribunals and the Courts in relation to a category of transactions about which the officer may not have the same specialist knowledge as the specialists dealing with statutory clearances. Although it will normally be prudent for a member to err on the side of fuller disclosure in relation to both types of clearances, in the case of statutory clearances it may not be necessary to go into the same detail concerning the law.

4 ACQUIRING KNOWLEDGE OF DIRECT TAX IRREGULARITIES

For the purposes of this Chapter, the term 'irregularity' is intended to cover innocent errors, negligent conduct (by either the client or an adviser) and also matters which could be treated as civil or criminal fraud for direct tax purposes.

Generally

4.1 A member must do nothing to assist a client to plan or commit any offence or to conceal any offence which has been committed. A member must exercise great care to avoid the commission of an offence by knowingly or recklessly making false statements or false representations when assisting a client whom the member suspects may have defrauded the Crown of tax or of having been negligent in regard to tax matters.

4.2 The offences for which the Revenue seek penalties fall into two categories:

- failures (in which can be included payment failures leading to surcharges), where the penalty applies unless the taxpayer can demonstrate reasonable excuse and remedial action without unreasonable delay, as for example, in TMA 1970 s.118(2); and
- errors, where the penalty will apply only if the error was made fraudulently or negligently. The phrase 'innocent error' needs some care: an error that is innocent even of neglect is not culpable, but there is no implication of deliberate intention in neglect.

The Revenue take the prima facie view that any error may be due at least to negligence, but will seek to establish the facts of the case.

4.3 Counsel has advised that if a taxpayer in good faith receives advice from a person who he reasonably believes has appropriate and relevant experience and knowledge, and to whom he has given full and accurate particulars of the matter, to the effect that, say, a particular receipt is not taxable, then he is not negligent if he submits his return relying on that advice. Counsel has advised that this remains correct even if the adviser on whom the taxpayer reasonably relied was himself acting negligently or even fraudulently.

4.4 A taxpayer might make a return unaware that it contained a wholly-innocent error. If that error subsequently comes to his notice he must then act without unreasonable delay to remedy it. If he does not, TMA 1970 s.97 will treat the incorrect return as having been made negligently for TMA 1970 s.95 penalty purposes.

4.5 A member who, as a result of any work undertaken on behalf of a client, has reason to believe that a tax irregularity or error has occurred should discuss with the client the matter which gave rise to that belief and consider whether in the circumstances it is appropriate for him to act. Where the member has not acted in relation to that question, he should take into account the fact that he may not be party to all the facts and circumstances and may not therefore be able to reach a conclusion on this issue. It is not the duty of the member to pursue to a conclusion a matter in respect of which he has not been engaged, unless it affects work in respect of which he has been engaged. Members should be aware that Statement of Auditing Standards 110 'Fraud and Error' gives guidance to auditors which may have relevance in a fiscal context. Members are particularly referred to paragraphs 50–64 of that publication. (*Note: superseded for audits of financial statements for periods commencing on or after 15 December 2004 by International Standard on Auditing (UK and Ireland) 240 ('ISA 240'): 'The Auditor's Responsibility to Consider Fraud in an Audit of Financial Statements' – see* http://www.frc.org.uk/images/uploaded/documents/ACFAA4.pdf.)

4.6 If there is doubt as to whether or not an irregularity has occurred, the member should consider protecting his position by obtaining advice from a specialist in this field. Furthermore, if the member has any doubt about his competence to provide advice to his client in these circumstances he should seek specialist help.

Money laundering

4.7 Where appropriate, members should bear in mind the legislation on money laundering and the duties which this places upon them (see paragraphs 2.43–2.47).

Human rights

4.8 Wherever appropriate, in particular if there is a risk of prosecution or tax-geared penalties, the provisions of the HRA 1998, in particular the protection given by Articles 6 and 8 of the European Convention on Human Rights, should be considered, and in obtaining advice on behalf of their clients members should ensure that the Act is taken into account.

Materiality

4.9 In considering the action which he should take in the circumstances outlined in this Chapter, the member may take account of materiality (save in relation to money laundering issues) but reference should be made to paragraphs 2.40–2.42.

Advice to be given where an irregularity is admitted

4.10 A member whose client has admitted an irregularity should advise the client in writing to disclose it to the Revenue. One of the factors the member must take into account is whether his client will have the benefit of LPP in relation to confidential discussions between the client and the adviser concerning the client's knowledge of the irregularity. As indicated in paragraphs 2.32–2.38 above, the present position at common law is that communications for the purpose of the obtaining legal advice from non-lawyers do not qualify for LPP unless the dominant purpose behind such communications is to assist in litigation which is either pending or contemplated. In many circumstances, the dominant purpose in seeking such advice will be to ascertain the extent of the tax liability, rather than to assist in contemplated litigation. If legal advice is not appropriate, the member should advise the client to disclose the irregularity to the Revenue and make an internal note of having given such advice. The member should explain the consequences of not making a disclosure, in particular that:

(a) should the Revenue discover the irregularity later there might be no defence against the imposition of penalties;
(b) having knowledge of the irregularity but suppressing it may be construed as a criminal offence or a civil fraud;
(c) disclosure and cooperation will generally lead to discounted penalties being imposed; and
(d) it would be improper to allow the Revenue to agree a settlement without putting them in possession of all the facts.

When the Revenue are not aware of an irregularity

4.11 Where there is an irregularity which the Revenue have not discovered, voluntary disclosure and full cooperation will usually reduce the level of a penalty, although interest will remain due. The Revenue do not regard interest as penal, but merely commercial restitution for use of the money that was in fact due to the Exchequer. Prompt disclosure of an error may avoid suspicion by the Revenue that it was deliberate, thus reducing the risk of a civil fraud penalty.

When the Revenue allege that irregularities may have occurred

4.12 When the Revenue allege that an irregularity may have occurred, but it has not been identified by the member or his client, the member should establish from the Revenue such details as he can of the alleged irregularity and the circumstances in which it occurred. This should take place at a meeting between the member and the Revenue officer or in the course of correspondence, depending on the circumstances.

4.13 The member should then discuss the position with his client and establish with him the full facts relating to the alleged irregularity. The member should evaluate the Revenue allegations in the light of the facts as they have been explained by the client. Where appropriate he should advise his client to make a full disclosure to the Revenue and to offer them all facilities for investigation. In the course of his evaluation the member should consider

whether to recommend to his client to take specialist advice prior to making a disclosure. In particular, where there is a real possibility that the tax authorities may still bring criminal proceedings against the client even if he provided full disclosure, the client needs to have legal advice concerning his right to silence and the privilege against self-incrimination before deciding which course to take: see paragraph 4.18 below.

4.14 It may be appropriate for the member, having agreed this with his client, to offer that a full report of the facts behind and surrounding the alleged irregularity be prepared by the member on behalf of the client with a view to making a full disclosure to the Revenue. In so doing the member should bear in mind the advice in paragraphs 2.32–2.38 about LPP, which would probably apply to the drafts of the report, although not to the report itself once delivered.

When the Revenue are aware of an irregularity

4.15 In cases where Special Compliance Office ('SCO') is involved, the adviser should establish whether Code of Practice ('CoP') 8 or 9 will be used. CoP 9 deals with cases of suspected serious fraud, while CoP 8 deals with all other cases. (*Note: SCO has been renamed Special Civil Investigations Office and CoP 9 (2005) has replaced CoP 9 for inquiries commencing on or after 1 September 2005; see* http://www.hmrc.gov.uk/practitioners/civil-investigations.htm. *The following explanation of HMRC's procedures refers to the pre-1 September 2005 position.*)

4.16 When the Revenue is aware that an irregularity has occurred, an interview under caution may be conducted. If the member is made aware of such an interview, he should notify his client of the seriousness of the proposed Revenue action and advise him to take advice from an appropriate specialist. It must be apparent to all that an interview under caution is an indication of the possibility of a criminal prosecution.

4.17 Interviews conducted by members of the SCO are frequently carried out within the terms of the revised Hansard practice as set out in CoP 9. Following *Regina v Gill & Gill* [2003] STC 1229, CoP 9 enquiry interviews are being conducted under PACE 1984 Code C. The Hansard statement makes it clear that provided the taxpayer makes a full disclosure he can be assured that the Revenue will not pursue a criminal prosecution. Nevertheless, TMA 1970 s. 105 provides that statements made or documents produced by a taxpayer in response to a Hansard warning remain admissible in criminal or penalty proceedings. There is no express saving for situations where the taxpayer has cooperated fully or where the statements or documents are relied upon as being accurate, and so as evidence of wrongdoing by the taxpayer. It is doubtful whether reliance by the Revenue on s. 105 in those circumstances would be consistent with the taxpayer's privilege against self-incrimination under Article 6 of the European Convention on Human Rights. Subject to the above points and to paragraph 4.18 below, a member should advise his client to make a full disclosure to the Revenue and ensure that at each meeting with the Revenue, the client is represented by a professional adviser experienced in that type of investigation.

4.18 Until it has become clear that criminal proceedings are not being considered, the member should bear in mind that the client has a right to silence. Even in cases where criminal proceedings are not in point but tax-geared penalties are likely to be imposed, the taxpayer may have a right to silence under the HRA 1998, although whether the client should seek to rely upon that will depend on the circumstances. The member should exercise careful judgement in giving his advice and, if appropriate, tell the client to obtain specialist advice, which may include specialist legal advice.

4.19 SCO have been instructed not to hold 'neutral' interviews (namely ones where neither the Hansard statement nor a CoP is quoted). Accordingly, in any case in which neither the Hansard statement nor a CoP is offered, it should be assumed that criminal proceedings are being contemplated, and specialist advice, including if appropriate specialist legal advice, should be sought as soon as possible.

4.20 Equal care must be exercised in cases handled by the local district. An assurance that any disclosure will be dealt with along civil procedures before any admissions are made is unlikely to be obtained and districts are not authorised to administer Hansard or CoP 9. However, before advising on a disclosure to a local inspector, the member should seek to establish whether any of the following circumstances apply:

(a) false accounts have been deliberately compiled;
(b) documents affecting the accounts or the tax liability (for example invoices) have been materially altered or falsified;
(c) there are grounds for doubting the honesty of a solicitor, accountant or any tax adviser;
(d) the taxpayer or directors have conspired with a third party to defraud the Revenue;
(e) a certificate of disclosure or statement of assets signed during the current or earlier investigations turns out to be false;
(f) further offences have occurred immediately or shortly after the conclusion of an investigation;
(g) the potentially fraudulent taxpayer is a member of either House of Parliament or has a special status in the administration of justice or tax;
(h) there is suspected fraud or evasion using the vehicle of an off-shore company or other foreign entity, for example involving false invoices or monies diverted off-shore;
(i) informers have valuable information about a suspected fraud or substantial evasion;
(j) it is a case of phoenixism;
(k) it is a case of failure to notify chargeability or very late filing; or
(l) it is a case of serious PAYE irregularities.

If any of the above applies, then the member should consider carefully whether he is competent to deal with the matter or whether it might be sensible to obtain specialist advice.

The importance of confirming admissions of irregularities by clients

4.21 Misunderstandings can arise, especially when the client is under investigation by the Revenue. Before a member makes any disclosure to the Revenue on behalf of a client, he must be absolutely clear that an irregularity has occurred and that he has the client's agreement to the manner of disclosure.

Instructions to disclose

4.22 If the client accepts the member's advice and instructs him to make a full and immediate disclosure, the member should write to the Revenue (in terms approved by the client) and either give full details or explain the position in general terms and say that the client has directed that a complete disclosure will be made as soon as possible. This letter should be provided to the Revenue as soon as possible. It would be improper to allow the Revenue to agree a settlement without putting them in possession of the full facts. The Revenue usually require a certificate of full disclosure to be signed by the client and it is vital that the client appreciates the importance of such a certificate.

Disclosure to other tax authorities of an admitted irregularity

4.23 The member should also consider the need to make a similar disclosure to Customs.

Unwillingness or refusal to disclose an admitted irregularity

4.24 'Unwillingness' in this context includes such procrastination or prevarication as effectively amounts to a 'refusal', albeit not expressed. A member should allow a reasonable period for the client to make a decision. Thereafter, the member must decide whether continuing 'unwillingness' is in fact 'refusal' for this purpose.

4.25 If the client refuses to accept the member's advice to make a full and prompt disclosure to the Revenue, the member should ensure that his conduct and advice are such as to prevent his own probity being called into question. It is essential therefore, to advise the client in writing properly and fully of the consequences of the failure to disclose.

4.26 The member should explain to the client the Revenue's wide-ranging powers to obtain information from taxpayers and their agents. The client should be told that there is a considerably greater likelihood of a criminal prosecution (with the likelihood of imprisonment) where the Revenue 'discover' a fraud than where the client makes a voluntary disclosure and offers a suitable monetary settlement, and that voluntary disclosure normally results in a lower scale of penalty.

4.27 If the client refuses to accept the member's advice to make a full and prompt disclosure to the Revenue, the member should take such steps as are necessary to disassociate himself from the client's conduct. The member should write to the client setting out the facts understood by the member or agreed, and advising the client of his advice to disclose. He should also make it clear

that he, the member, may have an obligation formally to disassociate himself from any work done, should disclosure not be made.

4.28 If the client refuses to disclose or to take other steps (for example, seeking Counsel's opinion on the member's view) to regularise the situation, the member should consider taking steps formally to disassociate himself from the relevant work taking account of all relevant issues. In certain cases it may be necessary to cease to act in relation to the client's direct tax affairs, or indeed all his affairs.

4.29 If the Revenue realised that the member had continued to act after becoming aware of such undisclosed errors, they might consider the member to be 'knowingly concerned' in the commission of an offence. At the very least the Revenue might cease to trust the member. Furthermore, the relationship of trust which must exist between member and client will have been impaired.

Where the member has acted in relation to the irregularity

4.30 A member who has acted in relation to the irregularity should make it plain that if the client refuses to authorise disclosure, the member must cease to act for the client in all matters, not just those related to direct tax, save that the member is entitled to take the view that he is not obliged to cease to act where the amounts are not material. The member should also explain that if the client refuses to disclose, the member must act in accordance with paragraph 4.32. The client should be left in no doubt that this step could result in the Revenue commencing enquiries which might lead to the discovery of the non-disclosure and possible offence.

4.31 The member should explain the practical implications relating to the appointment of a new adviser in that it is the duty of professional advisers before accepting professional work to communicate with the person who previously acted in connection with that work.

4.32 If, despite fully advising the client of the consequences, the client still refuses to disclose to the Revenue, the member should forthwith:

(a) cease to act for the client in all respects and inform the client in writing accordingly; and
(b) inform the Revenue that he has ceased to act for the client.

If the matters in question affect accounts or statements which carry a report signed by the member as to their accuracy, he should inform the Revenue that he has information indicating that the accounts or statements cannot be relied upon, provided that the member has included in his engagement letter with the client wording such as that set out at paragraph 2.7. If he has not, and does not have his client's consent to the disclosure of errors generally, he should take specialist advice as to what action he should take.

4.33 A member has no legal obligation to provide the Revenue with an explanation as to the reasons for ceasing to act. Whether the member has a duty to correct a report carrying his opinion as to the accuracy of the accounts

will, in Counsel's opinion, depend upon its terms. Where it is qualified as being based on information supplied then ceasing to act for the client should suffice. If the member is uncertain as to how to proceed he should consider taking legal advice.

4.34 A member who follows paragraphs 4.30–4.33 is under no legal duty to explain to the Revenue the reasons why the returns, accounts, etc. are defective, and should do so only with the former client's permission. See also paragraphs 2.43–2.47.

Where the member has not acted in relation to the irregularity but has acted in relation to other tax matters

4.35 The member may discover a material irregularity which occurred either before the engagement began or in relation to matters dealt with by another adviser or by the client himself, for example PAYE, NIC and returns on forms P11D. In such cases, the member should advise the client to make full disclosure to the Revenue. If the client refuses to disclose, the member should cease to act because the relationship of trust which must exist between a member and the client would have been impaired and, just as important, the member's relationship with the Revenue would be prejudiced.

4.36 However, as the member has not acted in those tax matters to which the irregularities relate, the member's duty is merely to inform the Revenue that he has ceased to act.

Where the member has not acted in relation to tax matters

4.37 A member who has not acted in relation to tax matters, but discovers or suspects that a client has committed a tax irregularity, should discuss the position with the client. If the client confirms the discovery or suspicion, the member should ask the client to discuss the situation with the tax adviser with a view to making full disclosure to the Revenue. If the client refuses, paragraph 4.25 applies.

4.38 The member's duty is limited to encouraging disclosure to the Revenue. Thereafter, it is for the client to decide how to proceed. The member is not required to take the steps referred to in paragraphs 4.30–4.33. However, in the event that the client fails to make the disclosure, the member should consider whether the relationship with the client, which is based on trust, has been impaired and, if it has, whether it is proper to continue to act for the client. A member who decides to continue to act should not thereafter give any advice in relation to any tax matters (other than the matter of disclosure) unless and until the client agrees to disclosure to the Revenue.

Where the client refuses to admit an irregularity

4.39 Where the client denies any irregularity to the satisfaction of the member, the member is free to continue to act for that client. The member should protect himself by ensuring that his files fully document the discussions with the client and the reasons why the member is satisfied with the explanations given. It may be appropriate also to send a copy of the file note to the client.

4.40 Where the client denies any irregularity and the member rejects outright that denial, the member must cease to act for the client, at least in relation to his direct tax affairs, and very possibly in relation to all his affairs. The member should inform the Revenue that he is no longer acting on behalf of the client and should consider whether the course of action outlined in paragraphs 4.30–4.33 should be followed. He should also make it clear to the client that he may have an obligation formally to disassociate himself from the work done.

4.41 Where, despite the client's denial of any irregularity, the member still has reservations, but does not consider that he is justified in rejecting the denial outright the member must give careful consideration as to whether he can continue to act on behalf of the client. If the member decides to continue to act his file notes should set out clearly the client's explanation and/or assurance that there have been no such irregularities.

Suspicious circumstances

4.42 A member who acts in relation to tax matters and has good grounds to suspect that a client has committed a material tax irregularity should discuss the position with the client to confirm or remove the suspicion. This applies whether or not the member has acted in relation to the actual matter concerned. If the suspicion is confirmed, the member would then have actual knowledge of the irregularity and these guidelines should be followed. The member should also bear in mind the guidance on money laundering (see paragraphs 2.43–2.47) and his possible obligations.

4.43 If the member finds no confirmation but remains suspicious such that the relationship of trust which must exist between the member and the client may have been impaired, the member should consider whether he should continue to act. If a new adviser then approaches the member, the member should consider his position in the light of paragraphs 4.45 and 4.46.

Request for information from a new adviser

4.44 On changes in a professional appointment, the initiative to request information lies with the new adviser who should obtain the proposed client's authorisation to communicate with the member. The member should not volunteer information to a new adviser in the absence of any such request from the new adviser or his former client.

4.45 When the member receives a request for information from a new adviser, he should:

(a) seek authorisation from the former client to disclose all relevant information to the new adviser;
(b) on receipt of such authorisation, disclose all the information needed and reasonably requested by the new adviser to enable him to decide whether to accept the work; and
(c) to the extent that he is authorised to do so, discuss freely with the new adviser all matters of which he should be aware.

4.46 If the former client refuses permission, the member cannot disclose information to the new adviser. However, the member can refer the latter to the fact that there is correspondence between the member and the former client without disclosing what it says. The new adviser will then ask the client for copies of that correspondence.

4.47 The new adviser will therefore become aware of the non-disclosure and possible offence. Since the former adviser will have resigned on the grounds of the client's unwillingness or refusal to disclose, it should follow logically that if the client continues to be unwilling or refuses to disclose, or refuses permission for the former adviser to communicate with the new adviser, the new adviser should decline to act. However, the new adviser is entitled to consider whether or not he comes to the same conclusion as the former adviser. *See also Members' Handbook Section 3.3 'Code of Ethics' Part B, paragraph 210 'Professional Appointment' at* www.icaew.co.uk/membershandbook.

Interaction with indirect taxes

4.48 A member who prepares accounts should ensure that they reflect all material liabilities for indirect taxes whether or not they have been declared. If a material liability for indirect taxes is omitted an auditor cannot, without qualification, report on the accounts as showing a true and fair view. Customs often request the accounts in the course of a control visit in an attempt to reconcile turnover with the VAT returns.

4.49 If an assessment based upon alleged undisclosed takings is accepted by the client or a settlement at a reduced figure is agreed with Customs, and the member has already submitted accounts information for the period in question to the Revenue, the member must consider whether the accounts show a true and fair view and, if not, follow the guidelines set out above.

4.50 In such circumstances it may be wise to inform the Revenue before a final settlement is agreed with Customs in order that the self-assessment for direct tax purposes can be amended as well. This may help to avoid a second investigation.

5 INLAND REVENUE ERRORS

Notes:

1. The Revenue have explained that this Chapter presents them with major difficulties and in particular they do not see how 'special circumstances' as in paragraph 5.5 could exist. They ask that members should take all possible steps to ensure that their clients pay the correct amount of tax due in law, even where following an error by the Revenue insufficient tax is demanded.
2. Members should be aware that the law in Scotland differs.

Generally

5.1 Throughout this Chapter references to Revenue errors are to the position which may arise from the raising of an inadequate assessment, an under collection of tax or interest or an over repayment of tax or interest, in circumstances where it is apparent to the member that a mistake has been made by the Revenue. The mistake may be one of law or may be a calculation error or a clerical error; equally it may arise from a misunderstanding on the part of the Revenue of the facts as presented. Reference should also be made to the Revenue publication Code of Practice 1: 'Mistakes by the Inland Revenue' (see http://www.hmrc.gov.uk/leaflets/cop1.htm).

5.2 The Revenue position is that any error, however trivial, ought strictly to be corrected. In practice they do not insist upon this where the amount involved is de minimis, but they do not give any guidance in this area. It is reasonable for members to weigh the cost to the client of correcting minor errors against the amount of tax at stake. See also paragraphs 2.40–2.42.

5.3 As noted in paragraph 2.7, members are advised to include in their letters of engagement authority to advise the Revenue of errors, so that reference to the client is not needed. Where no such authority has been obtained, the procedure in paragraph 5.8 should be followed.

5.4 When advising clients of possible action in the light of an error made by the Revenue, members should in the first instance consider whether in making his return, the taxpayer adequately disclosed information bearing on his tax liability, and in particular on the aspects which gave rise to the error.

5.5 Where the member becomes aware that the Revenue, in full possession of the facts, have made an error in dealing with the affairs of a client, the member should seek the client's authority to advise the Revenue of the error. If the client refuses to give that authority, the member should consider whether there are any special circumstances which might render the refusal reasonable. If there are not, then, unless the amount of tax or interest at stake is de minimis, he should consider whether he should continue to act. In determining whether any such refusal would be reasonable, the member should consider whether TMA 1970 s. 97 would apply if the error subsequently came to light. If it would, it is highly unlikely that the client's refusal could be considered reasonable for this purpose. If the client is under a duty (see paragraphs 5.10 et seq) to bring innocent errors to the attention of the Revenue but refuses to do so notwithstanding the member's advice to the contrary, there is a substantial risk that if the member continued to act whilst remaining silent, he would be assisting the client in a breach of the client's duty.

5.6 If, however, a member is specifically asked by the Revenue to agree a figure, he must agree what he believes to be the correct figure; this may be a figure negotiated in the course of discussions following full disclosure of the facts and circumstances. He is not at liberty to accept a figure he knows to be incorrect, and he does not need to seek his client's authority to disclose to the Revenue their errors.

5.7 Counsel has advised that, in all other cases of excessive repayment or inadequate demand, unless the tax at stake is de minimis, the member should take the client's instructions. The client should be asked to authorise the member to advise the Revenue of the error, and warned of the possible legal consequences if he is reluctant to give the authority sought; such consequences might additionally include interest and penalties.

5.8 Because the member may himself commit a criminal offence (see paragraph 5.11) through his involvement in obtaining an excessive refund, he should seek his client's authority to inform the Revenue of the error. If this is not forthcoming he should consider taking independent legal advice with a view to:

(a) notifying the Revenue in any event, and notifying the client of his action; and
(b) ceasing to act for the client.

5.9 A member should ensure that a written record is kept of all advice given to clients in connection with Revenue errors, and of any reassessment of his relationship with his clients. The member should also consider taking independent legal advice where he has any doubts as to the proper course of conduct to be followed. Revenue errors may cause expense to members, and thereby to their clients. Members should bear in mind that in some circumstances clients may be able to claim compensation. (*See HMRC Code of Practice 1: 'Putting things right – how to complain' at http://www.hmrc.gov.uk/leaflets/cop1.htm*)

Legal considerations

Offences under the Theft Act 1968 (not applicable in Scotland)

5.10 Theft Act offences might apply when a repayment results from the error. The most likely offence is that of theft contrary to the Theft Act 1968 s. 1. Such an offence is committed when a person dishonestly retains, intending to keep or use, money which he knows does not belong to him. Dishonesty is the core of this offence. If the defendant were to raise the defence that he did not consider what he was doing to be dishonest, the prosecution would have to prove:

(a) that what was done was dishonest by the ordinary standards of reasonable and honest people; and
(b) that the defendant himself must have realised (or would have, had he stopped to think about the matter) that what he was doing was by those standards dishonest.

It is no defence that the defendant did not himself regard his conduct as dishonest.

5.11 If, before a client receives an excessive repayment, a member knows that it is to be made and that it is excessive, where the member was in any way concerned, however innocently, in obtaining it (for example, by submitting the repayment claim) but does nothing to draw the Revenue's attention to the error, the member is at risk of prosecution. This is a very difficult area

for the member. If he was unaware at the time he did the act he committed (for example, sign accounts or submit a repayment claim) that the claim was excessive, and he only obtained that knowledge later, and if he does not himself receive the repayment, as a matter of law he is not guilty of any offence. The problem that the member faces, however, is the risk of it being alleged against him that his knowledge of the client's dishonesty was earlier than in fact it was. Hence he would be vulnerable to prosecution either alone or together with the client.

5.12 If the Revenue send the excessive repayment to the member, and if he is aware that it is excessive, he should simply return it to the Revenue and inform the client that he has done so.

5.13 The offences for which the member would be at risk of prosecution are:

(a) obtaining a money transfer by deception;
(b) procuring the execution of a valuable security (for example, the repayment warrant) by deception;
(c) dishonestly retaining a wrongful credit; and
(d) conspiracy to commit any of those offences.

5.14 Members should also bear in mind that it is a serious criminal offence to tell the Revenue an untruth (whether oral or in writing) if this is done with intent to 'prejudice' the Revenue, that is to deceive an officer into not doing his duty, namely further to investigate the taxpayer's affairs and raise any tax assessments that might be appropriate, whether or not any additional tax is in fact due from the taxpayer.

The offence of cheat (not applicable in Scotland)
5.15 Revenue prosecutions for the common law offence of cheat are not uncommon. This is an ancient offence which requires proof of an intent to defraud or to prejudice the Revenue. The Revenue need to prove dishonesty, the test of which is effectively the same as that set out above.

5.16 The offence of cheat is certainly applicable to the dishonest obtaining or retention of over-repayments of tax.

5.17 Counsel has advised that mere failure to advise the Revenue that they have demanded insufficient tax, particularly if the amount is significant, may in strict law be sufficient grounds for a successful prosecution. Members are therefore warned that their clients have no valid defence to a charge of cheating in cases where they refuse to authorise the member to disclose to the Revenue an error of fact which results in such an underpayment.

5.18 The reality of the risk of such a prosecution being instituted, of course, depends on the facts of each case.

Other matters
5.19 Counsel has also advised that there is no legal obligation on a taxpayer, or a member, to press the Revenue to issue an assessment, even if by reason of

the delay the Revenue's ability to start an enquiry or raise an assessment goes out of time, provided that the full facts and information have been supplied.

Offences under Scots law

5.20 TMA 1970 s. 107 applies only in Scotland. It carries a maximum sentence of six months on summary conviction. It applies to any person knowingly making a false statement or false representation in any return or claim.

5.21 Under common law theft is committed by taking the goods or property of another. In this context 'taking' means the 'taking away'. Proving the intention to steal is sometimes a difficult matter in cases of theft; but the question comes down to the inference which may properly be drawn from the acts proved. It may be theft for someone to appropriate to his own use funds which are in his possession. Thus a taxpayer who retains a tax repayment which he knows is not due to him might be guilty of theft.

Money laundering

5.22 Where appropriate, members should bear in mind the legislation on money laundering and the duties which this places upon them (see paragraphs 2.43–2.47).

6. INVESTIGATION OF TAX ACCOUNTANTS

Background

6.1 The Revenue have specialist units, part of whose brief is to monitor and investigate the standards of practising accountants and tax practitioners. The Revenue employ accountants to advise officers on GAAP and the concept of 'True and Fair'.

6.2 Generally the investigator will seek a meeting with the member perhaps following a series of instances in which accounts or returns have been found to be incorrect. In the first instance, it may be that the investigator only outlines to the member the reasons for seeking a meeting. There is no legal obligation on a member to acquiesce. In order to enable the member to consider whether to agree to the request, he should request full details of the matters giving rise to the investigator's concerns. If a meeting is held, it is likely that the investigator will ask to examine one or more sets of working papers relating to clients of the member either immediately or shortly after the meeting. There is no legal obligation on the member to comply at that stage.

6.3 On the evidence available before, during, or after a meeting with the member the investigator will consider whether:

(a) the member may have committed a criminal offence such as false accounting, or conspiring with a client to defraud the Revenue; or
(b) the member may have committed an offence within TMA 1970 s.99 or s.107 or FA 2000 s.144; or

(c) the member's standards may be otherwise unsatisfactory in that he has been negligent or incompetent in preparing accounts and returns for submission to the Revenue.

6.4 Any approach to a member by an investigator should be regarded as a serious matter, as should any request for access to working papers. A member who receives such an approach should consider taking the advice of a suitably-experienced specialist in tax investigations at an early stage. A member who believes at any stage that criminal proceedings may be taken against him and who is not entirely confident of the legal position should take legal advice, especially in view of the conflict between refusal to cooperate and his obligation of confidentiality.

6.5 The Revenue have extensive powers to obtain information. It should be noted that TMA 1970 s.20A enables a Revenue investigator to obtain access to a member's working papers, and that its operation is clearly restricted to those circumstances where a 'tax accountant' has been convicted of a tax offence by a UK court or had a penalty imposed under TMA 1970 s.99. The Revenue can also obtain access to working papers for specific clients under TMA 1970 s.20(3) subject to the override in TMA 1970 s.20B(11), and a warrant for entry and seizure under TMA 1970 s. 20C would in practice give access to the working papers of all clients. Both statutory powers are subject to an implied exception in favour of documents or communications which qualify for LPP. See paragraphs 2.32–2.38.

6.6 A negotiated civil settlement resulting in no penalty actually being imposed on the member does not enable the Revenue to use TMA 1970 s. 20A.

6.7 Before the Revenue are able to impose a penalty on any person under TMA 1970 s.99 they have to prove that the person:

(a) had assisted in or induced the preparation or delivery of any information, return, accounts or documents; and
(b) knew, at the time of the preparation or delivery, that the items would be, or would be likely to be, used for some purpose of tax, and knew that they were incorrect.

The Revenue have confirmed that auditors who correctly ignored small errors because they were not material would not fall within TMA 1970 s.99.

6.8 Following the case of *Inland Revenue v Ruffle* [1979] STC 371 and observations made by the Revenue in 1989, it is clear that because TMA 1970 s.99 is a penalty section a very high standard of proof is imposed on the Revenue. In relation to TMA 1970 s.99 'Assisting in preparation of incorrect return, etc.', the changes then proposed by clause 161 of the Finance Bill 1989 were discussed at a meeting with the Revenue, the agreed notes of which were issued by the Institute of Chartered Accountants in England and Wales as TR759. These notes include the following:

(a) 'The Institute of Chartered Accountants in England and Wales considered that the provisions should be qualified to make it clear that auditors who

correctly ignored small errors because they were not material did not fall within the ambit of s.99.'

(b) 'The Revenue explained that the revised wording corrected two lacunas in the wording of the present section, so that it applied generally to persons involved in the preparation of returns, accounts or other information to be used for tax purposes. These had come to light in the case of *Inland Revenue v Ruffle* [1979] STC 371 and the amended wording was as recommended by Lord Jauncey in that case and endorsed by the Keith Committee. They added that, unlike other penalty provisions in the tax code where there were comparatively weak tests of culpability, s.99 applied only where a person had assisted in the preparation of a return or accounts which he "knew" to be incorrect. This requirement of "guilty knowledge" was the equivalent of "civil fraud" and required a correspondingly high level of proof. It followed that there could be no question of the situations which were of concern to the Institute of Chartered Accountants in England and Wales – an auditor who noticed a small error but decided it was not material, or a person whose responsibility for an error was small – being caught by s.99.'

6.9 The Revenue normally act against an individual practitioner, and not against a firm as a whole. It is questionable whether there is any power to proceed under TMA 1970 s.20A in respect of a firm's working papers where the individual penalised under TMA 1970 s.99 no longer has the firm's papers in his power or possession (see TMA 1970 s.20A(1)). If therefore, a partner in the firm is at risk of being convicted of a tax offence or having a s.99 penalty imposed, it may be prudent for the other partners in the firm, in the interests of other clients, to take steps to limit the documents over which that partner has possession or power.

6.10 SP5/90 'Accountants' working papers' explains how the Revenue in practice use the powers available to them. (See http://www.hmrc.gov.uk/practitioners/sop.pdf)

6.11 Even without reliance on any legal powers, a Revenue official can simply request a member to give access to a wide range of working papers. Members should consider the matters referred to below before agreeing to do so.

Confidentiality and freedom to disclose

6.12 There should be no disclosure of confidential client information without the prior consent of the client unless there is a legal right or duty to disclose. See also paragraphs 2.22–2.31.

Further considerations

6.13 Members should bear in mind that:

(a) the papers to which access is given may contain prima facie evidence of criminal offences by the member or a client, which may lead to prosecution;
(b) the papers may contain prima facie evidence of an offence within TMA

1970 s.99, leading to an award of penalties under which the Revenue could legally seek access to the member's working papers for all clients;
(c) if the member gives access to client working papers without the prior knowledge and consent of the client, he may be liable for breach of at least an implied term of the contract between the member and the client;
(d) other factors may deter the member from disclosing client working papers, such as a possible restriction on access included in the terms of professional indemnity insurance contracts;
(e) if access on a voluntary basis is refused the Revenue may exercise their statutory powers. Alternatively, tax districts may be advised that the investigator has misgivings as to the member's standards, and that clients' returns and accounts submitted by the member should be viewed in that light; and
(f) the imposition of a TMA 1970 s.99 penalty, or an agreement to enter into a civil settlement with the Revenue, may prejudice the status of the member as a fit and proper person for audit and other regulatory purposes.

Advice in practice

6.14 As stated in paragraph 6.4, a member who believes at any stage that criminal proceedings may be taken against him should take legal advice.

6.15 In particular, where the Revenue have alleged that the member may have committed an offence within TMA 1970 s.99, and it is clear that formal proceedings under TMA 1970 s.99 may be taken against him, the member should consider disclosure of working papers in the light of paragraphs 2.22–2.31.

6.16 It may be appropriate, after discussions with the investigator, to suggest the appointment of an independent practitioner to review and report on a sample of the member's working papers; this still represents disclosure of confidential information. It is, however, likely that the investigator will still wish to have direct access to a sample of the member's working papers.

6.17 An independent practitioner may be able to negotiate a settlement on behalf of the member. A member is not always the best advocate in his own cause.

6.18 Where it is alleged by the Revenue investigator that the member's standards are unsatisfactory, but in circumstances falling short of the possibility of criminal proceedings or a penalty being imposed under TMA 1970 s.99, then generally the member should not give access to client working papers without the prior knowledge and consent of the client. Any member contemplating giving access to a Revenue investigator where paragraph 6.14 is not in point should consider the matters at paragraphs 6.12 and 6.13. The advisability of appointing an independent practitioner to represent the member, as discussed at 6.17, should be considered.

6.19 Although the investigation may be instigated by the Revenue it may, in practice, be conducted jointly with Customs who have powers to obtain

information and documents (VATA 1994 Sch.11, paragraph 7). In addition the VAT and Duties Tribunals have extensive powers to obtain information and documents under VATA 1994 Sch.12, paragraph 9.

6.20 In Scotland any person knowingly making a false statement may be prosecuted and on conviction may be imprisoned for a term of up to six months (TMA 1970 s.107).

6.21 The member may also wish to seek guidance from the Institute's Advisory Services in any of the above circumstances.

VALUE ADDED TAX

Chapters 7 and 8 deal with Value Added Tax but apply mutatis mutandis to other indirect taxes. They should be read in conjunction with Chapters 1 and 2.

7. Disclosure

Relevant responsibilities in preparing VAT returns

7.1 The client has the primary responsibility to submit a true and complete VAT return to Customs. It follows that the final decision as to whether to disclose is the client's. A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.

7.2 Where a member is acting as a 'tax representative' for an overseas principal, the obligations and liabilities of the VAT legislation are imposed jointly and severally on the client and the member. A member who acts in this way as a tax representative should seek indemnity from the client against failure by the client to provide information required. The member should also make clear in writing his obligation to disclose any irregularity to Customs (see Chapter 8).

7.3 A member is not required to audit the figures in the books and records provided by the client but should exercise normal care and judgement in preparing the return and should record detailed figures in working papers.

Disclosure of specific transactions to Customs

7.4 Normally, specific transactions need not be disclosed to Customs. Nevertheless, a member may recommend to a client that a particular matter be disclosed in order to avoid uncertainty.

7.5 In such a case the full facts concerning it, including the reasons for doubt, should be disclosed to Customs. The client can then generally rely on any unequivocal ruling in writing received from them on the point.

7.6 If a transaction is found to have been treated incorrectly but it can

be shown that full information about it was disclosed to Customs, the client will be able to claim the benefit of the concession concerning misdirection given in the Ministerial undertaking known as the 'Sheldon Statement' and reproduced as VAT Extra-statutory concession 3.5 in Notice 48 (March 2002): 'Extra Statutory Concessions' (see http://customs.hmrc.gov.uk/channels PortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_PROD_011540). The undertaking says 'If a Customs and Excise officer, with the full facts before him, has given a clear and unequivocal ruling on VAT in writing or, knowing the full facts, has misled a registered person to his detriment, any assessment of VAT due will be based on the correct ruling from the date the error was brought to the registered person's attention.'

7.7 The meaning of full disclosure was considered in *Matrix Securities Limited v IRC* [1994] STC 272 albeit in the context of direct tax. Customs have stated that the Sheldon statement will not be honoured in cases where Customs have been misled to obtain a specific ruling.

7.8 When disclosing transactions on which the member has previously advised, extra care may be needed to ensure that the full facts are disclosed. The advice given must not be allowed to affect the member's objectivity.

7.9 Customs consider that they are entitled to override their general guidance by a specific ruling relating to the affairs of a particular taxpayer. Whether a specific ruling is applied retrospectively will depend on whether the general guidance could reasonably have been read as covering the particular case.

Known Customs' practices

7.10 Particular care is needed if Customs have published their interpretation or have indicated their practice on a point and the client proposes to take a different view. Disclosure will probably be prudent in the interests of the client. Even where a taxpayer has Counsel's opinion that Customs' interpretation is wrong, it is advisable to disclose the facts in writing to Customs' Written Enquiries Team making it clear that Customs' interpretation is not accepted. However, the final decision on what, if any, disclosure is to be made rests with the client.

Requests for rulings from Customs

7.11 Once the member is satisfied that it is appropriate to apply for a ruling he should ensure that the client understands the issues and implications of the proposed course of action. This advice to the client should normally be confirmed in writing.

7.12 Customs Notice 700/6 of August 2003 (see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000874) provides guidance on how rulings

should be sought. Rulings should normally be confirmed by Customs in writing. If necessary the client, or the member, should write to Customs confirming the facts and the ruling that is understood to have been given.

7.13 If a written ruling appears to the member to be incorrect, he should consider whether it is clear that full facts were disclosed (the amount of VAT involved may be a material fact) and whether it is clear from the wording of the ruling that the officer of Customs has understood the question.

Effect of rulings and official practice

7.14 Members are entitled to rely on official Customs' practices and rulings where these are favourable to their clients.

7.15 However, there are limits to the extent to which Customs are bound by undertakings and statements of policy which they have given or issued. Examples of restrictions on a taxpayer's entitlement to rely on Customs' rulings are:

(a) the VAT and Duties Tribunals will have regard to the strict terms of the law in their decisions and may ignore any Customs' advice or extra-statutory concessions which the taxpayer may have relied on even if they have been published in an official Customs' Notice or leaflet; and
(b) failure by Customs to comply with the Sheldon Statement cannot, of itself, constitute a ground for appealing to the tribunals.

7.16 If Customs refuse to stand by a ruling given, whether generally or specifically to the client, there may be a remedy in judicial review before the High Court, and, in Scotland, the Court of Session. In this event, the member should seek legal advice as soon as possible as to the applicable time limits for such procedures. An application may also be made to the Adjudicator or to the Ombudsman.

7.17 If an error was obvious in the records available when a control officer visited, this should prevent any suggestion of fraudulent evasion or recklessly negligent conduct entailing a criminal penalty; and may also obviate the risk of an accusation of conduct involving dishonesty which could lead to a civil penalty. However, the concession on misdirection explained in paragraph 7.6 will not apply unless it can be shown that the officer saw the specific records in question and failed to point out the error. By its very nature, this is difficult to prove.

7.18 If a member obtains a ruling with which he disagrees, he may advise the client to consider an appeal to the VAT and Duties Tribunal (having regard to the applicable time limits). The member should be aware that an appeal can only be made against a ruling which has been given in respect of an actual transaction. It is not possible to appeal against a ruling given in respect of a proposed transaction.

Demands by Customs for information

7.19 Customs' powers to demand information and their policy on access to working papers etc. are outlined in Leaflet 700/47/93: 'Confidentiality in VAT matters (tax advisers) – Statement of Practice' dated February 1993 (see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000100). However, Notice 700/47/93 was published before the decisions in *R (on the application of Morgan Grenfell & Co Limited) v Special Commissioners* [2002] STC 786 and *R v Customs and Excise Commissioners, ex parte Popely and Harris* [1999] STC 1016 and members should be aware of the possible implications of these decisions. In particular, Counsel advises that Customs have no statutory powers to compel the disclosure of LPP material. Furthermore, the information powers must be interpreted by the Courts and applied by the Customs' officers in a manner which is consistent with the client's and the member's rights under Article 8 of the European Convention on Human Rights.

7.20 Enquiries from Customs are often unexpected and informal and usually arise from a visit to the client. The member should consider whether authorisation to reveal the information requested is needed from the client. The nature of the enquiry may not be immediately apparent and the position may need reviewing as it progresses.

7.21 A member who is in doubt about the implications of a question should consider asking for it to be put in writing so that a response may be agreed with the client.

7.22 Although there are no equivalent provisions of TMA 1970, ss. 20–20D in the Customs and Excise management legislation, Customs' powers to require disclosure of documents and information are contained in various statutes, including, in the context of VAT, VATA 1994, Sch.11, paragraphs 7(2) and (3).

7.23 These provisions permit Customs to require production of documentation by every person concerned in the supply of goods and services or the acquisition or importation of goods, or from any other person 'who appears to the authorised person to be in possession of them.'. This provision may be wide enough to entitle Customs to demand recovery of documents from a tax adviser. Although the Statement of Practice in Notice 700/47 recognises the client's common law privilege, both in relation to legal professional privilege and litigation privilege, disputes may arise as to whether or not a particular document is protected by privilege.

8. ACQUIRING KNOWLEDGE OF VAT ERRORS AND IRREGULARITIES

For the purposes of this Chapter, 'irregularity' means conduct which could give rise to prosecution or an evasion penalty. Some errors may constitute or become irregularities.

Generally

8.1 A member must do nothing to assist a client to plan or commit any offence or to conceal any offence which has been committed. A member must exercise great care to avoid commission of an offence by knowingly or recklessly making false statements or false representations when assisting a client whom the member suspects may have defrauded the Crown of tax or of having been negligent in regard to VAT matters.

8.2 Subject to the terms of his engagement, a member who assists a client to prepare any return or advises a client on a VAT matter has no responsibility to carry out an audit of the client's accounts or to investigate any matter not directly affecting the assignment he has agreed to undertake or to seek or to detect any error or irregularity. In general, his duty is limited to carrying out the assigned work, and he need only deal with errors or irregularities in respect of that assignment which came to his attention in performing it.

8.3 A member who, as a result of any work undertaken on behalf of a client, has reason to believe that a VAT error or irregularity has occurred should discuss with the client the matter which gave rise to that belief and consider whether in the circumstances it is appropriate for him to act. Where the member has not acted in relation to that question, he should take into account the fact that he may not be party to all the facts and circumstances and may not therefore be able to reach a conclusion on the issue. It is not the duty of a member to pursue to a conclusion a matter in respect of which he has not been engaged, unless it affects work in respect of which he has been engaged.

8.4 If there is a VAT error, the member should normally advise the client to follow the procedure set out in Customs Notice 700/45/02: 'How to correct VAT errors and make adjustments or claims' (see http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000077).

8.5 If there is doubt as to whether or not an irregularity has occurred, the member should consider protecting his position by obtaining advice from a specialist in this field. Furthermore, if the member has any doubt about his competence to provide advice to his client in these circumstances he should seek to obtain specialist help as appropriate.

Money laundering

8.6 Where appropriate, members should bear in mind the legislation on money laundering and the duties which this places upon them (see paragraphs 2.43–2.47).

Human rights

8.7 Wherever appropriate, in particular if there is a risk of prosecution or tax-geared penalties, the provisions of the HRA 1998, in particular the protection given by Articles 6 and 8 of the European Convention on Human

Rights, should be considered, and in obtaining advice on behalf of their clients members should ensure that the Act is taken into account.

Materiality

8.8 In considering the action which he should take in the circumstances outlined in this Section, the member may take account of materiality but reference should be made to paragraphs 2.40–2.42. However, Customs' position is that any error ought to be corrected.

VAT errors

8.9 Correction of errors up to a prescribed amount can be made on the current VAT return as part of the entries for that period. If this is done, neither penalties nor interest is due. If the net value of the errors is greater than the specified level this procedure is not available, and separate disclosure of the error must be made. Form VAT 652 is provided for the purpose of making a voluntary disclosure separate from the VAT return, although its use is not mandatory and in most circumstances it may be more appropriate to make the disclosure by letter.

8.10 Customs have stated that disclosure of errors after a visit date has been arranged will be rejected where there is reason to believe that:

(a) the errors were disclosed only because of the visit; or
(b) disclosure made during or after a visit was prompted only by Customs' enquiries.

Other voluntary disclosures made after the visit date has been arranged may, however, be accepted by Customs.

Advice to be given where an irregularity is admitted

8.11 A member whose client has admitted an irregularity should consider whether to recommend to his client to take legal advice. One of the factors the member must take into account is whether his client will have the benefit of LPP in relation to confidential discussions between the client and the adviser concerning the client's knowledge of the irregularity. As indicated in paragraphs 2.32–2.38 above, the present position at common law is that communications for the purpose of obtaining legal advice from non-lawyers do not qualify for LPP unless the dominant purpose behind such communication is to assist in litigation which is either pending or contemplated. In many circumstances, the dominant purpose in seeking such advice will be to ascertain the extent of the tax liability, rather than to assist in contemplated litigation. If legal advice is not appropriate the member should advise the client to disclose the irregularity to Customs and make an internal note of having given such advice. The member should explain the consequences of not making a disclosure, in particular that:

(a) should Customs discover the irregularity later there might be no defence against a misdeclaration penalty;
(b) having knowledge of the irregularity without acting upon it may be construed as a criminal offence or a civil fraud;

(c) interest may accrue up to the time the VAT is paid: the policy of Customs not to assess interest in 'no loss to the Revenue' cases may not be relevant; and
(d) it would be improper to allow Customs to agree a settlement without putting them in possession of all the facts.

If the client declines to disclose the irregularity, the member should confirm his earlier advice in writing and consider whether it is appropriate to carry on acting.

When Customs are not aware of an irregularity
8.12 Where there is an irregularity which Customs have not discovered, voluntary disclosure and payment of the under-declared or over-reclaimed tax will usually remove the risk of a penalty, although interest may remain due. Prompt disclosure of an error may avoid suspicion by Customs that it was deliberate thus reducing the risk of a civil fraud penalty.

When Customs allege that irregularities may have occurred
8.13 When Customs allege that an irregularity may have occurred, but it has not been identified by the member or his client, the member should establish from Customs such details as he can of the alleged irregularity and the circumstances in which it occurred. This should take place at a meeting between the member and the Customs officer or in the course of correspondence, depending on the circumstances.

8.14 The member should then discuss the position with his client and establish with him the full facts relating to the alleged irregularity. The member should evaluate Customs' allegations in the light of the facts as they have been explained by the client. Where appropriate, he should advise his client to make a full disclosure to Customs and to offer them all facilities for investigation. In the course of his evaluation the member should consider whether to recommend to his client to take legal advice prior to making a disclosure. In particular, where there is a real possibility that the tax authorities may still bring criminal proceedings against the client even if he provided full disclosure, the client needs to have proper legal advice concerning his right to silence and the privilege against self-incrimination before deciding which course to take.

8.15 It may be appropriate for the member, having agreed this with his client, to offer that a full report of the facts behind and surrounding the alleged irregularity be prepared by the member on behalf of the client with a view to making a full disclosure to Customs.

When Customs are aware of an irregularity
8.16 If Customs intend to prosecute a person for evading tax, they should administer a caution to that person. Therefore, when Customs are aware that a serious irregularity has occurred, an interview under caution may be sought. If the member is made aware of such an interview, he should attempt to ascertain Customs' reasons for the interview and then notify his client of the

seriousness and the potential implications of the allegations. If the interview under caution is already taking place, and no legal advice has been sought, the member should repeat the need to take legal advice which Customs should in any case have indicated at the outset as the client's legal right. The member should also advise the client of his right to silence and his privilege against self-incrimination. If the member does not feel competent to advise on these matters, he should seek to arrange legal advice on these matters for the client as soon as possible.

8.17 A tax adviser who is not a lawyer has no right to attend his client's interview under caution. Customs have indicated that when a client is being interviewed in a criminal investigation, that client may already be under arrest and there is no obligation to allow a tax adviser to be present during such an interview unless that adviser is also a lawyer. It is therefore unlikely, in most instances, that tax advisers will have access to their clients in such circumstances.

8.18 The benefit of full cooperation and complete disclosure in civil fraud cases is set out in Customs' 'Civil evasion penalty investigations: Statement of Practice' (VAT Notice 730 – see http://www.hmce.gov.uk/forms/notices/730.htm – which should be read together with the addendum thereto issued in April 2002 – http://www.hmce.gov.uk/forms/notices/730add.htm) and VAT Information Sheet 1/02 (http://www.hmce.gov.uk/forms/notices/info0102.htm). (*Note: CoP 9 (2005) applies for inquiries commencing on or after 1 September 2005; see http://www.hmrc.gov.uk/practitioners/civil-investigations.htm. The following explanation of HMRC's procedures refers to the pre-1 September 2005 position*). The Addendum and the Information Sheet explain Customs' equivalent procedure to Hansard effective from April 2002. If this approach is offered, they will prosecute only if a fraud is likely to continue or the trader refuses to answer four standard questions. In criminal cases cooperation can facilitate the agreement of offers to compound criminal offences (under CEMA 1979 s. 152) and the mitigation of penalties, although it will not always prevent prosecution. If Customs seek to rely in criminal or tax-geared penalty proceedings upon statements or documents produced by the client following such procedure as comprising accurate evidence of the client's involvement in the irregularity, then it is possible that such reliance would be a breach of the client's privilege against self-incrimination under Article 6 of the European Convention on Human Rights. It should be noted that tax-geared penalty proceedings will normally be regarded as criminal proceedings for the purposes of Article 6 of the European Convention. Again, this is a matter on which specialist legal advice should be sought as soon as possible.

8.19 An interview under caution is an early indication of the possibility of a criminal prosecution. If it appears likely that criminal charges will be brought, the member should advise the client to take advice from a criminal law specialist. Even if Customs are prepared to compound proceedings it may still be appropriate to take legal advice.

8.20 If the advice is to cooperate, the member should advise his client to make a full disclosure to Customs and, when under investigation for civil evasion, cooperate within the terms of VAT Notice 730 or the Statement of Practice in VAT Information Sheet 1/02. In the case of a criminal investigation under caution, the advice of a specialist professional should be taken throughout in respect of full disclosure and production of documents etc.

8.21 Customs will advise the client at the outset if they are considering an investigation under the civil regime by issuing VAT Notice 730 or the statement of practice in VAT Information Sheet 1/02: this is not a caution. In the event of a criminal investigation a caution will be issued. In most cases, full cooperation under the civil regime affords a maximum discounted penalty of 25 per cent of the tax concerned.

8.22 Members should be aware that Customs' policy is not to offer the civil regime to professional advisers in respect of their own affairs.

The importance of confirming admissions of irregularities by clients

8.23 Misunderstandings can arise, especially when the client is under investigation by Customs. Before a member makes any disclosure to Customs on behalf of a client he must be absolutely clear that an irregularity has occurred and that he has the client's agreement to the manner of disclosure.

Instructions to disclose

8.24 Provided the member has the client's written permission (or a note of oral instructions which he has confirmed in writing to the client) to disclose an error too large to be corrected on the next return, he should write to Customs giving as much detail of the inaccuracy in the return(s) as is available.

8.25 It may be more appropriate for the letter of disclosure to be sent by the client. In this case the member may either draft the letter for the client or review the client's draft to ensure that adequate disclosure has been made.

8.26 The disclosure should be made to Customs as soon as possible in order to minimise the risk of them becoming aware of the problem before they are told. Care should be taken to ensure that the disclosure is as full as practicable concerning the number and the amount of irregularities which have been detected.

Disclosure to other tax authorities of an admitted irregularity

8.27 The member should also consider the need to make a similar disclosure to the Revenue.

Unwillingness or refusal to disclose an admitted irregularity

8.28 'Unwillingness' in this context includes such procrastination or prevarication as effectively amounts to a 'refusal', albeit not expressed. A member should allow a reasonable period for the client to make a decision. Thereafter,

the member must decide whether continuing 'unwillingness' is in fact 'refusal' for these purposes.

8.29 If the client refuses to accept the member's advice to make a full and prompt disclosure to Customs, the member should ensure that his conduct and advice are such to prevent his own probity being called into question. It is essential therefore to advise the client in writing properly and fully of the consequences of the failure to disclose.

8.30 The member should take such steps as are necessary to disassociate himself from the client's conduct. The member should write to the client setting out the facts understood by the member or agreed, and advising the client of the latter's duty to disclose. He should also make it clear that he, the member, may have an obligation formally to disassociate himself from any work done, should disclosure not be made.

8.31 If the client refuses to disclose or to take other steps (for example, seeking Counsel's opinion on the member's view) to regularise the situation, the member should consider taking steps formally to disassociate himself from the relevant work taking account of all relevant issues. In certain cases it may be necessary to cease to act in relation to the client's VAT affairs, or indeed all his affairs.

8.32 If Customs realised that the member had continued to act after becoming aware of such undisclosed errors, they might consider the member to be 'knowingly concerned' in the commission of an offence. At the very least Customs might cease to trust the member. Furthermore, the relationship of trust which must exist between member and client will have been impaired.

The member prepares or assists in the preparation of the VAT return

8.33 Where the member either prepares or assists in the preparation of VAT returns, and the client refuses to disclose errors which occurred during or before the period in respect of which the member has acted, it may be necessary to cease to act in relation to the client's VAT affairs, or indeed all his affairs.

8.34 If Customs are aware that the member has been acting for a particular client, the member should, when appropriate, notify them that he has ceased to act for that client.

The member prepares or assists in the production of accounts

8.35 A member may prepare or assist in the production of accounts, without advising on VAT. If the client refuses to disclose a VAT error, the member should consider whether the relationship with the client, which is based on trust, has been impaired and, if it has, whether it is proper to continue to act for the client. A member who decides to continue to act should not thereafter give any advice in relation to any tax matters (other than the matter of disclosure) unless and until the client agrees to full disclosure.

The member is engaged to provide VAT advice

8.36 If required to deal with Customs on the client's behalf, the member might not be in a position to do so in good faith whilst aware of an undisclosed error and the member should consider ceasing to act. This does not apply where the member has advised on VAT matters, or otherwise, without dealing with Customs, but the member should consider his position carefully.

Where the client refuses to admit an irregularity

8.37 Where the client denies any irregularity to the satisfaction of the member, the member is free to continue to act for that client. The member should protect himself by ensuring that his files fully document the discussions with the client and the reasons why the member is satisfied with the explanations given. It may be appropriate also to send a copy of the file note to the client.

8.38 Where the client denies any irregularity and the member rejects outright that denial, the member must cease to act for the client at least in relation to his VAT affairs, and very possibly in relation to all his affairs. The decision depends on the nature and scope of the member's relationship with the client having regard to the various circumstances. See also paragraphs 2.43–2.47.

8.39 Where, despite the client's denial of any irregularity, the member still has reservations, but does not consider that he is justified in rejecting the denial outright, the member must give careful consideration as to whether he can continue to act on behalf of the client. If the member decides to continue to act, his file notes should set out clearly the client's explanation and/or assurances that there have been no such irregularities.

Consequences of ceasing to act

8.40 The member need not inform Customs of the termination of his instructions unless the member is at the time dealing with Customs on the client's behalf.

Suspicious circumstances

8.41 A member who acts in relation to VAT matters and has good grounds to suspect that a client has committed a material tax irregularity should discuss the position with the client to confirm or remove the suspicion. This applies whether or not the member has acted in relation to the actual matter concerned. If the suspicion is confirmed, the member would then have actual knowledge of the irregularity and these guidelines should be followed.

8.42 If the member finds no confirmation but remains suspicious such that the relationship of trust which must exist between the member and the client may have been impaired, the member should consider whether he should continue to act. If a new adviser then approaches the member, the member should consider his position in the light of paragraphs 8.45 and 8.46.

Request for information from a new adviser

8.43 On changes in a professional appointment, the initiative to request information lies with the new adviser who should obtain the proposed client's authorisation to communicate with the member. The member should not volunteer information to a new adviser in the absence of any such request by the new adviser or his former client.

8.44 When the member receives a request for information from a new adviser, he should:

(a) seek authorization from the former client to disclose all relevant information to the new adviser;
(b) on receipt of such authorization, disclose all the information needed and reasonably requested by the new adviser to enable him to decide whether to accept the work; and
(c) to the extent that he is authorised to do so, discuss freely with the new adviser all matters of which he should be aware.

8.45 If the former client refuses permission, the member cannot disclose information to the new adviser. However, the member can refer the latter to the fact that there is correspondence between the member and the former client without disclosing what it says. The new adviser will then ask the client for copies of that correspondence.

8.46 The new adviser will therefore become aware of the non-disclosure and possible offence. Since the former adviser would have resigned on the grounds of the client's unwillingness or refusal to disclose, it should follow logically that if the client continues to be unwilling or refuses to disclose, or refuses permission for the former adviser to communicate with the new adviser, the new adviser should decline to act. However, the new adviser is entitled to consider whether or not he comes to the same conclusion as the former adviser. See also Section 3.3 'Code of Ethics' Part B, paragraph 210 'Professional appointment' at http://www.icaew.co.uk/membershandbook/.