

## HAS HMRC TAKEN A WRONG TURN?

Frank Haskew considers the Working with Tax Agents project

The 2009 Pre-Budget Report (PBR) on 9 December 2009 saw the latest crop of consultations to arise out of HMRC's modernisation of powers programme. The most important of these – certainly in terms of its impact on our members – sets out HMRC's latest proposals on the Working with Tax Agents project.

### Introduction: the Budget 2009 consultation

This project was launched at the April 2009 Budget with the publication of a consultation paper *Working with tax agents* (the first condoc). The document considered a number of areas for possible reform, including:

- possible new penalties on agents who make careless errors;
- greater sanctions against tax agents who have been deliberately non-compliant, including possible financial penalties and possible 'naming and shaming';
- greater reporting by HMRC to professional bodies;
- closer monitoring and risk assessment; and
- whether tax agents should be registered with HMRC.

The paper recognised the key role that tax agents play in the delivery of the tax system and that the overwhelming majority of tax agents advise their clients appropriately and calculate the right amount of tax.

The Tax Faculty's response was published as TAXREP 48/09 and discussions continued with HMRC over the summer, culminating in a workshop held on 6 October 2009.

### The 2009 PBR consultation document

HMRC has now published a further consultation document *Working with tax agents: the next stage* (the second condoc), together with a related impact assessment.

The second condoc reflects the continued discussions and some of it is welcome reading. For example, the suggestion in the first condoc about a possible tax

agents' registration scheme has been dropped, not that HMRC were keen on this idea in the first place. The second condoc now focuses on the following areas:

- greater disclosure to professional bodies;
- dealing with deliberate wrongdoing by tax agents; and
- dealing with high volume repayment agents.

Some of the proposals made in the second condoc are less than welcome, and we are not convinced that they reflect the many concerns that were expressed about the suggestions when they were first raised at the 6 October 2009 workshop.

### Disclosure to professional bodies

The first condoc discussed the role of professional bodies in maintaining and improving standards and whether the existing statutory gateway (in s 20, Commissioners for Revenue and Customs Act 2005 (CRCA 2005)) allows HMRC to disclose bad work by agents to their professional body or whether it needs to be amended.

HMRC proposes that where it identifies problems with an agent, it would first raise the concerns with that agent to see if the problem can be resolved. That seems a sensible step. HMRC suggests that in some cases, the tax agent may wish to approach their professional body to seek help. If the problem persists or the member does not wish to engage with HMRC, then HMRC will seek to take formal steps to disclose details to the professional body. Presumably HMRC will need to be satisfied that the agent's behaviour amounts to misconduct under s 20, CRCA 2005. In more serious cases 'where there is clear evidence of conduct likely to result in exclusion from membership of the professional body', HMRC plans to make an immediate disclosure to the professional body.

What happens where the tax agent is not a member of a professional body? HMRC would again seek to resolve the matter with the agent. If that fails then HMRC would consider invoking other, as yet unspecified, sanctions. While it is right that HMRC

reports ICAEW members engaged in misconduct, any such disclosure could have serious consequences for the member. HMRC must ensure that it has similar procedures and sanctions in place for unaffiliated agents and that its risk assessment procedures properly reflect the fact that members of a professional body have a duty to comply with their professional body's codes of conduct, whereas unaffiliated agents have no such duties. Given the important role of the professional bodies in setting and maintaining standards, any proposals in this area should seek to encourage agents to belong to a professional body, not the other way around.

#### **Deliberate wrongdoing by agents**

Proposals in this area take up a considerable portion of the consultation document. HMRC is at pains to make clear that these proposals are aimed at serious problems such as fraud or evasion where the behaviour of the agent could result in prosecution – they are not aimed at agents who operate in accordance with professional standards but might make mistakes.

HMRC already has a number of powers in this area over and above the ability to make a criminal investigation, although of course the decision as to whether or not to prosecute lies with the independent Crown Prosecution Service. These include the ability to fine an agent who knowingly prepares an incorrect tax return up to £3,000 (s 99, Taxes Management Act 1970 (TMA 1970)) and the ability in certain defined cases to seek access to the agent's working papers (s 20A, TMA 1970). HMRC sets out a number of possible ways to extend these existing powers.

- Making it easier for HMRC to access the working papers of tax agents who have been involved in deliberate wrongdoing. Under current rules HMRC can only proceed under s 20A if the agent has been successfully prosecuted or been fined under s 99. These requirements would be removed but any approach would need to be authorised by a tribunal.
- Tax-gear penalties imposed on agents involved in deliberate wrongdoing, with a suggested minimum penalty of £5,000 and a maximum of £50,000 but subject to mitigation for unprompted/prompted disclosure in line with the penalty rules in FA 2007.
- 'Naming and shaming' of the agent along similar lines to the new rules in s 94, FA 2009.

These proposals have come in for a fair amount of criticism, for example Robert Maas expressed some trenchant views on them in his article in *Taxation* on 14 January 2009. We remain unconvinced that HMRC has made out a compelling case for these changes. The danger is that HMRC will not deal with the hardcore of dishonest agents but instead use these provisions to penalise honest agents who have nevertheless committed errors.

#### **High volume repayment agents**

The first condoc highlighted HMRC's concerns about certain tax agents who submit large volumes of tax repayment claims which on investigation often have little or no merit. In the second condoc HMRC proposes that:

- it would issue a direction to the agent requiring them to verify information included in the repayment claim on a bulk basis; and
- if that direction was not complied with, the repayment claim would lapse, and in certain circumstances any repayment would only be made to the taxpayer and not the agent.

HMRC recognises the need to respect the rights of bona fide tax repayment agents who submit valid claims. These powers would be subject to safeguards including the need for authorisation by a tribunal.

While this is a relatively specialised area, once again the proposals appear designed to deal with agents who are engaged in deliberate wrongdoing. It seems to us that, rather than introduce yet more civil remedies that will probably be circumvented by those at whom they are aimed, HMRC needs to invest time and resources to root out these agents so they can be prosecuted.

#### **Please let me have your views**

If these proposals are introduced they could have a far-reaching, and perhaps unwelcome, impact upon all tax agents. The Tax Faculty will be putting in a detailed submission but we need your views. Please send them to me at [frank.haskew@icaew.com](mailto:frank.haskew@icaew.com). The deadline is 3 March 2010 but I would welcome comments by 22 February 2010.

#### **Frank Haskew is Head of the Tax Faculty**