

Amending HMRC's Civil Information Powers

A public consultation issued by HM Revenue & Customs

Comments from ACCA to HM Revenue & Customs

October 2018

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ACCA welcomes the opportunity to comment on the proposals issued by HM Revenue & Customs. The ACCA UK Tax Committee has considered the matters raised and their views are represented in the following.

SUMMARY

ACCA does not support the removal of the requirement to seek tribunal approval before issuing third party notices. We consider that the external independent oversight of the tribunal remains essential, both to maintain public trust in HMRC, and to prevent placing disproportionate administrative burdens on third parties.

The increasing use of digital record-keeping should provide opportunities for speeding up the provision of information to HMRC. Rather than removing tribunal approval, the standardisation and digitalisation of third party information requests could prove more effective in streamlining the process.

The current level of requests for tribunal approval of third party notices is strikingly low, as noted in paragraph 3.16 of this consultation document¹. The scale of the potential increase in third party information requests, should the requirement for tribunal approval be removed, needs to be more clearly understood, in order to assess the impacts on businesses and on the overall efficiency of the process.

We are concerned about the proposal to allow HMRC to obtain information for all its tax functions, as described in paragraphs 4.12 and 4.13. In our view, the scope of the information that will be sought as part of this extension of information powers needs to be clarified, and debated as part of a separate and wide-ranging stakeholder consultation process. Such a change would require the introduction of additional safeguards, including restrictions on the purposes for which information is used, and the actions that HMRC can take based on the information obtained.

AREAS FOR SPECIFIC COMMENT:

Question 1: Do you have any views on the suggested change to align third party notices with taxpayer notices?

ACCA does not support the removal of the requirement to seek tribunal approval before issuing third party notices.

We appreciate the need to reduce administrative burden on both HMRC and third parties, and reduce the turnaround time for in the exchange of information with foreign tax authorities. However, in our view, the first priority should be on improving the

¹ Only 216 requests were submitted for tribunal approval of a third party notice in 2016/17. In understanding HMRC's aims in seeking changes to the process, it would be more informative to know the proportion of these requests which related to international requests for information, and the proportion of the requests which were ultimately approved.

efficiency of the existing process, through the use of standardised information requests, for example, to facilitate the collection of information by third parties.

Question 2: Do you think any further internal processes, or safeguards, prior to issuing the notice, would be required?

Determining what is 'reasonably required' for HMRC to assess a tax position is a grey area. On this basis, and in the light of current issues that have emerged around HMRC's record-keeping practices, internal safeguards within HMRC are unlikely to give sufficient comfort that due process is followed in all cases.

For this reason, we believe that tribunal approval should still be required, as an external safeguard to ensure that HMRC are justified in issuing the notice, and that due process as set out at Schedule 36 Finance Act 2008, including the restrictions set out at Part 4 of the Schedule, has been followed.

Question 3: Should there be any further restrictions on the type of information that could be requested under this notice?

Not applicable: please see our responses to questions 1 and 2 above.

Question 4: Do you think there should be a separate rule for third party notices for banking information?

Given the nature of the information automatically exchanged under the Common Reporting Standard, and the nature of information required for domestic enquiries, we would expect that banking information would constitute the main object of third party notices.

ACCA believes that one consistent process should apply for all third party notices. On this basis, the current process of tribunal approval should continue to apply in all cases, including third party notices for banking information.

We would support the standardisation and streamlining of requests for information (for example, as part of the exchange of information with foreign tax authorities under the CRS). This would both promote more effective international actions to tackle offshore tax avoidance, and facilitate banks' compliance with these requests.

However, it is not the role of banks to bear the costs of taxpayers' tax compliance or HMRC enquiries. A key principle of any information request process should be that the taxpayer remains the first port of call, insofar as he/she has the power to provide that information and it does not prejudice the assessment of tax.

Removing the requirement to obtain tribunal approval before issuing third party notices could lead to a significant increase in information notices being addressed to banks, and we are concerned that the additional administrative burden that this places on banks could lead to longer delays.

As explained above, we believe that the requirement for HMRC to obtain tribunal approval remains the best way to ensure that third party notices are reasonable and justified.

Question 5: Should this power be subject to any restrictions or safeguards? If so, please state the restrictions or safeguards.

Please see our response to Question 4 above.

If a separate streamlined process is adopted for banking information, it will be crucial to clarify what 'banking information includes'. The definition offered in paragraph 4.9 of the consultation document, especially 'information about transactions on the account' is very vague. In order for stakeholders to meaningfully engage with HMRC on the development of such a separate streamlined process, it is essential that its scope is defined more clearly.

Question 6: Do you have any other ideas for options that could deliver both the objective of speeding up the process and providing appropriate safeguards?

Instead of removing the requirement for tribunal removal, the standardisation of information requests to financial institutions will go some way towards speeding up the process. This is particularly relevant for CRS requests (described in paragraphs 3.6-3.9 of the consultation document), which are cited as one of the key drivers for reform.

In addition, amending legislation to enable third parties to respond to information notices electronically, for example by providing electronic bank statements, will also address some of the challenges of digitalisation cited under paragraph 3.2.

Question 7: What are your views on extending information powers in this way?

ACCA would not support extending information powers as set out under paragraphs 4.12 and 4.13 without a wide-ranging stakeholder consultation.

As it stands, paragraph 4.13 is very vague about the scope of the proposed extended information powers. In order for taxpayers, tax practitioners and civil society as a whole to appropriately consider its impact, HMRC needs to clarify what is meant by 'information reasonably required for all its tax functions.'

It will also be necessary to understand further what impact this will have on the current restrictions on the information HMRC can request as set out at Part 4 of Schedule 36 FA 2008, including the earliest period to which such requests can extend².

ACCA is opposed to extending the purpose of information to debt collection in particular, especially in the absence of any tribunal oversight. In assessing a taxpayer's ability to pay taxes and interests, a taxpayer's cash position must not be considered in isolation: claims from outstanding liabilities must also be considered. This would be the case, for example, where a large portion of a taxpayer's bank balance is required to make mortgage payments. In such circumstances there is a wider public interest in

² Currently limited to six years under paragraph 20 of that Part.

ensuring that HMRC's powers are exercised appropriately, and that adequate consideration is given to all relevant information and factors.

Question 8: Do you have any views on amending the legislation in this way?

It seems reasonable to amend the legislation to clarify the current inconsistency in wording as explained in paragraphs 4.16 and 4.17.

Question 9: Should the increased daily penalties apply to all Schedule 36 information notices?

As noted in our response to question 4 above, ACCA does not support the costs of tax compliance or enquiries being transferred to third parties. The penalties charged on banks and other third parties need to be proportionate.

On this basis, ACCA is opposed to extending increased daily penalties to cover all notices contained in Schedule 36. We have observed that daily penalties, while having a potentially significant financial impact on the persons on whom they are charged, are ineffective in achieving behavioural change. This is because taxpayers and third parties are often unable to calculate the full impact of daily penalties, as they are unable to reliably estimate the number of days that are needed for them to respond. A penalty regime which sets a clear projected amount of penalty for a clear period of time (for example, a fixed amount of penalty if no response is received within a month, increasing thereafter on a monthly basis) would be more effective in incentivising timely compliance with information notices.

Question 10: Do you have any views on making amendments to prevent the third party from notifying the taxpayer in this way?

Question 11: What form of sanction should be imposed on the third party for a breach of this rule?

There is a compelling logic to have a mechanism to prevent third parties informing the taxpayer of a notice in circumstances where a tribunal has already disapplied HMRC's obligation to notify the taxpayer. However, such a mechanism needs to be carefully designed in the light of existing legal and commercial arrangements.

Contractual terms in some sectors typically oblige suppliers to notify their clients should they be contacted by tax authorities for information about the client. In such cases, for a supplier to comply with a third party notice without notifying their client could significantly damage the commercial relationship, and have a serious impact on the supplier's ability to trade. Breaching their contractual terms could expose the supplier to legal action from the taxpayer.

A robust legislative framework would be needed to enable suppliers to comply with a requirement not to inform the taxpayer. There are precedents for such mechanisms, and the 'tipping off' provisions contained in anti-money laundering regulation could provide a suitable model. HMRC should consult further to establish the situations where third parties might be placed in difficulty by any requirement to withhold information from

their clients and develop a proportionate approach to enable them to remain compliant with all aspects of the law.