

HM Revenue & Customs Modernising Powers, Deterrents and Safeguards

Minutes of Meeting 2 February 2010: 2 pm

Attendees: Dave Hartnett (Chair), Derek Allen, Ian Menzies-Conacher, Peter Gravestock, Penny Hamilton, Philip Baker QC, Mike Hardwick, Professor John Hasseldine, Tina Riches, Francesca Lagerberg, Lawrence Longe, Chas Roy-Chowdhury and Maria Richards (Secretary)

Invitees: HMRC: Simon Norris, Jim Ferguson, Juliet Roche, Deborah Broughton, Simon Habesch, Richard Las, Chris Walker, Richard Davey, David Lewis, David Pruden and Oliver Haydon (HMT)

Apologies: Stephen Alambritis, Roderick Cordara QC, David Cruikshank, Mike Templeman and Nicole Kett (HMT)

Criminal investigations: exploring the deterrent effect

1. HM Revenue & Customs (HMRC) introduced a paper on exploring the deterrent effect of criminal investigations. HMRC explained that the Revenue & Customs Prosecution Office (RCPO) was formed in 2005 to undertake HMRC prosecution work and has the final decision on which cases to prosecute. HMRC continues to undertake criminal investigations and the powers to do this were aligned in 2007.
2. The paper stated that for a variety of reasons the success rate of current RCPO prosecutions was very high for a prosecuting authority. It also set out the details of small scale research from the United States (US) which suggested that an increase in the number of prosecutions, if publicised, would have a deterrent effect. The Committee were asked to discuss a number of issues and questions raised by the paper.
3. The Committee thought that criminal investigations do have a strong deterrent effect if they are considered to be fair and proportionate. The effectiveness could depend on a number of factors including the level of sentence and the amount of publicity.
4. Benefit fraud is an area where there are many low level prosecutions and there could be something to learn about the deterrent effect from this area. There could also be some evidence around behavioural

change following the decriminalisation of many VAT offences during the 1980's.

5. Although with criminal prosecutions there is less control over the sentence and a lesser offence could be subject to large penalties following a civil investigation, HMRC should not underestimate the effect of a prosecution. It was not merely the length of the sentence that was of consequence but also the effect on reputation; a criminal record could even prevent travel to certain countries.
6. The committee thought that campaigns such as the offshore disclosure would be more effective if there were publicity about prosecutions in this area. HMRC explained that the problem was not that criminal investigations were not being undertaken but that prosecutions took a considerable time to reach court and this delayed the deterrent effect.
7. The high success rate of current RCPO prosecutions is to be applauded but did it indicate that perhaps HMRC was not taking up as many cases for criminal prosecution as it should be for fear of losing? But the bar should continue to be set fairly high as too many failed prosecutions or short sentences would pose a reputational risk to HMRC. The aim of a criminal investigation policy should not be purely about the numbers sent to prison but for the policy to act as a deterrent effect. It was noted that for MTIC fraud there was a different perception. If HMRC did not undertake criminal investigations there would be reputational damage.
8. Dave Hartnett summed up the discussion by noting that the view of the committee was that criminal investigation work did have a significant part to play as a deterrent and HMRC should think hard about whether they were doing enough in the conventional tax area.

Working with Tax Agents: the next stage – Consultation Document

9. HMRC introduced a paper that set out the areas of policy HMRC was consulting on (public interest disclosure; deliberate wrongdoing and high volume agents) and the areas that were not within scope. It was acknowledged that public interest disclosure could not be used to address the behaviour of those agents who were not members of a professional body and that the consultation did not cover any civil sanction for misconduct which was at a lower level than deliberate wrongdoing.
10. The committee thought that generally the consultation was sensible and that HMRC had done a good job at picking up the issues raised during the initial consultation.
11. It was noted that the Impact Assessment stated that 'While further work will be done, the tax loss relating to the deliberate behaviour of tax agents, derived from both successful criminal and other HMRC civil

enquiry work covering a number of past years, is at least £25 million'. The committee asked for information on how the figure had been arrived at, its reliability and how it was made up, in terms of affiliated and unaffiliated agents.

12. HMRC explained that due to the perceived defects with the current civil powers and the fragmented information HMRC has on agent behaviour it had been difficult to quantify the scale of deliberate wrongdoing by agents. However the £25 million was based on actual tax loss figures from both successful criminal prosecutions and other HMRC civil enquiry work covering a number of past years.
13. A committee member was concerned that HMRC had not published enough information about how the £25 million had been arrived at. HMRC undertook to provide further clarification.
14. The committee agreed that the consultation rightly identified that more needed to be done to tackle those agents who were incompetent and those who made serious errors and lied to cover up.
15. The committee welcomed the aim to improve the performance of agents through initial engagement and then through improved co-operation with representative bodies. However any changes to the disclosure process would need to be discussed in detail with the representative bodies to ensure it did not add unnecessary burdens. HMRC also needed to improve its own performance and better training on both sides would lead to improvements. Sanctions for those who were not a member of a representative body would have to be considered alongside the proposals for disclosure. Even if an agent was disqualified from their representative body this did not necessarily stop them from dealing with HMRC.
16. The committee had some specific comments on Chapter 6: Deliberate wrongdoing: access to working papers. The need to protect confidentiality was recognised but the agent should also be able to make representations and for them to be able to do this all Tribunal applications to see 'working papers' should be with notice, including papers in the hands of a third party. HMRC confirmed that this point is also coming across very strongly in the consultation meetings and that HMRC will be looking closely again at the strength of the case for without notice hearings. HMRC also reconfirmed that tax agents would always be able to be present at hearings concerning whether or not their behaviour amounted to deliberate wrongdoing. It was agreed that access to the working papers of tax agents involved in deliberate wrongdoing was appropriate but the committee thought that asking for all papers relating to all clients past and present may not be a proportionate request. It would be more proportionate for HMRC to perhaps initially look at the papers for current clients with a specific profile. HMRC explained that from experience where a serious problem had been identified with one client, then there was a need to look at all

working papers and for many firms client profiling would not work due to the varied client base.

17. Chapter 7 set out the proposals for a civil penalty for deliberate wrongdoing by a tax agent. The committee agreed that penalties should be reduced if an agent made a full unprompted or prompted disclosure but had concerns about client confidentiality and the possible need to obtain authority from their client before disclosure could be made.
18. Chapter 10: set out proposals for high volume agents. The committee thought that any applications to the Tribunal should be with notice and the hearing should consider the validity of the claims.
19. Although tax agents were generally viewed as individuals in the consultation in some cases the tax agent may be the firm and this should be spelt out in the legislation. HMRC confirmed that the draft legislation on deliberate wrongdoing by tax agents would be published within the next week.

Tackling offshore tax evasion – consultation document

20. HMRC explained that the New Disclosure Opportunity (NDO) provided UK taxpayers with an opportunity to disclose undeclared offshore assets. The time now was right to enhance HMRC's capabilities to deter, track and punish those who continue to seek to evade tax.
21. HMRC is obtaining details on offshore assets following recent information notice requests to financial institutions. The aim was to keep this information up to date and the consultation document set out details of a proposal that would require taxpayers to notify HMRC of new offshore bank accounts. To keep the admin burden at a minimum only bank accounts in certain high risk jurisdictions without information exchange with the UK would need to be notified. Furthermore, accounts in some other jurisdictions would be notifiable only if the balance in the account was over 25,000.
22. Penalties for failure to notify an overseas account would follow a similar model to those introduced in Schedule 55 to FA2009. Any penalty for late notification would be in addition to any penalty that may arise for an under-declaration of tax. In the most serious cases the sum of these two penalties could reach 200 per cent of the tax evaded.
23. The committee were content with the design principles but did not think that these had flowed into the process which needed more thought. The notification requirement was felt to be disproportionate with too high an admin burden on the compliant without acting as a sufficient deterrent to the potentially non-compliant. The distinction between evasion, avoidance and non-compliance was not clear enough. The failure to distinguish between offshore locations did not run through to

the level of the penalty. If there was an exchange of information agreement then European Community Law may require a lower penalty.

24. There were also concerns that a notification requirement would require a high level of publicity with countries in each jurisdiction grouping clearly set out. The actual process of notification would also need to be made as easy a possible ideally through an online tick box.
25. The committee thought that those seeking to conceal their assets from HMRC would use other offshore vehicles and that rather than notification HMRC should be concentrating on penalties on the failure to declare the correct income. It was suggested that it may be feasible to charge a higher level of penalty for failure to disclose offshore income.
26. **Update on other consultation and response documents published at PBR**
27. A committee member said that an area of confusion was when the various new powers had or would become operational. She suggested that a timeline setting out the implementation dates would be helpful.
28. HMRC explained the proposed way forward for the bulk and specialist information powers as set out in Chapter 3 of the responses document.