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Open Consultation - Enhancing HMRC's powers: tackling tax advisers facilitating non-compliance

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We would like to thank HMRC for publishing the above open consultation document and welcome the chance to both formally respond to the questions raised and also to contribute more widely to the debate on this important issue.

The Taxation Disciplinary Board

Before addressing the questions posed by the Condoc, it may be helpful to provide some background information about the Taxation Disciplinary Board "TDB").

In 2001 the Chartered Institute of Taxation ("CIOT") and The Association of Taxation Technicians ('ATT') established an independent Taxation Disciplinary Scheme to manage complaints made regarding the professional conduct of members and students of the two bodies.

One of the objectives was to ensure that there was a common approach to procedures and philosophy in handling disciplinary matters, with a consequent improvement in efficiency and effectiveness. In addition, there was an awareness of the concepts of the Human Rights Act and in particular the need for complaints regarding alleged breaches of professional rules of conduct to be considered by committees and tribunals which are independent of the body establishing the rules. Therefore, the disciplinary arrangements, although established by the Institute and the Association, are administered through the independent Taxation Disciplinary Board Limited. Members of the various committees and tribunals set up by the Board consist of individuals who have no current involvement with the professional standards setting of CIOT or ATT.

Overall responsibility for the Scheme rests with a small Board. The (lay) Chair is a joint appointee of CIOT and ATT. The other members are individual appointments made by each participating body, and a lay member.

The Scheme is underpinned by regulations governing the procedures which apply to the processing of complaints and disciplinary matters. The Scheme applies to allegations of professional misconduct, inadequate professional service, and conduct unbecoming a professional person. Although the arrangement originally applied only to members of CIOT and ATT, it was structured so that other tax bodies might join at a later stage. Early in 2011 the Institute of Indirect Taxation (IIT) joined as the third participating body (IIT has since been subsumed within CIOT). The regulations were updated, effective from 1st January 2024.

The 2024 regulations provide that the TDB Operations Team undertake the initial assessment and examination of complaints. Unless the reviewer is of the opinion that the complaint is trivial or out-of-time (in which case the complainant may request

that the reviewer's decision be examined by an independent assessor), the TDB Operations Team will refer it to the Investigation Committee ("IC"), having sought the member's response to the complaint first.

The role of the IC is to determine whether there is a prima facie case for the member to answer. Where the IC finds that there is a prima facie case to answer, it will consider whether the case is appropriate for the Consent Order procedure. This involves the member agreeing to accept a sanction decided by the IC. The IC can impose any sanction that would be available to the Disciplinary Tribunal ("DC") upon finding a charge proved. If the Consent Procedure is not appropriate, the IC will refer the case to a DT.

This Tribunal, which consists of three members, comprised of a legally qualified chair, a tax professional and lay member of the public, assesses the case and, if proven, the member is guilty of a breach of the professional rules and standards, imposes the appropriate sanction. The member has a right to appeal to an Appeal Tribunal.

The Board is responsible for appointing the members of the Investigation and Disciplinary Panels, from whom the IC, DT and Appeal Tribunal members are selected. Each panel includes lawyers, tax professionals and lay (i.e. non-tax technical) members. This is to ensure that there is a balanced review of the issues from a legal, technical, and practical viewpoint.

The aim of the Scheme is to provide protection for the public and the right level of discipline over members, as tax practice continues to play an increasingly key role in fiscal affairs; but the Scheme must at the same time operate fairly for members and respect their rights.

Introduction

TDB agrees that HMRC should have appropriate powers to take effective action against tax advisers who seek to facilitate non-compliance. However, we recognise that disputes between HMRC and individual taxpayers can be based on legitimate differences in technical interpretation, and that not all technical positions with which HMRC disagrees should be classified as "non-compliance".

As HMRC notes, tax advisers play a vital role in the efficient operation of the UK tax system by providing high quality technical advice to millions of individual and business taxpayers. We believe that the overwhelming majority of tax advisers carry out this role to the best of their abilities and, in doing so, ensure that their clients pay the right tax at the right time. We also recognise that a small minority of tax advisers (some of whom are members of professional bodies) are not fully committed to rigorous ethical and professional standards and that these tax advisers, by their actions, risk undermining public trust both in the overall tax system and in honest and professional tax advisers. We are supportive of HMRC policies which, with appropriate safeguards, will make it easier to deal with those tax advisers who facilitate non-compliance with the UK tax system.

As a disciplinary, rather than a regulatory body, (TDB has no members to represent) it is inappropriate for TDB to attempt to answer every question in the Condoc. We have responded to such questions with "not applicable to TDB". In addition, we have answered some questions briefly, only addressing what we consider to be an important issue of principle, without providing any comments on technical detail.

We are grateful to Max Romanovich and his team for finding the time to speak to us and for answering our questions about various aspects of the Condoc. This has made drafting this response a great deal easier.

Question 1: Do you agree that HMRC's powers to tackle tax advisers who harm the tax system could be more effective?

Yes. For the reasons stated in the Condoc. In particular, the growing "industrialisation" of some advisor claims which seem to rely on HMRC adopting a "pay now, check later" approach. Also, where contingency fees are typically very high thus providing a further incentive for reckless, or dishonest, tax adviser behaviour.

Question 2: Do you agree with the government's aim that any enhanced powers should allow for swift, effective, and proportionate action in cases of tax adviser activities that result in harm to the tax system and facilitates non-compliance?

Yes. Provided that there are appropriate safeguards to inter alia protect those tax advisers who are, for instance, simply challenging a debatable technical position on a full disclosure basis. Similarly, those who have simply made an innocent error (provided that multiple errors do not amount to recklessness).

Question 3: What actions that lead to harm being done to the tax system should be within scope of the proposals outlined within this consultation?

We do not think that it is possible to produce a comprehensive list of all of those actions which might cause such harm. Instead, we suggest that any action calculated to undermine the principle of paying the right tax at the right time (accepting that there will be very different technical understandings of what this means in specific circumstances) should be within scope. This would include tax adviser dishonesty and could also include recklessness.

Question 4: Do you have any other suggestions for how HMRC might enhance its powers to tackle non-compliance facilitated by tax advisers?

Not applicable to TDB.

Question 5: Do you have any comments on the proposed scope?

We believe that tax advisers providing indirect advice (i.e. not dealing directly with HMRC) should be in scope, as such client advice is very common. We also think

that it should be possible to take action against both individual tax advisers and against their employers.

We also think that where the advisory entity is a partnership it should also be possible to take action against the engagement or client partner, even where that person did not provide the advice themselves. This is on the basis that the client or engagement partner would (in most professional partnership risk management processes) be responsible for any work delivered to the client.

Question 6: Are there any other groups HMRC should consider?

Anyone, no matter what their professional qualification (or lack of qualification), who provides tax advice should be in scope. This would include Barristers (not included in "solicitors, auditors and financial advisers"). Any other approach could, we believe, lead to an uneven playing field.

Questions 7 to 13 (inclusive):

We understand the difficulties which HMRC have with the 2013 legislation but do not feel that TDB is best placed to comment on the detail of the current proposals.

We do, however, have a direct interest in the efficient referral of cases involving alleged unprofessional behaviour by CIOT and ATT members (either directly to TDB or to CIOT and ATT). As "dishonesty" is challenging to prove in the context of a conduct and information notice, we recommend that behaviour which falls short of dishonesty (recklessness for example) could still lead to a TDB referral and ultimately to a sanction from TDB. We suggest that a more flexible approach could be adopted in referring cases to TDB and other professional bodies.

Questions 14 to 23 (inclusive):

TDB recognise that significant fines can be an effective disincentive to unacceptable tax adviser behaviour. However, it makes little sense to have a maximum fine when the rewards for such bad behaviour (particularly in regard to contingency fees) can be very substantial, and the fine might be a small proportion of the financial advantage gained by the tax adviser.

Recognising its own fines have been historically low, TDB recently reviewed the level of fines, compared to fines routinely being imposed by the legal and accounting professions. Updated guidance has been issued for TDB panellists.

The imposition of a fine, should also be considered in the context of other sanctions. While TDB's ultimate sanction is exclusion from membership, this does not prevent the individual from practicing as "tax adviser" is not a reserved title.

Question 24: Are there any reasons why HMRC should not make further non-PID disclosures to professional bodies, as well as continuing with PIDs (where appropriate)?

Enhancing HMRC's Powers: Tackling tax advisers
TDB response

TDB can see no reason why further non-PID disclosures should not be made to professional bodies and support this proposed initiative. It could act as a very effective "early warning system", allowing constructive engagement, help and education to prevent more serious unacceptable tax adviser behaviour, including the facilitation of non-compliance. Preventative medicine rather than surgery!

Question 25: What types of behaviours or activities do you consider it appropriate for HMRC to make further disclosures about?

A non-comprehensive list might include bullying behaviour towards HMRC staff, acting outside areas of competency (e.g, a VAT adviser submitting an R & D claim), poor quality technical work, refusal to properly answer reasonable HMRC queries, provision of poor quality evidence to support claims etc.

Questions 26 to 33 (inclusive)

Although we consider these questions to be largely outside of our remit, we suggest that, where publication takes place, the information is published where citizens (and potential tax adviser clients) will read it. This would include making more use of HMRC's Press Office and the media more broadly, rather than restricting publicity to accounting and professional channels. This may alert citizens to unacceptable 'advisers' and non-compliant schemes. This might be a better way to emphasise that advice leads to both citizens (clients) and the public purse being worse off.

If HMRC would like to discuss this response or requires further information, please contact Daniel Lyons: dlyons@tax-board.org.uk

Yours sincerely.

Tom Hayhoe,
Chair,
Taxation Disciplinary Board