Response from ICAS

Amending HMRC's Civil Information Powers

2 October 2018

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The Board, with its five technical committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members.

2. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

3. ICAS welcomes the opportunity to respond to the HMRC consultation "Amending HMRC's Civil Information Powers" published on 10 July 2018. We are pleased that this consultation is a Stage 1 consultation, as defined in the Tax Consultation Framework; consulting at an early stage of the process of policy development means that any resulting legislation is more likely to meet the policy objectives and to be workable in practice.

4. We were pleased to have the opportunity to meet with HMRC to discuss the proposals in the consultation on 23rd August 2018. This response summarises and builds on our comments made during that meeting. We would be pleased to have further discussions with HMRC about any of the matters raised in this response.

5. ICAS supports HMRC having appropriate information powers to enable it to check tax compliance and to comply with obligations under international agreements. However, taxpayers need to have confidence that the powers are being exercised proportionately and that appropriate safeguards are in place. In the case of third party notices, independent scrutiny by the Tribunal is the only effective taxpayer safeguard to ensure that HMRC is only seeking information that is 'reasonably required'.

6. It is clear from the consultation document and from our meeting with HMRC that the main driver behind the proposed removal of the safeguard (Tribunal approval) in the third party notice process is international pressure to accelerate the process for dealing with information requests from other tax authorities. This does not, in our view, justify removing the only effective safeguard in all cases.

7. Our preferred option would be to retain Tribunal approval in all third party notice cases. However, if this is impossible because of international pressure and OECD scrutiny, a clear distinction should be made between domestic cases (ie where HMRC is seeking a notice relating to a UK taxpayer) and international requests where the notice arises from the request of an overseas tax authority. In UK cases the requirement to obtain Tribunal approval should be retained.

8. Alternatively, as most requests from overseas tax authorities involve banking information (paragraph 4.7 of the consultation document) we can see scope for the introduction of a Financial Information Notice to cover this type of information. Other notices should then retain the requirement for Tribunal approval in both domestic and overseas cases. However, the requirement for Tribunal approval should also be retained in domestic cases involving Financial Information Notices, ie the requirement would only be removed for Financial Information Notices arising from requests from overseas tax authorities.

9. The consultation also proposes a number of other changes, although these are not discussed in the same level of detail as the proposed changes to third party information notices.

10. The most significant of the other proposals is an extension to HMRC's information powers to allow it to obtain information reasonably required for 'all its tax functions'. However, insufficient evidence and explanation is provided to justify the extension or to allow for proper comment. We do not therefore support the blanket approach proposed. Further information and evidence on the perceived problem areas (and why the extension would assist in dealing with them) should be provided, as part of a further consultation on a properly targeted extension of the information powers to specified HMRC functions where there is a demonstrable need.

11. We deal with the other changes proposed by the consultation in our responses to Questions 8 to 11 below.

Specific questions

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

12. As outlined in our general comments we do not agree with this proposal. This would remove the only effective safeguard for taxpayers (where they have not given their agreement to an approach to the third party) which can ensure that HMRC only seeks information which is reasonably required. The third party would have a right of appeal (although only on the grounds that the notice is too onerous) but the taxpayer would have no rights at all.

13. Whilst the numbers of third party notices are currently very small it is inevitable that the numbers will increase if the safeguard is removed – indeed this must be anticipated or there would be little point to the proposal. We are not convinced by the suggestion in paragraph 3.16 of the consultation document that the numbers would remain low – given the comments in paragraphs 3.5 and 3.8. At our meeting with HMRC, an expected figure of 500 notices was mentioned but it is unclear how this would split between international requests and domestic requests.

14. Our main concern is that with no effective safeguard the number of domestic notices would increase unchecked. HMRC may only have had one request rejected to date (paragraph 3.17 of the consultation document) – but this is arguably because HMRC currently takes great care only to apply for approval in appropriate cases. There would be no incentive to do this without the safeguard of Tribunal scrutiny. There is also considerable pressure on HMRC resources, as noted in the consultation document; we believe it is therefore unlikely that adequate resources would be devoted to ensuring that requests were only made in appropriate cases, if the need for Tribunal approval no longer applied to domestic cases.

15. We note the comments in paragraphs 3.11 and 3.12 (and the list in Annex A) of the consultation document on 'international comparisons'. However, we do not consider that this provides adequate evidence to justify the proposed change to the UK approach. The entire context of any overseas tax system and its legal system would need to be considered in determining whether appropriate safeguards exist – and in any case we do not believe the UK should be seeking to emulate some of the jurisdictions in the list.

16. Judicial review is also noted as a 'safeguard' for several jurisdictions in the list in Annex A. In UK cases we do not consider that this would amount to an effective safeguard for the taxpayer because of the time constraints and cost – the taxpayer (rather than the third party) would also be unlikely to be able to initiate judicial review proceedings before the third party had received the information notice.

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

17. In domestic cases, involving UK taxpayers (and requests for notices from HMRC) no internal HMRC process would be an adequate replacement for the independent scrutiny of the Tribunal. We have reports from members of cases where the relationship between HMRC and the taxpayer has completely broken down. We also understand that far more taxpayer notices are being issued, often at an unduly early stage of an enquiry (where the taxpayer and their agent are cooperating) and some of which appear to be inappropriate 'fishing' expeditions on the part of HMRC. Therefore, where the taxpayer does not agree to a third party being approached, independent external oversight of any attempt by HMRC to issue a third party notice is essential to maintain confidence in the system and provide an appropriate balance.

18. Pressure on HMRC resources makes it unlikely that further internal processes or safeguards would be properly applied in all cases, without the need to satisfy the Tribunal that the request was appropriate. At our meeting with HMRC we mentioned that we are aware of past failures by HMRC to apply internal processes and safeguards correctly, until there was some external intervention; we therefore believe that external scrutiny is essential to ensure that HMRC puts in place and adheres to robust internal processes and safeguards.

19. Whilst we would prefer independent scrutiny to be retained in all cases we can, however, see that the position could be different for notices arising from requests by overseas jurisdictions for information

about their taxpayers. As most of these requests relate to banking information (paragraph 4.7 of the consultation document) we discuss this further in our response to questions 4 and 5 below.

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

20. See our responses to questions 1 and 2 above. We do not support this approach. However, if it is adopted we believe there should be further consultation on appropriate additional restrictions on the type of information that could be requested.

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

21. As noted above our preferred option would be to retain the safeguard of Tribunal approval in all cases but we recognise that this may be creating problems in terms of the UK's international agreements. As most requests from overseas tax authorities involve banking information (paragraph 4.7 of the consultation document) we can therefore see scope for the introduction of a Financial Information Notice to cover this type of information.

22. If this approach is adopted, all other notices (ie non-Financial Information Notices) should retain the requirement for Tribunal approval in both domestic and overseas cases. The requirement for Tribunal approval for Financial Information Notices should only be removed for Financial Information Notices arising from requests from overseas tax authorities for information about their taxpayers.

23. The requirement for Tribunal approval should be retained in domestic cases involving Financial Information Notices. We note the comments in paragraph 4.8 of the consultation document about uncertainty around whether banking information constitutes a statutory record. Paragraph 4.9 appears to suggest that for the purposes of the proposed Financial Information Notice all banking information (as defined in paragraph 4.9) would be treated as statutory information – but 4.10 would mean that notices could only be used to obtain banking information reasonably required to check a taxpayer's tax position. We do not agree that this would be acceptable in UK cases; HMRC's view and the view of taxpayers and their advisers on what constitutes statutory records and what is 'reasonably required' do not always coincide. Independent oversight should be maintained in UK cases to provide an effective safeguard.

24. We understand from our discussions with HMRC that some overseas jurisdictions provide more information in support of their requests than others – and that HMRC does reject some overseas requests. If the requirement for Tribunal approval is removed in overseas cases it will be important for HMRC to continue to scrutinise overseas requests carefully and to reject them where HMRC does not consider that adequate supporting details have been provided.

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

25. See our response to Question 4 above. For domestic cases the requirement for Tribunal approval should be retained.

26. Approaching a bank for information about a taxpayer, without the taxpayer's agreement, is highly intrusive and the consultation makes no mention of the potential adverse effects on taxpayers of a third party notice being issued to their bank. Risk averse financial institutions might decide to withdraw banking facilities from a customer if they assumed that the issue of the notice indicated wrongdoing.

27. If, contrary to our recommendations above, Tribunal approval for third party notices is removed for domestic cases, as well as those arising from requests from overseas tax authorities, there should be additional safeguards or restrictions in domestic cases, where the request for information is to a bank. One option would be to make it mandatory for HMRC to issue a formal taxpayer notice, requiring provision of the banking information from the taxpayer, before it could issue a third party notice to the bank. This would give the taxpayer possible appeal rights (unless the information formed part of 'statutory records' – as noted above we do not agree that all financial information should be automatically treated as statutory records) and a clear indication that if they did not provide the information their bank would be approached.

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?

28. We do not agree that the process for domestic cases needs 'speeding up'. The consultation document does not provide any evidence to support the suggested removal of the only meaningful safeguard in domestic cases. As noted above there are already some concerns about the way HMRC is using its information powers (including taxpayer notices) in some cases; changing the process for third party notices, as proposed, would undermine confidence that the powers would be exercised properly.

29. As outlined above, if the requirement for Tribunal approval is removed in domestic cases (either solely for Financial Information Notices or for all information notices) we recommend that it should be made mandatory for HMRC to issue a formal taxpayer notice before it could issue a third party notice; this would give the taxpayer some rights of appeal and provide a safeguard. We understand that HMRC do not currently plan to change their existing practice of informally approaching the taxpayer first but, if the requirement for Tribunal approval is removed, issue of a formal taxpayer notice should be made mandatory.

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

30. The consultation document provides insufficient explanation of these proposals and the rationale behind them to allow for proper comment. It is not clear what is meant by 'all its tax functions' in paragraph 4.13 of the consultation document – the only function specifically referred to is the 'collection of tax debt'.

31. Looking first at tax debt, it is not clear from the consultation document why HMRC believes that it should have additional powers to obtain information about debtors, beyond procedures available to all creditors. Consideration would need to be given to the interaction between any additional powers given to HMRC and enforcement/diligence processes and insolvency procedures – to ensure that other creditors are not disadvantaged.

32. Paragraphs 3.18 and 3.19 do not clarify what other functions HMRC has in mind and it is unclear why HMRC think that the extension of information powers would assist. We do not therefore support the blanket extension proposed. Any extension should be properly targeted and restricted to specified tax functions, where there is a demonstrable need for HMRC to have additional information powers. Detailed proposals (with supporting evidence) should be the subject of a further consultation.

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

33. We agree that it would make sense to amend the legislation to ensure that the current increased daily penalties can be imposed, although it would have been helpful for the consultation to have provided more information about the number of cases affected. We assume that it is a relatively small number.

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

34. We do not consider that the case for extending the increased daily penalties to all Schedule 36 cases has been made. This proposed change would considerably increase the number of cases potentially within the scope of the increased penalties. Whilst there are currently a relatively small number of third party notices, this may increase (in view of the proposals discussed above) and there are already far more taxpayer notices.

35. Insufficient evidence is provided in the consultation document to demonstrate whether there is a significant level of non-compliance which would justify this extension. Paragraph 2.8 of the consultation document indicates that it is only a small minority of recipients who do not comply, which does not appear to support the case. Further information is required – including details of any proposed safeguards.

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

36. It would be useful to have information on the number of cases arising where HMRC considers that notifying the taxpayer could prejudice the assessment or collection of tax. We assume it is a relatively small number. We agree that where the Tribunal agrees with HMRC that there is a risk to

the collection of tax, so that HMRC does not have to inform the taxpayer, it would be sensible to provide that the third party should also not notify the taxpayer.

37. As discussed at our meeting with HMRC it would be useful to have confirmation that the legislation will ensure that the third party will not be subject to any sanctions under GDPR, as a result of not supplying information to a client in response to a subject access request in these circumstances.

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

38. Any sanctions should be proportionate to the nature of the breach. A scale of penalties would probably therefore be appropriate – permitting a distinction to be made between, say, deliberate, careless and inadvertent breaches of the rule by the third party. The third party should also have a right of appeal against any penalty imposed.