Amending HMRC’s Civil Information Powers: ATT, CIOT and LITRG responses

General Features **Management of taxes**

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The ATT, CIOT and LITRG have responded to a consultation on reform of HMRC’s information powers under FA 2008 Schedule 36, in particular the procedures surrounding third party notices.

HMRC launched a consultation entitled *Amending HMRC’s Civil Information Powers* on 10 July 2018. The aim of this consultation is to explore how effective and efficient HMRC’s civil information powers under FA 2008 Schedule 36 are and consider some amendments to the provisions.

A key focus of the consultation is the procedures around issuing third party notices, which currently require either taxpayer agreement or Tribunal approval. The document in effect argues that HMRC’s existing powers to obtain information from third parties are insufficient. This is mainly due to the length of time it takes to obtain Tribunal approval which HMRC are concerned will make it difficult for the UK to meet international standards for requests for information from other jurisdictions.

Two main options are proposed to address these issues:

- **Option 1**: Aligning third party notices with taxpayer notices – under this option third party notices could be issued where authorised by a HMRC Officer, without the need for taxpayer or Tribunal approval.
- **Option 2**: Creating a new class of notice, the *Financial Institution Notice*, which could be issued without taxpayer or Tribunal approval and would require the third party to provide ‘*banking information reasonably required to check a taxpayer’s tax position*’.

Further proposals in the consultation include:

- Widening the purpose for which information can be required, so that HMRC would be allowed to access '*information that was reasonably required for all its tax functions, including the collection of tax debt*'.
- Extending the scope of the daily penalties for failure to comply with a notice requiring information relating to an unknown taxpayer to cover all information notices in Schedule 36.
- Introducing an obligation on third parties not to inform the taxpayer of a notice where the Tribunal has approved this.

The CIOT response

In our opinion, HMRC's information powers under Schedule 36 currently provide a coherent balance between the right of HMRC to obtain information and the protection of taxpayers and third parties against unwarranted intrusion and cost. However, HMRC's proposals to remove the existing independent oversight by the Tribunal in certain cases risk changing the balance of power too far in the direction of disclosure which may not be appropriate or necessary. Retaining appropriate Tribunal oversight would also allow legitimate concerns about confidentiality in overseas jurisdictions to be taken into account when considering the approval of contested notices.

In our response we analyse both options put forward by HMRC and suggest some alternative means of achieving the same objective which we feel would be more targeted and proportionate.

On Option 1, we think that removing the requirement to obtain Tribunal approval in all cases goes significantly further than is needed for HMRC to cope more promptly with requests for information from overseas jurisdictions. Where HMRC have not agreed the request with the first party, or where they do not want to engage with the first party, Tribunal approval should be retained. On Option 2, we see the value in a limited power that relates to certain information that financial institutions will hold and support this option in principle. Our concerns relate to the details: which institutions and which records?

In our view, the interests of HMRC and taxpayers would be best balanced by a system where Tribunal approval for issuing third party notices should not be

required only in three limited situations:

1. Where the request for information has come from an overseas jurisdiction for information about a first party not based in the UK;
2. Where the first party has been approached and has no objections to HMRC contacting the third party for information;
3. Where the first party has been approached and has made representations which HMRC have either accepted or an agreement has been reached between them.

There should be a statutory obligation on HMRC to approach the first party before approaching the third party for information in b) and c).

Tribunal approval should be required in all other circumstances.

We accept there is a case for updating the rules in some other areas, such as the proposal to amend the wording in para 49A FA 2008 to clarify that the Tribunal grant permission for HMRC to assess daily penalties and the proposal to make amendments to prevent the third party from notifying the taxpayer, but we are disappointed with the way that these subsidiary proposals have been tagged onto the consultation. In our view they justified a fairer airing than that provided by this document.

As regards the proposal to allow HMRC to access information that was reasonably required for all its tax functions, we believe that insufficient information is provided in the consultation document to explain what is meant by 'Other Functions of HMRC' and what information HMRC want to access. Without knowing more, we cannot support giving HMRC what could, in effect, be a blanket power to access all sorts of information from taxpayers and third parties. We therefore suggest that there ought to be further consultation specifically on this proposal so that the pros and cons can be adequately addressed and debated.

The full CIOT response can be found on the CIOT website.

The ATT response

The ATT response acknowledges that HMRC are experiencing increasing number of demands for information due to various automatic exchange of information standards, and that the current process of seeking Tribunal approval can be time

consuming. However, the ATT does not believe that the consultation provides sufficient evidence to support the erosion of important safeguards for both taxpayers and third parties.

Of particular concern is the proposal to remove the requirement for Tribunal or taxpayer approval before a third party notice is issued. This requirement was included in Schedule 36 for a reason – to protect the privacy of taxpayers and prevent undue burdens being imposed on third parties.

The alternative option of introducing a separate, specific Financial Institution Notice for banking information would be preferable on the understanding that this would be a more targeted response, balancing HMRC's concerns over the existing process with a restricted application to a defined group of third parties and a specific class of information. However, the ATT notes that the definition of 'financial institution' for these purposes would have to be carefully considered, as the definition currently applying under CRS and FATCA is very wide.

Regarding the other proposals in the consultation, the ATT notes that HMRC have not set out in any detail the reasons why it might be desirable to apply daily penalties more widely to Schedule 36, and that there is insufficient evidence to justify extending such potentially severe penalties (up to £1,000 a day) at this time.

The ATT response can be found on the ATT website.

The LITRG response

LITRG has echoed the above concerns over the proposal to abolish the requirement for HMRC to obtain Tribunal approval for third party information notices and has rejected the government's case to do so. It states that the existing safeguards are just as valid today as when they were originally introduced, regardless of HMRC's claim that they are currently unable to process third party notices efficiently.

LITRG notes that the replacement of an independent judge with an 'authorised officer' of HMRC means that HMRC become both judge and jury in a matter of their own interest, with unrepresented taxpayers in particular lacking the means to challenge where the information request has been issued unlawfully.

The government claims that current law means that HMRC is unable to respond to requests for information from overseas jurisdictions in a timely manner. In order to

mitigate the effect of the proposals, LITRG has recommended that the government considers restricting any new powers to deal with these overseas cases only, rather than all third party information notices. It also suggests looking more closely at how the existing process might be streamlined, such as in respect of the requirement for HMRC to obtain representations from the third party before the Tribunal approval is sought.

LITRG has also stated that it feels expanding HMRC's debt collection powers by using Schedule 36 is likely to have a negative impact on low-income taxpayers, bringing them in scope of a harsh penalty regime. It suggests instead that HMRC take a more collaborative approach rather than threatening those without the means to pay with penalties of up to £1,000-a-day.

The LITRG response can be found on the LITRG website.