

CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY
Revenue Committee

Please reply to:

Vairao House
3 Airlie Road
Winchester
SO22 4NQ

tel: 01962 844440

email: jeremy.desouza@wandb.co.uk

Ms Angela Shore
HMRC and the taxpayer
Room 1C/03, 1st Floor
100 Parliament Street
London SW1A 2BQ

BY FAX [020 7147 2460] AND E-MAIL: angela.shore@ir.gsi.gov.uk

10 April 2006

Dear Ms Shore

HM Revenue and Customs and the Taxpayer: Modernising Powers, Deterrents and Safeguards – A consultation on the developing programme of work

Members of the Committee are very concerned at the thinking which appears to underlie the preparation of this document, and feel that it is necessary to draw attention to four major issues which appear from the text of what was released on Budget Day:

- (a) As is recognised in para 6.3, considerable comment has been directed at HMRC's wish to retain 18th Century powers which are no longer appropriate in the 21st Century when responsibility for the prevention and detection of criminal activity (such as the possession of and trafficking in drugs) is that of the police: as to which see also para 1 of our response dated 4 April 2005.

The law lays down clear rules as to the procedures the police must go through before being able to enter premises and there can be no justification whatsoever for a tax collection authority to have greater powers.

Moreover, the suggestion which is made, that some form of electronic judicial authorisation may be permissible for an employee of HMRC when the equivalent policeman would have to appear before a magistrate and make an application under oath, cannot realistically be regarded as even worthy of consideration as an issue of Constitutional principle.

Furthermore, why should it not be considered that the suggestion, in para 6.1 that “risk to the Exchequer” constitutes a circumstance in which the normal safeguards “to ensure that taxpayers are treated fairly and in accordance with the law” is at variance with H M Government’s *most basic* responsibilities under the European Convention on Human Rights?

- (b) In para 6.4, the suggestion is made that the appeals structure needs to be changed to make it “more clearly independent of HMRC”. We consider that this form of wording to be particularly unfortunate, since the obvious inference to be drawn must be that the current sets of General Commissioners, Special Commissioners and VAT and Duties Tribunal members are either not already independent of HMRC or, in some respect or cases, act in accordance with their bidding. This is quite definitely not the case.

We sense, however, that HMRC may have picked up a certain amount of unease from taxpayers whose rights of appeal have been circumscribed by the “supervisory” concept.

These used to be reserved for administrative issues, but we have noticed that, recently, the category has been extended to certain substantive appeals. In such circumstances, there is a considerable risk of justice being denied by reason of the restrictions subject to which the tribunal has to hear the case. And we note, in this context, that disputes with charities as to the application of the proposed section 506A (published on 31 March) are to be conducted subject to such a limitation – as to which the justification is, to put it at its lowest, obscure.

As far as the general public are concerned, the application of FA 1994, s.16(4) in relation to cars seized at Dover seems highly likely to give rise to a sense of injustice in circumstances such as those in which a widow lent her car to her son, believing him to be travelling to Scotland when it had been used to take a friend about to be married to Calais to buy wine for the Wedding Reception (the friend not taking a copy of the Invitation with him). The historical and theoretical background notwithstanding (which would just not be understood by a layman), it will readily be appreciated that a feeling of lack of fair play could result from a combination of:

- (i) HMRC objecting to the facts at the time of detention being investigated on the basis that Condemnation Proceedings were not contested, as in *Gora* and *Dickinson*; and
- (ii) the fact that the tribunal did not have the power to restore her car immediately, merely to quash the Reviewer’s decision that she had been “innocent but culpable” and order the carrying out of a further Review.

It seems, therefore, that tinkering with the names of the appeal tribunals (which will cost a lot of money) should not be seen as the remedy for the perceived problem, but rather the restriction of “supervisory basis” appeals to issues in which they have been found to be a fair means of redress, such as the provision of security for VAT where the taxpayer has had a poor track record.

- (c) One of the inferences which has to be drawn from para 4.23 is that professional advisers should, in some way, desist from giving clients *totally independent* advice because they owe some sort of duty of care to HMRC.

This is, again, a very dangerous concept and, furthermore, one which, if pursued further will give rise to an implied conflict of interest – a position which a professional is under a *legal* obligation to both the Courts and the client to avoid getting into.

It has been accepted for centuries that the advice given by a lawyer to a client is privileged, and the position of other professional advisers in relation to taxation ought clearly to be seen in the same light.

Provided that the adviser is not advising either:

- (a) actual non-compliance; or
- (b) the concealment of disputed or borderline transactions through the non-completion of an appropriate White Space entry

the soundness of the advice given must be a matter between him and his client *alone*.

The fact that the advice given will be subject to the possibility of a professional indemnity claim (against which he will be required to have taken out an appropriate degree of insurance cover) should be sufficient assurance of responsibility, as far as HMRC is concerned, without the construction of a parallel (and legally conflicting) duty to HMRC.

It must follow that the very concept of “looking for new ways of working in partnership” as conceived by HMRC is fundamentally flawed.

Linked to this is, no doubt, the newly invented concept of “unreasonable tax position” [see Annex D, para 5] and the examples given in Annex D, para 11:

- (1) with regard to the first indent, it has to be said that it is *frequently* extremely difficult to ascertain what HMRC considers to be either existing practice or their own preferred position from the Manuals, not least because:
 - (i) as has been pointed out in journals, the software used does not enable the dates of changes to be discovered retrospectively; and
 - (ii) the detail of changes to the Manuals and other Guidance is often not given in the announcements made on the HMRC website
- (2) with regard to the second indent, this is only reasonable if the “fact” in question was *either* one which a reasonable taxpayer would have inferred that he needed to tell his professional adviser *or* which was actually known to him at the time – the tax code is now so complex that situations can arise in which it is not reasonable to assume that a layman would think that a tax problem might arise;

- (3) the same problem arises in relation to the third indent;
 - (4) assuming the fourth indent to refer only to statutory procedures, it is sometimes the case that time just does not permit these to be resorted to, especially if it is not immediately apparent that a problem might arise;
 - (5) with regard to the fifth, if a highly technical issue (or an issue on a tax which the client's normal adviser does not meet very often, e.g. environmental taxes) arises, how, in practice, is the client expected to know whether the advice he has taken comes within this head – clearly taxpayers cannot be expected to have Counsel instructed on (apparently) everyday issues; and
 - (6) while no objection can be taken to the sixth indent, it does need to be appreciated that what appears at first sight to come within this head could be the result of a lack of perception rather than deliberate intent, i.e. just as in the case of the second and third indents.
- (d) The suggestion, in paras 4.10/11, that HMRC should be entitled to take action against taxpayers before the time for filing their direct tax returns has arrived and where no *actual* evidence of any irregularity has come into HMRC's possession, is, in principle, a dangerous one.

For a start – vide para 4.12, first section, third indent – a compliant taxpayer is likely to end up incurring additional professional fees if the proposal contained in Annex B, para A were to be authorised by Parliament.

- It must, moreover, be asked, in the context of the presumption underlying para 4.6, whether the problem postulated in Annex D, para 6, could be avoided by visits made during the year where the deduction claimed had resulted from failing – in ignorance – to review the running management accounts bad debt allowances at year end on an “actual” basis.

And this is relevant because it appears, from Annex B, para F, that there is in prospect the likelihood of taxpayers operating in certain types of trade being subjected to *preventative enquiries* without there being any evidence to suggest that the particular target of those enquiries has actually been materially non-compliant or intends to be non-compliant at some future date.

- The practice of Customs in relation to VAT and catering establishments is the subject of complaint from time to time and, indeed, there have been tribunal decisions as a result of this type of targeting in which the content of the Decision ought to have be regarded as less than satisfactory as far as the (then) Commissioners were concerned.
- Furthermore, the procedure proposed in Annex B, para D, appears to be particularly unsatisfactory (to say nothing of potentially extremely unfair to the fiscally unversed, especially if the telephone conversation is taped recorded by HMRC), if activated as a result of a *trade based* risk assessment, and

- especially if that was generated by a comparison with that particular trader's actual results against an undisclosed norm. Para 2[B] of our response dated 4 April 2005 also refers to this problem area.

Yours sincerely

W J de Souza
Chairman