



The Law Society

## **Working with Tax Agents: Dishonest Conduct**

### ***Comments of the Tax Law Committee of the Law Society of England and Wales***

#### **Introduction**

1. The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession and lobbies regulators, the Government and others.
2. This response has been prepared on behalf of the Law Society by the members of the Tax Law Committee. The Committee is made up of senior and specialist tax lawyers from across the country.
3. We are grateful for the opportunity to comment on the consultation 'Working with Tax Agents: Dishonest Conduct' published on 14 July 2011.

#### **Chapter 1: Introduction**

4. This is a frank description of the history of the consultation and is to be welcomed. The initial document was not well received because it was too wide and caught too many different types of conduct. It was also considered that the notice to obtain documents could be issued without those persons affected having a proper chance to present their case. We welcome the change in position of HMRC and in particular the adoption of a "two stage" process so that the culpability of the agent is established before a file access notice can be issued.

#### **Chapter 2: The changes made and the revised model**

5. While the separation out of the process into a separate determination of dishonest conduct followed by a file access notice is to be welcomed, it has to be said that it is also essential. It was always vital that these matters were dealt with separately to give both the agent and third parties a fair hearing. The power, it should not be forgotten, is extremely intrusive, enabling papers relating to a taxpayer's affairs to be disclosed because of the actions of an agent in relation to an unconnected client.

#### **2.8 Summary of changes**

6. Many of these are to be welcomed. However there are some points that need discussion, which we mention in relation to the draft clauses.

## **Chapter 3 - Key problem areas and HMRC's proposed solutions**

7. Various issues still arise, as mentioned below, although our main comments are made in relation to the draft clauses.

### **Paragraph 3.14**

8. We understand the point made by HMRC but do not agree that "deliberate wrongdoing" has the same meaning as "dishonest conduct". We have become more concerned about the various possible meanings of the word "deliberate" as time has gone on in relation to the Powers project. We prefer "dishonest" in this context.

### **Paragraph 3.17 onwards: Tribunal Rules**

9. It must be clear that the Tribunal Rules operate effectively in relation to procedural aspects of the new process. So that:
  - HMRC issues a notice of dishonest conduct, against which an agent can appeal;
  - HMRC issues a notice of access to working papers against which an agent can appeal and also a third party can appeal. We note the letter from Simon Norris dated 22 July 2011 but we still have some concerns in this area, as referred to further below.

### **Paragraph 3.33**

10. When should a document become old? It is currently proposed that old is 20 years unless used for the purposes of current proceedings. We do not consider the definition in the legislation to be satisfactory. It really has the effect that a document of any age may have to be produced if it has a "bearing" on tax periods within the 20 year limit. This goes too far. A simple 20 year limit should be sufficient.
11. The penalty for the agent is reduced by disclosure. Lawyers may be unable to disclose because of LPP. This is not taken into account on the face of the legislation. We believe this should be recognised.

## **Comments on draft legislation:**

### **Paragraph 2**

12. Does this wording deal with the pro bono agent? Apparently HMRC take the view that an agent carrying on pro bono activities in an office within working hours might be caught. We do not believe that agents acting pro bono should be subject to the legislation. Could the reference to "in the course of business" be limited so as not to apply if the agent is acting pro bono when he gives the advice? Pro bono advice may be in the course of business, in that clients sometimes expect lawyers to carry on some pro bono work as part of their corporate responsibilities. The work therefore has some business purpose at any rate. We consider there should be a carve out for work done pro bono and this should be express.

## **Paragraph 7**

13. Under Case B it does not appear to matter whether the serious tax offence occurred while the person was a tax agent. It is pretty unlikely that an individual would commit a serious tax offence and then become an agent, but surely the offence should occur while he was an agent?
14. 7(1) could "prior" be inserted before "approval"?

## **Paragraph 9**

15. Relevant documents includes any documents prepared by the tax agent on any matter relating to anything. It seems to us that this is disproportionate particularly in relation to the third party in possession of "relevant documents" which may have been compiled over a 20 year period. The reference to documents "received" or "used by" the tax agent is particularly wide. What HMRC is really interested in are documents which the agent has had the opportunity to alter, which he has manipulated dishonestly to avoid tax; at the very least the word "received" should be deleted.

## **Paragraph 13 - Approval by a Tribunal**

16. Paragraph 13(1)(d) and (e) - Paragraph 8 should be subject to paragraph 13. Given that there is no right of appeal against a paragraph 13 notice, a document holder, in particular, must be allowed to make representations directly to the tribunal not through HMRC. We acknowledge that such changes are not consistent with other powers legislation, but frankly, we objected to those provisions as well. We are concerned that there could be a conflict between the wording of paragraph 13 and the Tribunal rules as described by Simon Norris. How is it the legislation can say the representations are made to HMRC when Mr Norris' letter (correctly) refers to the Tribunal issuing a notice of hearing? The document-holder will inevitably respond to the Tribunal in this case, surely?
17. Paragraph 13(3) - Should be subject to paragraph 20, as otherwise the two paragraphs appear to contradict one another. Also and slightly strangely, although paragraph 13 is entitled "approval by the tribunal" there is nothing in paragraph 13 which actually deals with the act of approval, but it appears included, by implication, from paragraph 7.

## **Paragraph 20**

18. This is an extremely important paragraph for lawyers, accountants and all professionals. The concept of "unduly onerous" is not fair or appropriate in this context. HMRC can ask for all documents in any way "relevant" over a period of over 20 years. A document-holder can only object if the obligation to produce is unduly onerous. The document-holder should be able to object not simply on these grounds, but if the production requirements are "unreasonable in all the circumstances" as regards documents described in the notice. If this is not the case the document-holder has no protection against what might be a business threatening burden. It is understood HMRC will use the provision as a "bargaining chip" in negotiations; but this should not be the case as regards the document-holder unless it is implicated. There is a real danger that the powers envisaged will end up being poorly targeted, so that HMRC will not see "how far the rot has spread" but will receive a very large amount of material, a significant proportion of which is useless. The only effect will be that clients'

tax affairs will have been disclosed unnecessarily and disrupted as a result. A document-holder should be able to make representations that the requirements as regards all or some of the documents held are unreasonable. A tax agent should also be able to appeal against a notice on the grounds that it is unreasonable in all the circumstances.

### **Paragraph 53**

19. Why is it that Part 6 of schedule 13 FA 2003 is to be retained? This seems unlike other powers – are the powers elsewhere enacted following the recommendation of the PDS Review not sufficient?

### **Contact details:**

If you have any questions concerning these representations or would like to discuss anything contained in them, please contact the Mr Richard Stratton (tel: 020 7295 3219, e-mail: [richard.stratton@traverssmith.com](mailto:richard.stratton@traverssmith.com))

16 September 2011