Introduction

1. This response has been prepared by the Tax Law Committee of The Law Society of England and Wales ("the Society"). The Society is the professional body for the solicitors' profession in England and Wales, representing over 159,000 registered legal practitioners. The Society represents the profession to Parliament, the Government and regulatory bodies and has a public interest in the reform of the law.

Preliminary Comments

2. While we have some sympathy with the concern expressed in paragraph 1.1 of the Consultation Document, one of the reasons that individual items forming part of an enquiry cannot be resolved does, on occasion, seem to be a shortage of HMRC resources to deal with the other outstanding issues. In addition, there can be a reluctance on the part of HMRC to engage where HMRC is of the opinion that another case being taken through the Courts will be a “lead case” or otherwise decisive of the issue or issues in the enquiry that are not resolved. Indeed HMRC acknowledge this in paragraph 3.9 of the Consultation Document that because they hope to rely on a decision in another taxpayer’s case HMRC do not want to issue a closure notice in respect of all enquiries into the subject taxpayer’s affairs. It is for that reason we object to the proposals in their current form (but make constructive suggestions below – see our response to Q1 below).

3. We would have to acknowledge that some taxpayer’s advisers may use delay as a tactical weapon, although HMRC have considerable powers to require delivery of information, if it is not the inherent complexity of the matter under enquiry or the volume of documents that is being sought that delays a response.

4. We note, too, that it was only one representative body that, in paragraph 2.6 of the Consultation Document referred to adapting section 28ZA in the context of the consultation on “Tackling Marketed Tax Avoidance”. We might have been more sympathetic to the proposals if they were subject to a formal requirement that they were limited to arrangements where a notification had required to be made under DOTAS or in respect of which, a potentially slightly narrower set, HMRC had issued a follower notice or accelerated payment notice (APN) in respect of the type of matter in question. However that of itself raises the issue as whether HMRC need additional powers, at this stage, until the consequences of last year’s legislation (introducing APNs and follower notices) have worked themselves out, as HMRC acknowledge in paragraph 3.8. So, partly for this reason, in their current form we do not think they should be introduced.

5. Finally, we were puzzled by the reference in paragraph 3.5 of the current Consultation Document to “where a contract settlement is inappropriate...”. We would like to understand the circumstances in which HMRC felt that the inability to obtain a contract settlement meant that it was appropriate to change the legislation.

The Current Problem And Constraints
Q1. We would welcome views on the problem as expressed in this document.

While HMRC has identified an issue which concerns it, the suggested response does not address why delays occur, or other steps which could be taken to address the concern. Accordingly, we would recommend instead on an application to the Tribunal for a direction that a Closure Notice is issued, the Tribunal will give the direction unless they are satisfied there are reasonable grounds for not issuing it within a specified period. This would be applicable to both taxpayers and HMRC, but it would be subject to the overriding caveat that the Tribunal could not issue a direction if the aspect of the enquiry in respect of which the Closure Notice is being sought would have an impact on other areas of the enquiry that HMRC are conducting.

Provided, therefore, each aspect is effectively “ring fenced” as having no impact on any other aspect of an enquiry, we see no reason why a Closure Notice shouldn’t be issued in respect of that aspect. In short, the Society would be in favour of a proposal that enables either HMRC or the taxpayer to apply to a Tribunal for a direction that a Closure Notice is issued within a specified period, in respect of aspects of an enquiry, rather than (as it stands at the moment) in respect of the entire enquiry.

We see an advantage to HMRC in making the process even handed, not least because it might enable HMRC to resist on-going challenge to legislation introduced in FA 2014. The Society (and other commentators) have always expressed concern that once payment has been made under an APN, there is no incentive for HMRC to prosecute an enquiry with any enthusiasm. This means that if a taxpayer does want to challenge the technical basis of a scheme, he cannot do so until HMRC issue a Closure Notice. So a taxpayer would want to force HMRC to issue a Closure Notice by going to a Tribunal.

In respect of SDLT returns, for example, that is going to be relatively straightforward since the enquiry is going to be into a return in respect of which there is probably only a single issue.

For corporation tax/income tax/partnership returns, the position is going to be a great deal more complicated.

So if HMRC issue an APN in respect of one aspect of an individual partner’s affairs, and the individual pays it, then HMRC may say they cannot issue a closure notice in respect of that return, since there are other areas, over and above those in respect of which the APN is served, that they have insufficient information about to justify issuing a Closure Notice.

So a taxpayer in those circumstances, again subject to the ring fencing criterion we have suggested above, should be able to apply for a Closure Notice in respect of that aspect of the enquiry which has generated the APN.

So we would see this as a positive step forward for HMRC (in respect of reducing the likelihood of success of challenge to the APN legislation) and taxpayers provided that the legislation contains the ring fencing safeguard mentioned above.
The Proposal And Safeguards For The Taxpayer

6. Our first concern arises in relation to paragraph 4.1 which indicates that tax found to be due by the Tribunal (in respect of the matter that had been referred to the Tribunal) would become payable. However, it might be that one of the other matters under enquiry could have given rise to losses capable of reducing or eradicating an amount of tax due.

7. It would seem inappropriate in these circumstances for the taxpayer to be required to hand over tax. That might suggest that these powers could only be used to accelerate payment of tax if there were no other outstanding issues for the current or preceding years that were open which were capable of providing losses to reduce or eradicate the tax that would otherwise be due following a resolution in HMRC’s favour of the particular topic referred. Hence our suggested caveat on the alternative proposal in respect of Q1 (set out in our response to Q1 above).

8. In relation to paragraph 4.2 we wonder whether it should be a 60 day rather than a 30 day appeal, particularly if the point suggested in paragraph 6 above was not reflected in the legislation. This is because it would be very important for the Tribunal to be fully aware of the circumstances to perform a balancing act (between HMRC’s desire to collect the tax versus the taxpayer’s concern and other features of their circumstances) so as to judge whether a “Tribunal Referral Closure Notice” should be granted.

Q2. Do you agree with the proposed change to the tax enquiry process?

We are not in agreement with the proposed changes to the tax enquiry process for the reasons set out above. In particular were, contrary to our advice, the legislation to be changed to permit the Tribunal Referral Closure Notice procedure to be adopted and HMRC were to be successful at the first hearing, but a taxpayer was successful in appealing to the Upper-Tier or beyond, we would expect HMRC not to be entitled to use any powers they might otherwise have following the successful appeal against a lower Tier decision to retain the tax found, at that stage, not to be due to HMRC.

In our view, subject to the caveat set out in our response to Q1 above about “ring fencing”, all that is needed are provisions along the lines of those found, for example, in Section 28A(6) TMA (which provisions are replicated throughout other aspects of the tax legislation).

Q3. Do you have any suggestions concerning the terminology of the new notice?

At this stage, the terminology is irrelevant: it is whether the process is needed and if so what process should be adopted.

Q4. Do you have any suggestions for how the proposed changes might be adapted to those limited cases where the tax treatment of a particular issue is no longer in dispute?

We were not able to fathom what HMRC had in mind from this question.
Q5. **Do you agree with the proposed amendment to the joint referral process?**

For the reasons set out above in paragraphs 4 and 6 we think that the proposed amendments would need to be appropriately limited.

Q6. **Should any other taxes be included in the scope of the proposal?**

It is not clear to us what HMRC would regard as “significant” in relation to paragraph 4.7. We would expect this to be limited both by materiality in terms of absolute quantum – e.g. if the tax in question exceeded £50,000 for an individual and in relation to corporate bodies a percentage of turnover, to reflect significance in relation to the business or group as a whole.

As indicated above, we think it needs to be limited to arrangements where anti-avoidance procedure is engaged or otherwise DOTAS is in point if the “one-sided” proposal (where only HMRC can seek a partial closure notice) is adopted. Were the proposal to be “even handed” i.e. either taxpayer or HMRC have the power to request a partial closure notice we could see it having wider application, e.g. extending to SDLT.

Q7. **Do you agree with the proposed governance safeguards?**

We think it is important that the safeguards built into legislation rather than operationally within HMRC. We would only be prepared to consider administrative guidance if HMRC is prepared to set out detailed and public guidance (as to the materials taken into account in deciding when to issue such notices) which have been signed off by the Tax Assurance Commissioner, so that a taxpayer would be able to check whether those procedures have been followed and, in the light of recent cases on “selective briefing”, applied even handedly across taxpayers (irrespective of the identity of advisers and promoters with whom they may have dealt).

Q8. **We would welcome views on any additional safeguards to constrain the use of this proposal.**

As will be apparent, we believe that the proposals, if they are to be introduced at all, require radical revision. The form we suggest would be hugely to the benefit of HMRC as:

a) it would enable HMRC to use legislation already enacted to accelerate payments from “no hope” appellants or where an isolated aspect of a taxpayers’ affairs with no “knock on consequences” on other aspects could be addressed; and

b) equally importantly enable taxpayers confident in aspects of their affairs to achieve rapid resolution.

This would go some way to correcting the perception that HMRC is seeking to restrict taxpayers’ rights to the courts where taxpayers wish to achieve early resolution of their tax affairs.
Q9. Do you agree with the assessment of impacts?

We consider it premature to comment on the assessment of likely impact until the proposals have been clarified.

Contact Information

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