TAX ENQUIRIES: CLOSURE RULES

Response by the Association of Taxation Technicians

1 Introduction

1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the consultation document Tax Enquiries; Closure Rules (the Consultation) that was published by HMRC on 18 December 2015.

1.2 We very much welcome the fact that the Consultation is taking place during Stage 1 of the process. We also appreciate the willingness of HMRC to discuss the proposals as demonstrated by the very useful meeting which we attended on 17 February together with the Chartered Institute of Taxation (CIOT).

1.3 We respond in section 3 below to the specific Consultation questions. Before doing so, we comment in section 2 below on a number of general matters.

1.4 References in this response that are prefaced by the letter ‘C’ are to paragraphs in the Consultation itself. All other references are internal cross-references unless otherwise stated.

2 General matters

2.1 This Consultation has important implications for taxpayers, tax agents and HMRC. It concerns the inter-relationships between HMRC enquiries and litigation and between the agreement of the tax treatment of issues and the payment date for any resulting liability. The proposals could significantly change the manner in which HMRC enquiries are conducted and increase the role of litigation in the resolution of HMRC enquiries. All these features make it imperative that the proposals are carefully and thoroughly thought through.

2.2 We note from Chapter 7 of the Consultation that there will be subsequent consultation on a specific proposal for reform. We very much hope that there will also be an opportunity for consultation at Stage 2 (determining the best option). We commend the provision adopted in some recent HMRC consultations of workshop meetings. These can provide the opportunity for greater understanding of differing positions and the open exploration of ideas in a positive environment.
2.3 The Consultation does not comment significantly on the costs that a sole referral might impose on the parties. If the case involved a significant amount of tax, the costs might be proportionate to the clarification provided by the Tribunal’s decision. If, however, the case involved issues that were ‘novel, complex or had a wider impact’ (but not a significant amount of tax or avoidance), the referral route could impose disproportionate costs and potentially result in a denial of justice if the taxpayer could not afford to be represented at the Tribunal.

3 Response to the Consultation Questions

Our comments in this section 3 follow the numbering of the Consultation questions so that our 3.1 is in answer to question 1 and so on.

3.1 Question One

We would welcome views on the problem as expressed in this document.

3.1.1 The problems and constraints encountered by HMRC are identified in Chapter 3 of the Consultation. In essence, they can be summarised as follows:

A. Unless the parties agree to a joint application to the Tribunal, no aspect of an enquiry can be litigated until closure of the enquiry.

B. No aspect of an enquiry can be finalised unless and until every aspect of the enquiry can be closed.

C. Even where there is a joint application to the Tribunal and a conclusive decision is reached, formal effect cannot be given to that decision until the closure of the enquiry.

3.1.2 The Consultation identifies the consequences for HMRC of the three key features as follows:

3.1.2.1 HMRC cannot take any aspect of an ongoing enquiry to the Tribunal without the agreement of the taxpayer;

3.1.2.2 An unresolved long-running issue can prevent final resolution of a simpler issue with the potential for open enquiries in respect of the same taxpayer covering multiple years and numerous issues;

3.1.2.3 Unless the parties agree to an interim contractual settlement (and even if the Tribunal has made a decision following a joint application), the tax liability position is not finalised until the closure of an enquiry;

3.1.2.4 Promoters of tax avoidance schemes can use the rules to frustrate the resolution of issues;
3.1.2.5. Taxpayers can use the rules to delay the resolution of issues and thereby delay the payment of tax;

3.1.2.6. The rules can prevent the most appropriate case from being selected as a lead case.

3.1.3 The comparable consequences of the three key features for taxpayers are not identified in the Consultation. We identify them as follows:

3.1.3.1. The taxpayer cannot take any aspect of an ongoing enquiry to the Tribunal without the agreement of HMRC;

3.1.3.2. An unresolved long-running issue can prevent final resolution of a simpler issue with the potential for open enquiries in respect of the same taxpayer covering multiple years and numerous issues;

3.1.3.3. A tax repayment payable in accordance with a position agreed during an enquiry (or determined following a joint application to the Tribunal) is not paid until the closure of the enquiry;

3.1.3.4. HMRC can use the rules to optimise their negotiating position (for example by not formally agreeing a critical point until the end of the enquiry);

3.1.3.5. The rules can prevent a taxpayer from having their own case considered by the Tribunal even where (in their opinion) it can be distinguished from a lead case.

3.1.4 Without seeking to comment on which party is more greatly disadvantaged by the existing rules, we observe that the existing rules have the potential to be inconvenient for either party or indeed both parties. Our approach in this response is accordingly to consider what changes could be made that meet the objectives of the Consultation proposals without unnecessarily upsetting what might usefully be described as the balance of inconvenience imposed by the existing statutory provisions.

3.2 Question Two

Do you agree with the proposed changes to the tax enquiry process?

3.2.1 No. Not as they stand. They appear to be lop-sided. We consider, however, that the benefits which HMRC believe would flow from the proposed changes could with relatively little adaptation be delivered in a manner which left the legislative framework much more even-handed.

3.2.2 We can see the attraction for HMRC of being able to refer one or more areas of dispute within a wider tax enquiry to the Tribunal with a view to achieving early resolution of those aspects. Similarly, we can see the obvious attraction for HMRC in any tax found to be due by the Tribunal (in respect of those aspects) becoming payable at that stage whilst other aspects of the tax enquiry would remain open. (In passing, we note that detailed consideration would need to be given to the quantification of the tax that became payable as a result of the Tribunal’s decision.)

3.2.3 We can, however, see that there are also situations where similar early resolution of one or more areas of dispute by the Tribunal would be of attraction to the taxpayer. Examples might include questions such as whether:
• A taxpayer’s activities amounted to the conducting of a trade;
• A particular relief or allowance was available;
• A particular receipt or item of expenditure was taxable/allowable.

3.2.4 Whilst the benefit of early resolution of the type of point that HMRC might wish to take to the Tribunal might be expected to accrue primarily to the Exchequer, we think that early resolution of the type of point that a taxpayer might wish to take to Tribunal could also benefit HMRC. By narrowing down the number of open issues in an enquiry, the number of alternative lines of argument by the parties would necessarily be reduced and efforts could be focused on resolving

3.2.5 We accordingly think that the legislation should be designed to permit either HMRC or the taxpayer to apply to the Tribunal under the sole referral route in the event of being unable to obtain the other’s agreement to a joint referral.

3.3 Question Three

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

3.3.1 No.

3.4 Question Four

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?

3.4.1 We suggest that in conjunction with the sole referral proposal, consideration could be given to introducing a provision (modelled on the lines of s.54 TMA 1970) that enabled the like consequences to flow from an agreement reached between taxpayer and HMRC as would have ensued from the Tribunal’s decision following its hearing of a referral application (whether sole or joint).

3.4.2 It is appropriate to note here that the provision of the suggested s.54 type facility for agreement between the parties (following a referral application but prior to a Tribunal hearing) could enable both parties to reduce or avoid costs.

3.5 Question Five

Do you agree with the proposed amendment to the joint referral process?

3.5.1 We can see the logic of ensuring that the same consequences would flow from a Tribunal decision whether that had been made following a sole or a joint referral. Consistent with our recommendation (in 3.2.5 above) that the sole referral facility should be equally available to taxpayer and HMRC, it follows that a taxpayer should be able to issue a Tribunal referral closure notice (or something with the same effect). That would apply whether the referral was joint or sole. (If only HMRC could issue a Tribunal referral closure notice, it could mean that a taxpayer would be unable to secure the tax repayment referred to in C4.5.)
3.6 Question Six

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

3.6.1 No. At least initially, it is wise to limit the proposal to the taxes referred to in C4.8.

3.6.2 We note the indication in C4.7 that the proposed power would be targeted ‘narrowly at cases or issues involving significant tax under consideration or involving issues which are novel, complex, or have a wider impact, including certain of those which can include tax avoidance’ and that ‘the power would not apply to the majority of tax enquiries and therefore would be limited in its use’. If that limitation had been included in order to allay concern about the imbalance in access to litigation that was being proposed, it is possible that the limitation could be disposed of under our recommendation of equal entitlement to use the sole referral facility.

3.6.3 If the narrow targeting anticipated in C4.7 is seen as a required feature of the proposal (with or without equal entitlement to the sole referral facility), it will be important to provide appropriate definition in the legislation of ‘involving issues which are novel, complex, or have a wider impact’. (Without proper definition, the phrase would give very substantial discretion to any party wishing to make a sole referral application and could potentially lead to preliminary arguments at the Tribunal as to whether the issues being referred fell within the definition.)

3.7 Question Seven

Do you agree with the proposed governance safeguards?

3.7.1 We welcome the indication in C4.9 that HMRC would offer the taxpayer a joint referral in the first instance. (We think that it would be mutually beneficial to both parties for joint referrals to be used in preference to sole referrals). We think that it should be a statutory requirement for a sole referral application (whether by HMRC or the taxpayer) that the other party had been offered and declined a joint referral. Apart from anything else, such a step in the process could ensure that the other party gave serious consideration to the issues. We would certainly expect it to result in more referrals being made on a joint basis.

3.7.2 We think that the operational arrangements referred to in C4.10 should be within a statutory framework.

3.7.3 It is unclear from the Consultation what grounds of appeal would be available against a Tribunal referral notice. By reference to the proposals included in the Consultation, we think that the grounds would need to include:

- The appealing party had not been invited by the other party to join in making a joint referral;
- The issue(s) being referred did not fall within the intended target range of the legislation (assuming that such a limitation is maintained – see 3.6.2 above).

We refer in section 3.8 below to an additional essential safeguard.
3.8 **Question Eight**

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

3.8.1 To prevent the sole referral facility being used in an arbitrary or oppressive manner by the party issuing it (the Issuing Party), we consider that it would be essential for the other party (the Receiving Party) to have the right to apply to the Tribunal to have other relevant issues considered at the same time as those identified in the sole referral. We think this might work along the following lines:

3.8.1.1. Upon receipt of a *Tribunal referral notice*, the Receiving Party would be entitled to apply to the Tribunal for specified issues to be joined to the sole referral;

3.8.1.2. If the Issuing Party accepted the addition of the specified issues, those issues would be considered by the Tribunal together with those identified by the Issuing Party as part of the hearing of substantive issues;

3.8.1.3. If the Issuing Party objected to the inclusion of any of the Receiving Party’s issues, the Tribunal would as a preliminary matter consider whether those issues were relevant to the proper consideration of the issues referred by the Issuing Party. If the Tribunal considered them relevant, the issues would be heard alongside the Issuing Party’s issues. If the Tribunal did not consider them relevant, the substantive case would be confined to the Issuing Party’s issues.

3.8.2 We see the need for such a mechanism in order to prevent the Issuing Party from selectively narrowing the Tribunal’s entitlement to consider matters to the detriment of the Receiving Party. As a simple (if slightly absurd) example, the mechanism would prevent HMRC from referring issues relevant to the computation of a capital gain to the Tribunal without also recognising that there were issues relating to the calculation of a capital loss which required consideration by the Tribunal.

3.8.3 In an Appendix to this response, we provide an illustration of how our suggestion (in this section 3.8) and our recommendation (in section 3.4 above) for a section 54 type facility would work. We offer this in place of the proposed model set out in C4.2.

3.8.4 If the current proposals as set out in the Consultation were revised so as to enable a party to apply to the Tribunal for the enquiry in relation to a specific issue or issues to be closed (as distinct from applying for the issue(s) to be considered by the Tribunal), we think that the same principles as adopted in the Appendix to this response should apply. Thus:

- the opportunity to apply to the Tribunal for closure of specific aspects should be available to both parties;
- the Other Party should be entitled to apply to the Tribunal for other aspects to be closed; and
- there should be a section 54 type provision enabling the parties to achieve finality on the matter without the need for a hearing by the Tribunal.
3.9 **Question Nine**

*Do you agree with the assessment of impacts?*

3.9.1 The *Impact on business including Civil Society Organisations* section of the assessment indicates that:

‘There will only be an impact on a small number of businesses with complex high value tax affairs or who participate in avoidance schemes.’

That statement appears to be inconsistent with the indication in C4.7 that the powers could be used in cases ‘involving issues which are novel, complex, or have a wider impact’. It is perfectly possible that a matter could be novel, complex or capable of having a wider impact without it being high value or involving avoidance. In order to design any legislation appropriately, it is essential to identify the expected extent and focus of its use. We think there is currently a lack of clarity as to the intended application of the proposals. If only HMRC is entitled to make a sole referral, we would favour a narrow definition of the circumstances when it could be use. Conversely, if (as we recommend) either party is entitled to make a sole referral, we would see less requirement for a narrow definition

3.9.2 The *Operational impact* section of the assessment states:

‘There will also be an impact on the tribunal service. Given the intention not to use this power widely, these impacts are expected to be negligible.’

We are instinctively cautious about any indication that the intention is not to use any new power widely. It raises the alternative questions as to whether the potential use has been properly quantified and as to whether there is any real need for the legislation. As indicated elsewhere in this response, we think that a properly balanced amendment to the legislation permitting either party to make a sole referral to the Tribunal could assist significantly in the resolution of enquiries at the same time as delivering the benefits which the Consultation’s narrower proposals are intended to produce. That could, in our opinion, have a positive operational impact.

3.9.3 We are aware from our meeting with HMRC on 17 February of the department’s concern that amending the proposals to make them available symmetrically to both parties could open a floodgate of applications by taxpayers. We are very doubtful whether that concern is well founded. We say this for the following reasons:

- There is no evidence that HMRC is currently inundated with requests to make joint applications to the Tribunal under section 28ZA TMA 1970 on specific issues;
- Our recommendation that the Other Party (in this case HMRC) should be entitled to apply to the Tribunal for other issues to be joined would provide a mechanism to prevent issues being taken to the Tribunal on an inappropriately selective basis; and
- HMRC could apply to the Tribunal for ‘strike out’ if the proposed provision was being used frivolously or vexatiously.
4 Summary

The key points of this response are as follows:

4.1 The current legislation does not uniquely inconvenience HMRC.

4.2 The present lop-sidedness of the proposals should be addressed by making the sole referral facility available to both parties, thereby maintaining the legislation’s balance of inconvenience.

4.3 There is a compelling case to consider how the proposals might be improved by the creation of a s.54 type facility to enable finalisation of an issue without a Tribunal hearing.

4.4 Either party should be able to issue a Tribunal referral closure notice to give effect to a Tribunal decision.

4.5 Greater clarity is required as to the circumstances when the proposed provisions might be used.

4.6 A statutory condition for a sole referral should be that the other party had been offered but refused a joint referral.

4.7 Upon receipt of a Tribunal referral notice, the Other Party must be entitled to apply to the Tribunal for other relevant issues to be considered at the same time.

5 Summary and conclusions

5.1 We would be pleased to join in any discussion with HMRC in relation to the Consultation proposals. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Will Silsby, on 01905 612098 or at: wsilsby@att.org.uk.

Yours sincerely

Paul Hill
Chairman, ATT Technical Committee
6 Note

6.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has over 7,500 members and Fellows together with over 5,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.
APPENDIX: Suggested amendment to HMRC’s proposal
(This comprises an adaptation of the wording of section 4.2 of the Consultation)

4.2 It is envisaged that the enquiry process will work as it does currently up until the ‘joint referral’ to the Tribunal. The new process would work as follows:

1) If either party (ie HMRC or the taxpayer) does not wish to take advantage of mutual referral at that point:

   (a) The party wishing to refer the matter(s) (the ‘Referring Party’) would have the option to consider ‘sole referral’ to the Tribunal;
   
   (b) If the Referring Party was HMRC, the case worker would apply for senior official authorisation to use the power – (see para 4.10 below); [Please see note A below.]
   
   (c) Subject in the case of HMRC being the Referring Party to receipt of departmental authorisation, the Referring Party would issue a ‘Tribunal referral notice’ notifying the party who had not consented to a joint referral (the ‘Other Party’) of an application to the Tribunal for the matter(s) to be heard.
   
   (d) The Other Party would have 30 days to appeal against the notice (see para 4.11);
   
   (e) Upon receipt of a Tribunal referral notice, the Other Party would be entitled to apply to the Tribunal for specified matters to be joined to those identified by the Referring Party;
   
   (f) If the Referring Party accepted the addition of the matter(s) identified by the Other Party, those matters would be considered by the Tribunal together with those identified by the Referring Party as part of the hearing of substantive matters;
   
   (g) If the Referring Party objected to the inclusion of any of the Other Party’s matters, the Tribunal would as a preliminary point consider whether those matters were relevant to the proper consideration of the matters referred by the Referring Party. If the Tribunal considered them relevant, the matters would be heard alongside the Referring Party’s matters. If the Tribunal did not consider them relevant, the substantive case would be confined to the Referring Party’s matters.
   
   (h) Tribunal hears aspect(s) of cases and comes to a judgment;
   
   (i) Both the taxpayer and HMRC would enjoy the normal rights of appeal against the First Tier Tribunal’s decision, namely an appeal on a point of law;
   
   (j) Following the final outcome of the litigation and once rights of appeal to higher courts have expired or been exhausted, either party could issue a ‘Tribunal referral closure notice’. It is envisaged that the same consequences for payment or repayment of tax would flow from that as there would from a full closure notice.
   
   (k) If following the issue of a Tribunal Referral Notice and before a hearing of matters by the Tribunal, the parties reached agreement on the relevant matters, the like consequences would follow as would have ensued if the Tribunal had determined the matters in the manner agreed between the parties. However (in a similar manner to s.54(2) TMA 1970), either party would have 30 days in which to repudiate or resile from the agreement. [Please see note B below.]

2) If the parties had made a joint referral, they would similarly be able to reach agreement so that the matter could be resolved without the need for a hearing of the matter(s) by the Tribunal.

This would allow either or both parties to seek swifter resolution of certain aspects of an enquiry, if necessary through earlier litigation.
Notes:

A) We have left the HMRC authorisation provision unamended but we note that it might not be required in its existing form if the sole referral facility was equally available to both parties.

B) We would not envisage HMRC exercising a right to resile from a section 54 type agreement but have included it consistent with our theme of symmetrical rights under the proposal.