



HM Revenue  
& Customs

# Tax Enquiries: Closure Rules

## **Consultation document**

Publication date: 18 December 2014

Closing date for comments: 12 March 2015

<b>Subject of this consultation:</b>	This consultation is about a proposal to enable HM Revenue and Customs (HMRC) to refer matters to the Tribunal with a view to achieving early resolution of one or more aspects of an enquiry into a tax return. HMRC would target the power at cases or issues involving significant tax under consideration or involving issues which are novel, complex, or have a wider impact, which can include tax avoidance. The Government proposes that HMRC would expect earlier payment of tax in respect of the particular aspects successfully addressed by HMRC.
<b>Scope of this consultation:</b>	The Government seeks views on this proposal to change the process for enquiries into tax returns to reflect the complex nature of contemporary tax affairs and to modernise the administration of the tax system by increasing flexibility. This consultation proposes changes to the Self-Assessment enquiry framework in respect of Income Tax, including National Insurance Contributions (NICs) Class 2 and 4 in certain circumstances, Capital Gains Tax and Corporation Tax.
<b>Who should read this:</b>	We would like views from representative bodies, tax advisers, promoters, businesses and individuals plus other interested parties.
<b>Duration:</b>	This consultation runs from 18 December 2014 and ends 12 March 2015.
<b>Lead official:</b>	Angela Roach, HM Revenue & Customs.
<b>How to respond or enquire about this consultation:</b>	Written responses can be submitted to HM Revenue and Customs, Central Policy, Tax Administration Policy, 1C/06, 100 Parliament Street, London SW1A 2BQ.  Email: <a href="mailto:TAP@hmrc.gsi.gov.uk">TAP@hmrc.gsi.gov.uk</a>
<b>Additional ways to be involved:</b>	If you are interested in attending a meeting to discuss send an email to <a href="mailto:TAP@hmrc.gsi.gov.uk">TAP@hmrc.gsi.gov.uk</a>
<b>After the consultation:</b>	Responses will be taken into account in developing the proposal and a response document will be published. We also intend to consult on any subsequent draft legislation.
<b>Getting to this stage:</b>	This is the first consultation on this issue.

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**On request this document can be produced in Welsh and alternate formats including large print, audio and Braille formats**

# 1. Introduction

- 1.1. Where taxpayers have complex tax affairs, the existing tax enquiry processes covering Income Tax (IT), including National Insurance Contributions (NICs) Class 2 and 4 in certain circumstances, Capital Gains Tax (CGT) and Corporation Tax (CT) can be inflexible and enquiries can take a long time to settle. The enquiry rules currently prevent the formal resolution of one issue without closing the whole enquiry into the return unless both parties agree to refer an issue to the Tribunal.
- 1.2. This consultation examines the current enquiry process and the restrictions it puts on HMRC in resolving one or more aspects of an enquiry. It seeks views on a proposal to improve the tax enquiry process, by enabling HMRC to achieve early resolution and closure of one or more aspects of a tax enquiry, where it is not appropriate to close the whole tax enquiry. This document examines the types of cases the proposal would target and proposes potential safeguards surrounding use of the new power. The proposal also includes changes to rules governing payment, to allow earlier payment to be achieved in respect of the aspects of the enquiry successfully concluded by HMRC under the proposed power.
- 1.3. This government has taken significant strides to make the UK's tax system one of the most modern and competitive in the world. As part of its ongoing modernisation of the administration of the tax regime, the Government now proposes to modernise the enquiry process, to make it more flexible, in response to the complex nature of contemporary tax affairs. This complexity had not been fully foreseen at the time that Self Assessment for both IT and CT and current legislation on the enquiry process were introduced.

## 2. Background

- 2.1. The Self-Assessment tax system was introduced for individuals and partnerships in 1996 and is used by the self-employed and those with more complex tax affairs. Corporation Tax Self-Assessment was introduced for companies in 1999. Under both Self-Assessment frameworks, tax returns submitted to HMRC may be subject to an enquiry, which begins when HMRC issues a written notice to the taxpayer. As a matter of practice that notice will set out the areas of the return HMRC intends to look at, if not the whole of the return.
- 2.2. An HMRC enquiry will review and if necessary challenge the accuracy of the taxpayer's return. A particular tax return, or subsequent amendment to that return, may only be the subject of one notice of enquiry. Once the enquiry time limits have passed, or an enquiry has been concluded, a taxpayer's return and self-assessed tax bill can only be challenged if a "discovery" is made of a potential loss of tax. This provides the taxpayer with a degree of certainty after the period for making an enquiry has elapsed. It also allows HMRC to plan an efficient annual cycle of work. Annex A describes the current legislation relating to the ability to close an enquiry.
- 2.3. HMRC's aim is to seek a collaborative approach in achieving a resolution to establish the correct tax liability. Where areas of tax dispute arise, HMRC's Litigation & Settlement Strategy (LSS) sets out HMRC's policy on how they should be handled and the basis on which they should be resolved. The LSS applies to all tax regimes where cases are worked under civil processes. The vast majority of tax disputes are resolved by agreement, following discussions between HMRC and the taxpayer. However some areas of dispute cannot be resolved by agreement and proceed towards litigation. When an enquiry involves a number of areas of dispute, HMRC will reach decision points in relation to those disputes at different times depending on how long it takes to establish the facts. This can have implications for the length of time it takes to resolve a multi-dispute enquiry, because under current rules HMRC can only issue a closure notice once it has reached a conclusion in respect of all the areas of dispute within an enquiry.
- 2.4. In long-running enquiries many taxpayers will make a payment on account or enter into contract settlements in respect of the amount of all the relevant tax (and NIC), interest and penalties agreed as a result of the enquiry to date. This approach is sometimes used to settle routine aspects in enquiries with avoidance issues which often take many years to resolve, particularly if the substantive issue ends up being litigated. In some enquiries taxpayers refuse to co-operate fully with HMRC, which means that HMRC must rely entirely upon formal powers to take cases to tribunal to help them resolve certain issues.

- 2.5. At present only a single closure notice may be issued, when all aspects under enquiry are in a position to be included. The amount of time a particular aspect takes to resolve can vary widely, for example, settlement of a simpler, more mainstream issue which affects only the taxpayer can usually proceed much more quickly than an enquiry involving features which are novel or have a wider impact. The current enquiry framework can therefore be inflexible and constrain HMRC's ability to settle areas of dispute, particularly in complex cases or those involving high-risk or high-value issues. Such enquiries can take a long time to settle and increase uncertainty for the taxpayer whilst the enquiry is open.
- 2.6. This consultation reflects some suggestions made in response to the "Tackling marketed tax avoidance" consultation<sup>1</sup>. For example one representative body suggested *"adapting the 28ZA<sup>2</sup> of the Taxes Management Act 1970 provision which could provide an effective route for achieving resolution without either denying the taxpayer the fundamental right of appeal or imposing further investigative work upon HMRC"*.
- 2.7. Chapter 3 further explores the constraints of the current legislation relating to closing an enquiry.

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<sup>1</sup> Published 25 January 2014

<sup>2</sup> Section 28ZA of the Taxes Management Act 1970, which applies to Income Tax Self-Assessment, allows HMRC and the taxpayer to jointly agree to refer an issue, or multiple issues, to the tribunal whilst the enquiry is in progress. The tribunal's subsequent determination is binding on all parties, subject to the right of appeal against the tribunal's decision on a point of law. A reciprocal provision, applicable to Corporation Tax Self-Assessment, is contained within Paragraph 31A of Schedule 18 to the Finance Act 1998.

## 3. The current problems and constraints

- 3.1. As mentioned in Chapter 2 the enquiry framework can be inflexible, leading to complex tax enquiries taking a long time to settle. The enquiry rules currently prevent HMRC from taking individual aspects of an enquiry into a particular tax return to the Tribunal, unless there is mutual agreement with the taxpayer to refer that issue to the Tribunal.
- 3.2. Part of the problem lies with complex cases where there is significant tax under consideration or which involve issues which are novel or have wider impacts. This can mean a long-running issue can prevent final resolution of a simpler issue. International issues involving transfer pricing or double taxation relief are examples of such long-running issues. These can involve handling issues arising from the read-across to other taxpayers, such as ongoing European Group Litigation Order issues<sup>3</sup>. HMRC will always work collaboratively with agents and taxpayers to work through such matters, but it can take a number of years to resolve such complex issues, during which time HMRC is usually unable to collect the tax that may be due. In one large and complex case, one single element of the enquiry, which could be resolved in isolation, amounted to over £150 million of tax at risk. Annex C provides further examples of complex and long running cases.
- 3.3. HMRC's High Net Worth Unit deals with the tax affairs of approximately 6,000 of the UK's wealthiest individuals, who each have a net worth exceeding £20 million. The issues faced by the unit are invariably complex, some of which can include aspects of tax avoidance. There have been examples where there have been several enquiries in respect of one taxpayer, across multiple years running concurrently, involving 65 open issues. This demonstrates the complex and long running nature of some enquiries.
- 3.4. HMRC will always attempt to resolve enquiries collaboratively, with the taxpayer's agreement, in accordance with the Litigation and Settlement Strategy. In cases with a number of issues it is sometimes possible to reach agreement on some, but not all, aspects of the case. In these situations HMRC and the taxpayer may consider entering into a contract settlement covering the liabilities in respect of the areas of agreement, narrowing the scope of the continuing enquiry.

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<sup>3</sup> Under rules 5 and 18 of The Tribunal Procedure Rules 2009 the tribunal is able to direct that proceedings raising common issues are heard together. This is similar to the High Court's power to grant a Group Litigation Order, and is typically exercised where there are a large number of related cases and a single consolidated hearing is not appropriate: the rules provide for one or more cases to be treated as lead cases with other follower cases stood behind them. However, in order for HMRC and the taxpayer to be legally bound by any subsequent ruling the case must be within the tribunal's jurisdiction, either by way of a mutually agreed referral or an appeal against a closure notice.

- 3.5 Where a contract settlement is inappropriate, or where multiple issues remain and HMRC is not in a position to issue a closure notice, HMRC would consider a joint referral to the tribunal, with HMRC and the taxpayer agreeing the issues to be covered by the referral. This process requires mutual consent of the parties, and can in some cases lead to the taxpayer adopting a tactic of refusing to progress matters in order to ensure the dispute remains open, and tax remains unpaid, for as long as possible. Where this is the case HMRC is restricted in its ability to resolve the area of dispute and ensure that the correct tax liability reaches the public purse. This demonstrates the need for the proposal explained further in Chapter 4.
- 3.6 The promoters of tax avoidance schemes can also build specific features into their schemes which increase the challenges around settling single aspects of a complex enquiry. For example, there can be "tax contested agreements", which prevent the taxpayer agreeing to joint referral to the Tribunal. Other examples include contractual terms preventing individual scheme users from settling with HMRC.
- 3.7 Taxpayers may adopt a tactic of refusing to agree referral to a Tribunal for a variety of reasons: some will withhold agreement to avoid the costs (and publicity) of Tribunal, and to defer a decision that may go against them. In other cases, the main motivation may be to delay an appeal to push potential Tribunal hearing dates back. For example, one scheme user disputed HMRC's right to use a formal power to obtain documents in order to progress the enquiry. This took years to resolve in the courts in HMRC's favour. Once HMRC obtained the documents in question, the scheme user maintained that the scheme 'worked', thus requiring further enquiry in order to resolve this dispute. In the meantime no closure could be issued. Had a referral to the tribunal by HMRC been possible in this case, both production of the disputed material and the outcome of the scheme could have been considered by the same tribunals and courts. However by deferring progress of the enquiry through tactical dispute of HMRC's information powers, the scheme user was able to defer the enquiry into the scheme and, ultimately, payment of tax.
- 3.8 To some extent, the Accelerated Payment regime, introduced by the Government in Finance Act 2014, removes the previous cash-flow advantage by requiring payment up front in relation to certain disputes involving tax avoidance. However, the legislation applies only where the avoidance scheme is notifiable under the Disclosure of Tax Avoidance Schemes (DOTAS) regime; is subject to the General Anti-Abuse Rule (GAAR) or has been issued with a Follower Notice. So there remains a cash-flow advantage in other cases and, without mutual agreement to refer to the Tribunal, HMRC is required to close the whole enquiry in order to be able to litigate one aspect. This also results in tax due to the Exchequer remaining unpaid for long periods of time. Therefore there is a clear need to resolve areas of dispute efficiently and expediently.

- 3.9 The current framework presents further challenges when trying to progress enquiry cases to litigation. In order to resolve an issue through litigation, HMRC will ideally select a 'representative case' based upon the quality of evidence that it contains, as this enables the Courts to make a more principled and reasoned decision. However, current enquiry rules often mean that the 'representative case' is selected because it is a stand-alone example of the point at issue. As a result, multi-aspect enquiries (and in particular multi-scheme users) reap an unexpected benefit in being less likely to be selected for litigation than a taxpayer with straightforward affairs. Therefore, being able to settle any single issue and to take the case concerned as a 'lead case' could have a significant impact on a taxpayer's view of the risks involved in undertaking multi-scheme avoidance.
- 3.10 Similarly, in trying to secure final rulings on cases spanning multiple issues or on mass-marketed avoidance schemes, HMRC may wish to apply the new follower notices legislation<sup>[1]</sup>. This could, for example, involve litigating the case which is a sufficiently evidenced and representative example and to seek to apply the result to the other participants. There is a clear need to choose a case which is sufficiently clear and representative so as to reduce any doubt that the judgment applies to other scheme users too.
- 3.11 The following example, demonstrates the types of cases at which the proposed power would be used:
- HMRC's Tax Dispute Resolution Board considered the case of a Large Business taxpayer subject to enquiries which had been ongoing for over ten years, and raised a number of complex issues.
  - The taxpayer claimed capital allowances in respect of certain expenditure which it had incurred. HMRC disagreed that the expenditure qualified for capital allowances.
  - HMRC explored the issue and has quantified the substantial tax at risk. Although HMRC and the taxpayer have worked collaboratively to resolve the issue, the amounts involved and wider implications for the capital allowances regime meant it was likely to only be finally resolved by tribunal.
  - However, the enquiry also raised another important issue which also had significant implications for HMRC. This prevented HMRC from issuing a closure notice to enable the customer to appeal to the tribunal.
  - Being able to refer, and close, the capital allowances issue and collect any tax which is found to be due as a result would greatly improve the efficiency of the enquiry process.

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<sup>[1]</sup> The aim of the recent follower notice legislation is to tackle taxpayers using marketed tax avoidance schemes.

3.12 Example 2 (Annex C) demonstrates that the most determined of serial avoiders can achieve a significant cash flow advantage simply by creating complex interactions of a number of tax avoidance schemes. It highlights how the current rules can impede progress in HMRC's avoidance enquiries, handing an advantage to avoiders; and how the proposed new power could lead to an earlier Tribunal ruling on an avoidance scheme (and the earlier application of that ruling to other users of the same scheme).

**Q1: We would welcome views on the problem as expressed in this document.**

3.13 The proposal explained in Chapter 4 would give earlier certainty as HMRC could select appropriate cases and push them through to litigation more swiftly, resolving parts of the enquiry sooner. Early resolution of aspects of the enquiry would also help in resolving issues that go back many years, so improving the collection of the correct amount of tax, maximising revenue flows. It would allow for more efficient and effective case management by minimising those long running open issues.

## 4. The proposal & safeguards for the taxpayer

- 4.1. The Government proposes to enable HMRC 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. Any tax found to be due by the Tribunal in respect of those aspects would become payable, whilst other aspects of the tax enquiry would remain open.
- 4.2 It is envisaged that the enquiry process will work as it does currently up until the “joint referral” to the Tribunal. If the taxpayer does not wish to take advantage of mutual referral at that point:
- HMRC would have the option to consider “sole referral” to the Tribunal;
  - If HMRC decided to go to the Tribunal, the case worker would apply for senior official authorisation to use the power – (see para 4.10 below);
  - When the power was authorised a “Tribunal referral notice<sup>4</sup>” would be issued, that HMRC is making an application to the Tribunal for this aspect to be heard. The taxpayer would have 30 days to appeal against the notice (see para 4.11);
  - Tribunal hears aspect(s) of cases and comes to a judgment;
  - 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;
  - If HMRC were ultimately successful a “Tribunal referral closure notice<sup>5</sup>” would be issued, following the final outcome of the litigation, once rights of appeal to higher courts have expired or been exhausted. It is envisaged that the same consequences for payment of tax would flow from a “Tribunal referral closure notice” as there would be from a full closure notice.

This would allow HMRC to seek swifter resolution of certain aspects of an enquiry, if necessary through earlier litigation.

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<sup>4</sup> The terminology of the new notices could change pending responses to the consultation document.

<sup>5</sup> See Footnote 4.

- 4.3. In addition, HMRC does have experience of cases where there is no on-going dispute regarding the tax treatment of a specific issue, but that issue cannot be closed while others remain open and under discussion. In this way the taxpayer can gain an advantage by delaying payment. The changes proposed here would offer a remedy to this scenario - HMRC would apply to the Tribunal to close the issue, the tax treatment of which is no longer in dispute and the tax would become payable - but there may be more efficient routes to the same outcome.
- 4.4 Currently, when a tax enquiry is closed, the taxpayer's self-assessment is amended and any additional tax brought into charge (see Annex B). The closure of the enquiry is normally a pre-requisite of any amendment to the Self Assessment. HMRC does have the power to make "jeopardy" amendments during an enquiry, but these are subject to the specific conditions that there is likely to be a loss of tax to the Crown, for example because a company will become bankrupt or an individual will leave the country. A taxpayer may appeal a jeopardy amendment but the appeal cannot be brought before the tribunal until the enquiry is completed. In the meantime, the taxpayer may apply to postpone payment if they have grounds for believing the amount charged is excessive. It is proposed in effect to extend these jeopardy amendment provisions to cover the issue in question whilst the remaining aspects of the enquiry were still in progress but to enable an appeal to be determined before the enquiry is completed.

**Q2: Do you agree with the proposed changes to the tax enquiry process?**

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

**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?**

## Amendment to Joint Referral

- 4.5 At present, where a matter is litigated under the “joint referral” route and the final outcome received, the Tribunal’s determination does not take effect for payment of tax purposes until HMRC is in a position to issue a closure notice covering the whole enquiry. Although a payment on account may be made in the interim, we propose altering the current process to enable HMRC to issue a “Tribunal referral closure notice”, with payment of tax either from or to HMRC following within 30 days.
- 4.6 Therefore we propose that the legislation regarding payment of tax following joint referral to the Tribunal will be amended, to bring amounts into payment sooner. This amendment will align the payments regarding the joint referral with the sole referral - see Annex B for the current payment rules. Annex D shows the new enquiry resolution process map.

### Q5: Do you agree with the proposed amendment to the joint referral process?

#### Scope of the proposal

- 4.7 We propose to target the power 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. The power would not apply to the majority of tax enquiries and therefore would be limited in its use.
- 4.8 We propose the following taxes which use the formal enquiry process will come within the scope of the proposal:
- Income Tax/NICs<sup>6</sup>;
  - Corporation Tax; and
  - Capital Gains Tax (CGT) and whilst companies do not pay CGT their chargeable gains are returned as part of the CTSA process – also see Annex A.

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

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<sup>6</sup> Class 2 and Class 4 NICs are paid by the self-employed. These proposals would apply to Class 4 NICs as they are already part of the SA regime. Separate legislation may be needed to extend this to Class 2 NICs. For Classes 1, 1A and 1B, there is no timeframe within which NICs investigations have to start, and there is no equivalent of a closure notice.

## Safeguards

- 4.9 We intend the power to be used sparingly, in cases involving significant tax under consideration or involving issues which are novel, complex, or have a wider impact, including those which can include tax avoidance. The taxpayer will be offered a joint referral to the Tribunal in the first instance but as explained at para 4.4 above we propose to align the joint referral process to the Tribunal with this new power.
- 4.10 Operational arrangements for exercising the power will be put in place to ensure the power is used appropriately, fairly and consistently. These arrangements will include nominated senior officials to approve each use of the power. HMRC will consider whether it would be practical for that person to have no line management responsibility for case workers or any role in the affairs of taxpayers to maintain a separation of responsibilities.
- 4.11 We anticipate that the taxpayer would also have the right of appeal against the “Tribunal referral notice”, in respect of the application for sole referral to Tribunal. If the taxpayer did appeal, and this was heard by the Tribunal, a hearing on the substantive issues would follow, unless the Tribunal decides the HMRC application was incorrect. There will be no right of appeal against the “Tribunal referral closure notice” (that puts the tax into charge following the final decision) unless it fails to reflect the final outcome of the litigation. As such a notice would only be issued once all rights of appeal to senior courts on a point of law have been extinguished or exhausted.

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

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

# 5. Assessment of Impacts

## Summary of Impacts

<b>Exchequer impact (£m)</b>	2014-15	2015-16	2016-17	2017-18	2018-19
	The impact on the Exchequer will depend on the final design of the policy which will be finalised following this consultation. Any detailed costs would be subject to scrutiny by the Office for Budget Responsibility.				
<b>Economic impact</b>	The measure is expected to be used sparingly and is therefore not expected to have any significant economic impacts.				
<b>Impact on individuals, households and families</b>	There will be an impact on those individuals on above average incomes with complex tax issues and those who engage in tax avoidance.				
<b>Equalities impacts</b>	This measure will impact on a small number of individuals with above average incomes. It will therefore impact those with protected characteristics in this group.				
<b>Impact on business including Civil Society Organisations</b>	The measure is expected to have a negligible impact on civil society organisations. There will only be an impact on a small number of businesses with complex high value tax affairs or who participate in avoidance schemes. This measure will have no impact on any businesses or civil society organisations undertaking normal commercial transactions.				
<b>Operational impact (£m) (HMRC or other)</b>	HMRC will need to introduce a process to determine when the measure will be used. 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. A Justice Impact Test will be done to measure the impact on the Ministry of Justice.				
<b>Other impacts</b>	A small amount of small firms may be impacted if they had complex high value tax affairs or participated in tax avoidance.				

**Q9: Do you agree with the assessment of impacts?**

## 6. Summary of Consultation Questions

**Q1: We would welcome views on the problem as expressed in this document.**

**Q2: Do you agree with the proposed changes to the tax enquiry process?**

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

**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?**

**Q5: Do you agree with the proposed amendment to the joint referral process?**

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

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

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

**Q9: Do you agree with the assessment of impacts?**

## 7. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 1 of the process. The purpose of the consultation is to seek views on the policy design and any suitable possible alternatives, before consulting later on a specific proposal for reform.

### How to respond

A summary of the questions in this consultation is included at chapter 6.

Responses should be sent by 12 March 2015, by e-mail to [TAP@hmrc.gsi.gov.uk](mailto:TAP@hmrc.gsi.gov.uk) or by post to:

HM Revenue & Customs  
Tax Enquiries: Closure Rules Consultation  
Tax Administration Policy Team  
Room 1/C06, 100 Parliament Street  
London SW1A 2BQ

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from [HMRC Inside Government](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

### **Consultation Principles**

This consultation is being run in accordance with the Government's Consultation Principles. [If you wish to explain your choice of consultation period, this is the place. Also, if you are holding additional meetings or using alternative means of engaging, please mention this here].

The Consultation Principles are available on the Cabinet Office website: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments or complaints about the consultation process please contact:

Oliver Toop, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: [hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk](mailto:hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk)

Please do not send responses to the consultation to this address.

# Annex A: Current legislation relating to the ability to close an enquiry

## Income Tax Self-Assessment system

The legislation relating to enquiries into self-assessment tax returns is contained within the Taxes Management Act 1970. Trading profits calculated and declared under ITSA also form the basis for the charge to Class 4 NICs.

Section 9A governs HMRC's powers to enquire into any tax return made under Section 8 or 8A. It includes the time limits for enquiring into a return which is 12 months from the date a return is delivered or amendment made, unless the return is late or the amendment is made after the normal filing date, when the time limit is extended to the end of the quarter next following that 12 month anniversary. Section 9B(2) enables an officer to extend his enquiries into any amendments made by the taxpayer during the enquiry. Such amendments will not be given effect to until whilst the enquiry is ongoing.

During an enquiry if an officer of the Board has reason to believe that there is likely to be a loss of tax unless the self-assessment is increased immediately then he may amend the taxpayer's return under section 9C. This is commonly known as a "jeopardy amendment".

Section 28A governs the conclusions of an enquiry undertaken under section 9A. An enquiry under section 9A is only completed when an officer of the Board issues a notice to the taxpayer, stating their conclusions and making any amendments to the return, if they are required. Prior to the completion of the enquiry, if a taxpayer believes that HMRC has no reasonable grounds for continuing the enquiry they may make an application to the Tribunal for a direction requiring the officer to issue a closure notice.

Where an HMRC amendment to a return increases a taxpayer's liability, they may make certain claims, subject to certain conditions, which otherwise would have been out of time.

Section 31 governs a taxpayer's appeal rights in respect of any conclusion or amendment made by HMRC under section 28A. Such an appeal must be made within 30 days of the closure notice being issued. A taxpayer also has the right of appeal against an amendment made under section 9C, although this will not be heard until the completion of the enquiry.

A section 12AC TMA 1970 partnership enquiry is concluded by the issue of a closure notice under s28B TMA 1970, with the necessary consequential amendments then made to the partners' returns. Only the partnership has a right of appeal (under s31(b) TMA) against the partnership closure notice, via the partner nominated to make the appeal. There are no individual appeal rights against the consequential amendments to the partners' returns.

HMRC and the taxpayer may jointly refer an issue that is the subject of an open enquiry for determination by the tribunal during the enquiry under sections 28ZA to 28ZE TMA 1970, where both HMRC and the taxpayer wish a particular issue to be determined by the tribunal before an enquiry is completed. Although the matter will be heard and determined by the tribunal in the same way as an appeal, and the determination is binding on the parties, it can only be taken into account in the enquiry closure notice issued under section 28A TMA 1970.

At present a closure notice cannot be issued until the whole of the enquiry is in a position to be closed, which has the effect of further delaying any tax due for payment as a result of the tribunal's judgment.

### **Corporation Tax Self-Assessment (CTSA)**

Under para 24 Sch18 FA 1998 an officer of the board may make enquiries into a company tax return if notice of enquiry is given to the company within the enquiry window which is usually 12 months after the return was filed (for singleton companies or small groups), or 12 months from the filing date (for non-small groups). This is extended if the return is filed late. After the enquiry window has passed, if no enquiry has been undertaken then the return is final (subject to the "discovery" provisions for companies under para 41 Sch 18 FA1998, and the consequential amendments provisions at para 34(2A) Sch 18 FA 1998 which deal with amendments required due to an enquiry into either that company's return for a different year or another company's return). If an enquiry is undertaken into a company's return it is concluded by issuing a closure notice under para 32 and then amending the return under para 34. A company has a right of appeal against the amendment only (unlike ITSA where they can also appeal the conclusions stated in the closure notice).

As with ITSA there can only ever be one enquiry into a company tax return. Therefore as the rules currently stand, the issue of a closure notice terminates HMRC's enquiry powers for a given period. This means that where there are multiple issues under enquiry, the closure notice cannot be issued until all are concluded.

Under CTSA there are similar provisions to ITSA for referring a matter to the tribunal under mutual agreement during an enquiry, contained within para 31A Sch 18 FA1998. Jeopardy amendment provisions are contained within para 30 Sch 18 FA1998.

## Discovery provisions

Section 29 TMA 1970 governs the ability to make discovery assessments in respect of individuals, section 30B governs HMRC's ability to make discovery amendments on partnerships and Paras 41 through to 46 of Schedule 18 FA 1998 govern the ability to make discovery assessments or determinations on companies. Such assessments, amendments or determinations carry a right of appeal.

A discovery assessment will be valid where an officer of the board has newly discovered a loss of tax. If a person has filed a return then the discovery will only be sustainable if the loss of tax was either brought about carelessly or deliberately, or if a hypothetical officer, taking into account all of the information provided by the taxpayer prior to the enquiry window closing (or the conclusion of the ongoing enquiry) would not have been aware of the actual loss.

Discovery assessments may be validly issued whilst the enquiry is still ongoing or enquiry window is open, although the loss would have to be shown as resulting from the careless or deliberate actions of the taxpayer or somebody acting on their behalf.

## Capital Gains Tax

The statutory provisions in the Taxes Management Act 1970 (TMA 1970) which govern the self-assessment of capital gains tax (CGT) liability and the taxpayer's obligations are generally the same as those which govern income tax. In particular, the provisions of Part 2 TMA 1970 (Returns of income and gains) apply equally to income tax and CGT. Thus sections 7 and 8 ensure that the obligations to inform HMRC of a liability to tax and to make a return apply equally to income tax and to CGT by specifying both heads of tax. Other provisions which deal with enquiries into returns, penalties for incorrect returns etc., do not refer to CGT explicitly because they are written in terms of the return and therefore cover all information required to be on the return.

# Annex B: Current legislation relating to payment of tax

## Income Tax Self Assessment

### Individuals

Where HMRC amends a person's return, either via a s28A notice or a s28B(4) notice, or makes an assessment after a "discovery", Sch 3ZA TMA defines that the additional tax is due 30 days after the notice or assessment is issued.

A person who appeals against such a notice or assessment [excluding a s28B(4) and s30B(2) notice, which carry no individual appeal rights] may, under section 55(3) TMA, ask HMRC for payment of tax to be postponed until the appeal is settled. If such an application is not agreed the taxpayer can refer their application to the Tribunal to determine the amount to be postponed.

Where a taxpayer has appealed against an HMRC amendment or assessment, and the tax has been postponed, once the substantive matter has been heard by the Tribunal the tax must be paid or repaid, in line with the Tribunal's decision, whether or not that decision is then the subject of a further appeal.

### Partnerships

Partnerships themselves are not in general assessed to tax. HMRC has the power to amend partnership returns following an enquiry under section 28B TMA as well as following a discovery of a loss of tax, section 30B. The partnership has a right to appeal against such amendments.

The tax is brought into charge by the section 28B(4) and section 30B(2) consequential amendments to the partners' returns. These amendments carry no right of appeal and so the tax would be payable 30 days from the notice being issued.

In most cases it is HMRC general practice to only issue the consequential amendments after the partnership amendment has become final, that normally being 30 days after the amendment is issued if it is not appealed, or if an appeal has been made, following the determination of that appeal.

## Corporation Tax Self Assessment

The general due date for corporation tax is 9 months and 1 day after the end of the accounting period as per S59D TMA 1970. For members of large groups, corporation tax is paid in quarterly instalments under The Corporation Tax (Instalment Payments) Regulations 1998. The first quarterly payment falls 6 months and 13 days after the beginning of the accounting period. Whether or not the company is part of a large group, corporation tax will be paid before the filing date for the corporation tax return.

These payments are necessarily estimated. The liability is revised when the return is submitted. The return must contain a self-assessment under Paragraph 8, Sch 18 to FA 1998, and this gives the figure of tax payable for the accounting period. The amount the company has to pay to HMRC (or be repaid) is the amount of this self-assessment less any corporation tax already paid for the accounting period.

As described in Annex A, when an enquiry leads to additional tax due, the company's self assessment is amended under Paragraph 34, Sch 18 to FA 1998. This has the effect of increasing the tax which is due for the accounting period. Under current rules, this can only be done once all the issues under enquiry are resolved.

Thus, without closure of the enquiry and the amendment which follows, there is no statutory power to assess additional tax (with the exception of a "jeopardy" amendment). In many cases the company will make payment on account, but HMRC currently has no mechanism to assess tax where a company does not do this voluntarily.

### **Interest and Penalties**

Late payment interest is statutory under s101 TMA and Schedule 53 FA 2009, and it is charged on any tax paid late. It normally runs from the original due date of payment for the relevant year, even though the due date for the additional payment may be a later date.

Initial and further late payment penalties are issued at various times following the due date for payment. Where the tax due is as a result of an increased Self Assessment following an amendment by the taxpayer or HMRC, the due date is 30 days from the date the assessment was issued. Where a deferment of payment has been agreed no late payment penalties will be due as long as the taxpayer upholds his side of the deferment agreement.

The late payment penalty regime in schedule 53 applies to the tax year 2010-11 and any subsequent year. For earlier years the section 59C TMA surcharge regime applies for individuals.

### **Jeopardy Amendments**

Under both ITSA (section 9C TMA 1970) and CTSA (para 30 Sch 18 FA 1998) where an amount of tax payable is deemed to be insufficient HMRC may make an amendment to the relevant Self-Assessment during the enquiry, where there is a risk that failing to do so could bring about a loss of tax. This applies in situations where taxpayers are about to become insolvent, or leave the country. The additional tax becomes payable 30 days after the amendment was made providing there is no appeal.

# Annex C: Examples of issues with multiple aspect enquiries

## Compliance example 1: Large Business

HMRC's Large Business Dispute Resolution Board considered users of an avoidance scheme involving sale and leaseback arrangements using a third party bank. The scheme led to the customer claiming twice for the same expenditure for capital allowance purposes. HMRC wished to challenge the scheme at tribunal, but the preferred case, in which fact finding was most substantially completed, settled prior to litigation.

We identified a second preferred case. Although the fact pattern in all these avoidance schemes was similar, the particular facts of this case were considered to best bring out HMRC challenges and HMRC had obtained all relevant documentation for this group's use of the scheme. However, the enquiry into the relevant return also incorporated further issues involving financing and group structuring, which are not yet in a position to be resolved, but which we hope could be settled without the need for the tribunal's intervention. HMRC were therefore unable to issue a closure notice for the avoidance scheme, and the group were unwilling to agree to a joint referral to the tribunal.

Being able to decouple the avoidance issue would bring about resolution for the particular customer and would not automatically rule out this case, with the most beneficial fact pattern, from being used as a lead case for all the users of the scheme (as is presently the case). It would leave issues still under enquiry, but ones which could easily be resolved, hopefully by mutual agreement, following the tribunal's judgment.

## Compliance Example 2: tax avoidance

A serial avoider, Mr A, has been involved in several tax avoidance schemes over a number of years. The schemes cover a wide variety of types and promoters, including:

- EBT type schemes where the enquiries are on the entrepreneur-owned companies.
- Personal employment loss type schemes, and
- Various partnership schemes.

The years currently open for enquiry stretch over ten tax years.

Mr A has made it clear that he will only pay tax when he receives a closure notice / revenue amendment.

In each year, there is more than one avoidance issue under enquiry. In some years there are three separate tax avoidance schemes affecting the tax position.

Therefore, unless the tax position of each of the schemes affecting a particular year can be resolved, Mr A has the advantage of not receiving the closure notice that would bring the underpaid tax into charge.

It has been agreed by HMRC and the scheme promoters that one of the schemes ('Scheme 1') used by Mr A does not work. However as Mr A has also used another tax avoidance scheme ('Scheme 2') in that particular year and this second scheme is still being worked, HMRC is unable to formally close the enquiry by issuing a closure notice.

HMRC has invited Mr A to settle the issue by way of entering a contract settlement. That is, both parties would agree that the matter is finalised and Mr A would make a payment of the tax and interest arising on Scheme 1.

However, Mr A has also claimed there are losses arising from another scheme ('Scheme 3') in the subsequent tax year that would cover the additional liability arising from the agreement that Scheme 1 does not work. He also makes clear that, as there is no obligation on him to enter into a contract settlement, he will continue to refuse to do so.

In these circumstances, HMRC may not be able to resolve the tax chargeable in relation to this issue for a number of years - even though the promoter of Scheme 1 has confirmed that it does not work.

It can be seen that the most determined serial avoiders can delay resolution of disputes simply by creating complex interactions of a number of tax avoidance schemes.

# Annex D: New enquiry process map

