



HM Revenue
& Customs

Tax Enquiries: Closure Rules

Summary of Responses
28 September 2015

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1. Introduction

- 1.1. On 18 December 2014, HM Revenue and Customs (HMRC) published a consultation document that asked for comments on a proposal to enable 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.
- 1.2. The consultation, “Tax Enquiries: Closure Rules”, closed for comments on 12 March 2015. This document contains a summary of the responses we have received.
- 1.3. The consultation document covered several broad areas that HMRC considers creates problems and constraints within the enquiry framework. These areas are:
 - 1.3.1. Flexibility. The enquiry framework can be inflexible, leading to complex tax enquires taking a long time to settle.
 - 1.3.2. Complexity: complex cases where there is significant tax under consideration, or which involve issues which are novel or have wider impacts. As a consequence a long-running issue can prevent final resolution of a simpler issue; and
 - 1.3.3. Equity: 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 a ‘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-tax scheme users) reap a benefit in being less likely to be selected for litigation than a taxpayer with straightforward affairs.
- 1.4. There was overwhelming disagreement with the suggestion that HMRC should be able to use the proposed legislative change unilaterally. It was felt that both parties involved in a tax enquiry should have the ability to approach the Tribunal, to seek closure of a particular aspect. The terminology of a potential “Tribunal Referral Notice” was not of great concern.
- 1.5. Respondents made a number of suggestions regarding how the process might work in practice, including whether the onus of proof should lie with the party seeking closure or the appellant, and whether the determining factor in closing an aspect should be the ability to quantify the tax. It was also considered that the appeal and payment processes needed to be given further consideration.
- 1.6. The majority of respondents also wanted greater and more explicit safeguards that the new power would be used appropriately by HMRC.
- 1.7. A number of respondents suggested alternative approaches to address the issues set out in Chapter 3 of the consultation document, including a potential change to the legislation regarding the closure notice provisions. Rather than approach the Tribunal in the first instance, a potential solution proposed that HMRC should be able to issue a partial closure notice, or for the taxpayer to be able to request HMRC to issue a partial closure notice.
- 1.8. More detail is given in the pages that follow for each question we asked in “Tax Enquiries: Closure Rules”.

2. Responses to questions

Question 1: We would welcome views on the problem as expressed in this document?

- 2.1 Responses varied. Respondents were generally supportive of the principle of being able to conclude individual aspects of tax enquires, whilst acknowledging that problems arise in tax enquiries, although there were differing views on the precise causes. For example, some felt that HMRC are equally as guilty of delay as are taxpayers. In addition, many respondents felt that HMRC are not in favour of agreeing to certain joint referrals. There were also differing views on precisely how to most effectively tackle the problem. A very small number of respondents did not consider there to be an appreciable problem.
- 2.2 Most respondents understood that HMRC wants to speed up enquiries. Some felt it is important that HMRC have the powers and resources it requires to tackle tax evasion and avoidance. Others felt that the existing legislative framework is sufficient to address the problem of protracted multiple aspect enquiries.
- 2.3 Some respondents agreed that that the current closure rules on tax enquiries need to be revisited and updated as tax legislation has become more complicated since the introduction of the self-assessment rules, and that the enquiry and settlement process is inadequate because of the time taken to resolve matters. One respondent observed that the existing rules have the potential to be inconvenient for either party, or indeed both parties.

Question 2: Do you agree with the proposed changes to the tax enquiry process?

- 2.4 The majority of respondents agreed broadly with the proposed changes, subject to a number of provisos, the main one of which was that HMRC alone should not have the power to apply for a Tribunal Referral Notice (TRN). Those respondents said it was appropriate for there to be a level playing field and for the power to be available to a taxpayer also. One respondent said that it is essential for taxpayer to be given an equivalent power to take individual matters to a Tribunal, in order to speed up the resolution of enquiries, where the taxpayer does not feel that sufficient progress is being made by HMRC.
- 2.5 Other provisos included that the power should not be used by HMRC to “cherry pick “ issues which could be used to set precedents or used to a taxpayer’s disadvantage to settle certain aspects quickly with HMRC, then delaying resolving the remaining issues.
- 2.6 A number of respondents commented specifically on the issue of safeguards, expressing concern that the proposed safeguards are insufficient to ensure that the power is used by HMRC appropriately. A small number of respondents proposed that safeguards should be set out in legislation. Some suggested that if the power is introduced, a de minimis limit for the potential ‘tax at stake’ should be used. It was argued that this would act as a safeguard so that the new powers are only used exceptionally in complex and long running enquiries where there is a significant amount of tax at stake. Similarly another respondent commented that if rules are to be changed, there ought to be a very small and tightly defined set of application criteria.
- 2.7 A small number of respondents, whilst agreeing that changes are needed, suggested it would be simpler to adapt existing legislation. For example, HMRC should consider the idea of a ‘partial closure’ based on the existing provisions in s28A TMA 1970. HMRC could issue a partial closure notice for a discrete issue under enquiry, with the taxpayer also afforded the

right to apply to the Tribunal for a partial closure notice. The partial closure approach would apply in a similar way as currently applies for a full closure notice.

2.8 A minority of respondents did not support the proposed changes, either because they did not consider there is a sufficiently compelling argument that a problem exists, or because they consider existing powers within the tax administration legislation, e.g. Accelerated Payments and contract settlements, are sufficient to address the problem identified.

2.9 Several respondents made suggestions regarding the role of the Tribunal. These included that the Tribunal's authority should be sought before issuing a TRN, and that the Tribunal should determine the amount payable on closure of an aspect if HMRC and the taxpayer are unable to agree the sum.

2.10 Other suggestions made include:

- The party denying a 'joint referral' should be required to justify their decision to a Tribunal who would be able to rule whether or not the party had reasonable justification for withholding their agreement; and
- It would be beneficial to be able to agree individual aspects under enquiry and, if appropriate, have interim settlements made on that basis.

Question 3: Do you have any suggestions concerning the terminology of the new notice?

2.11 Most of the respondents were content with the terminology.

2.12 One respondent said the use of the terms "Tribunal Referral Notice" and "Tribunal Referral Closure Notice" seem logical and largely self-explanatory. Another said terminology of any notices or procedures should be clear, concise, understandable and written in plain English.

2.13 One respondent considered the terminology of Tribunal Referral Notice and Tribunal Referral Closure Notice, to be acceptable. Generally, most respondents had no comment, or at this stage found the terminology not a key issue. One respondent questioned whether there is a way of differentiating these terms from a joint notice of referral, which is the current joint referral terminology.

2.14 Other suggestions, in terms of a sole referral to the Tribunal, included that the terminology should say "Unilateral Referral", "HMRC Referral", "Taxpayer Referral", or "Partial Closure Notice."

2.15 One respondent commented that whatever the final title, any new procedures introduced, including new terminology, will need to be clearly explained so that unrepresented taxpayers can understand any changes to the enquiry process.

Question 4: 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?

2.16 The responses to this question were varied. One respondent said they were not convinced that there is a need for any changes where the tax treatment of a particular issue is no longer in dispute. Another respondent reiterated that there should be some acknowledgement that enquiries can remain open because of no fault of the taxpayer.

- 2.17 One response proposed that if a case is no longer in dispute, then the party that doesn't want the particular issue to be closed should make representations before the Tribunal. One respondent agreed with the proposed amendment to the joint referral process as outlined, enabling any payment or repayment of tax to be made within 30 days of any Tribunal Referral Closure Notice being issued.
- 2.18 Another response said that it would be beneficial to be able to agree individual aspects under enquiry and, if appropriate, have interim settlements made on that basis. Other responses proposed using the Alternative Dispute Resolution mechanism or the contractual settlement procedures, as these methods may be more time-efficient and less costly.
- 2.19 One respondent suggested that s.54 (1) TMA 1970 (Settlement of Appeals by Agreement) should be amended in order to extend the existing provision for settlements by agreement to also include "Aspect". This was echoed by another respondent who suggested 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). Such a provision would enable the consequences to flow from an agreement reached between a taxpayer and HMRC, as would have ensued from the Tribunal's decision following its hearing of a referral application (whether sole or joint).
- 2.20 One respondent raised concern about HMRC bringing new aspects into play during the course of an enquiry and never conceding that any elements in an enquiry can be closed. A further respondent said that in cases where the tax treatment of a particular issue is no longer in dispute, and it is in favour of the taxpayer, an amendment to the proposals enabling the taxpayer to be able to 'close' that aspect and utilise the tax advantage would be welcome. The respondent also said they anticipated that where there is a Tribunal ruling, HMRC would apply the ruling to other open cases where the facts are exactly the same.

Question 5: Do you agree with the proposed amendment to the joint referral process?

- 2.21 The proposal was to amend the legislation regarding payment of tax following joint referral to the Tribunal, to make amounts payable sooner. Comments received included a suggestion that as the joint referral process is dependent on the co-operation of the taxpayer, HMRC should be able to issue a Tribunal Referral Closure Notice following the Tribunal's decision in respect of a joint referral, with payment or repayment of tax to be made within 30 days. This approach could be adopted as an alternative to having to issue a closure notice for the whole enquiry.
- 2.22 Another comment said that the issuing of a 'Tribunal Referral Closure Notice' must only be processed after the time has passed for the taxpayer to appeal against the First Tier Tribunal's decision, and that there must be safeguards in place to ensure all proper procedures are adhered to and that the taxpayer fully understands the appeal process.
- 2.23 One respondent commented that it is difficult to see how, in some cases, tax could be computed on the resolution of a single issue in isolation to the other elements of the return that have not yet been resolved. If HMRC and the taxpayer do not agree the amount of tax that should be paid, the Tribunal should be able to determine it.
- 2.24 Further comments were that a referral which works in the taxpayer's favour must result in a repayment of the appropriate proportion of any sums withheld to that point. Some respondents commented on the need for clarification about whether this proposed new power will impact on all joint referrals made under s28ZA TMA 1970, or whether this will only affect partial referral notices.

2.25 Payment consequences should follow the decision, according to one respondent who said that the alteration should apply regardless of whether the taxpayer or HMRC win the case at Tribunal. The result would be that the aspect of the enquiry affected by the joint referral to the Tribunal would be closed by a 'Tribunal Referral Closure Notice' and a payment made to or from HMRC within 30 days of the final decision.

2.26 It was observed by one respondent that such measures may remove a sense of urgency for HMRC to close the enquiry, thereby leaving the other issues open indefinitely.

Question 6: Should any other taxes be included in the scope of the proposal?

2.27 The intended changes proposed that they apply only to Income Tax, National Insurance contributions, Capital Gains Tax and Corporation Tax.

2.28 Most respondents' view was that it seems sensible to limit those taxes included in the scope of the proposal to those subject to self-assessment. A minority of respondents considered other taxes, and felt that they were not appropriate for inclusion at this time. Generally, there was no objection to future expansion of this proposed power to other taxes.

2.29 One respondent was concerned that including other taxes (e.g. VAT, Inheritance tax) would necessitate substantial additional changes to the existing legislation and therefore consideration should not be given for a wider inclusion. Another respondent advised that they did not see the merits of restricting the provisions to only particular taxes.

Question 7. Do you agree with the proposed governance safeguards?

2.30 The consultation document proposed that the new power be used sparingly. The consensus from respondents was that safeguards need to be clearer in their detail. The lack of clarity raised concerns amongst many of the respondents.

2.31 One comment raised serious concerns about the proposed governance safeguards because they lack transparency and independence. In a similar vein, another respondent stated that they had a number of concerns with the safeguards as currently proposed, in respect of either parties' ability to use this power, potential costs, and lack of transparency.

2.32 Further comments stated that although the power is to be used 'sparingly' in cases where there is significant tax at stake, safeguards are vital to protect vulnerable groups. The view is that it is important that HMRC adhere to their proposed safeguard of using 'nominated senior officials', who are independent of the open tax enquires, to approve the use of 'sole referrals'.

2.33 Other respondents expressed concerns that the preliminary safeguard proposed seems to be merely an operational safeguard. They said that they would support a panel if it were independent, or at least not made up solely of HMRC personnel. They did, however, wonder whether that would just create another layer of bureaucracy without adding any substance to the process. It was suggested an alternative might be to use existing resources within HMRC's Alternative Dispute Resolution (ADR) service.

2.34 Some respondents said that their experience of the APN (accelerated payments notice) regime, which is modelled on a similar basis, with senior officers of HMRC exercising discretion, suggests that this is not an appropriate level of safeguard.

2.35 One respondent welcomed the acknowledgement of the requirement for an impartial decision-making process, but is concerned about whether it will be possible in practice to find

parties within HMRC with sufficient technical knowledge who are not connected to the case. They said that they would also welcome clarification of whether HMRC intends to use a single authorising party, as with the GAAR, or a more devolved system, such as the authorised officer approach in use for Schedule 36 Information Notices.

2.36 Sign-off within HMRC at a senior level to use this power was a focus for a number of respondents. Comments included views that approval for issuing a “Tribunal Referral Notice” should be at a senior organisational level within HMRC. Whilst understanding that the power of sole referral to the Tribunal will be used sparingly but specifically in issues which are novel, complex or against tax avoidance, this should be authorised by a nominated senior official outside the line management chain of the case worker.

2.37 Others responded that it is important that the safeguards are built into legislation rather than operationally within HMRC. It was suggested that in the interests of fairness and openness, HMRC should draw up and publish guidelines under which the new legislation will be operated to provide detail on all aspects, including the threshold of tax at stake above which HMRC may consider using this power.

2.38 Further views stated that the proposal as put forward could apply to any enquiry that has become entrenched, and has more than one issue at stake. The comment was made that it is not clear from these proposals how the power would be restricted other than by the statement ‘we intend the power to be used sparingly’. It was suggested that safeguards should be in the legislation, for example, a de-minimis level of tax at stake below which the new provisions would not apply. In addition, the view was expressed that it is essential that HMRC sets out in advance clear guidance on how the new powers will operate. The guidance should signal clearly how HMRC intends to use such powers to provide taxpayers with safeguards and certainty comparable with those that currently exist within the self-assessment enquiry process.

Question 8: We would welcome views on any additional safeguards to constrain the use of this proposal?

2.39 Comments in this regard varied. Some comments focussed on the Tribunal involvement. One respondent proposed that the ability of HMRC to issue a Tribunal Referral Notice should be dependent on prior approval by the Tribunal rather than requiring the taxpayer to appeal against the Notice. At the very least, there should be some form of independent body involved in the approval process, perhaps along the lines of the panel that is used in the case of the GAAR, rather than being issued by HMRC to the taxpayer.

2.40 Monetary safeguards were also raised. It was suggested setting a minimum monetary limit of potential tax lost before consideration of applying for use of this new power. A further comment stated that given the significant expense of litigation proceedings, the power should only be used where tax at risk exceeds £2 million.

2.41 Some respondents felt that the proposed safeguards needed revision as there are insufficient safeguards in places to protect taxpayers. Stronger safeguards proposed included no targets for issue of Notices, publishing statistics on the use of Notices, and if applicable to current open enquiries, taxpayers to be advised explicitly about these changes.

2.42 Legislative safeguards were also proposed. One response suggested that if, as HMRC state throughout the consultation document, the new power is to be used sparingly and restricted only to complex cases involving multiple issues and significant tax, then specifying this limitation in statute would provide an additional safeguard against its more widespread use in multi-issue cases.

2.43 Appeal rights were raised in responses. One respondent said that they agree in principle that a right of appeal against a Tribunal Referral Closure Notice would necessarily be limited to whether the notice properly reflected the final outcome of the litigation, to avoid re-litigating points which have already been determined. A further response suggested that to prevent the sole referral facility being used in an arbitrary or oppressive manner by the party issuing it (the Issuing Party), 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. A further comment was that if the proposal is implemented as it is currently suggested, then it was recommended that the guidance at ARTG 7555 is revised to place the onus on HMRC to agree to a joint referral application made by the taxpayer.

2.44 Further comments reiterated that both parties should have the statutory right to sole referral. In addition, HMRC's guidance should limit the use of the power to situations where HMRC can show that there have been wholesale delays in bringing a matter to a conclusion.

Question 9: Do you agree with the assessment of impacts?

2.45 Responses varied from generally having nothing further to add, to agreement. Where there was commentary, it was generally considered that at this stage a definitive view could not be given. One respondent said that it is difficult to quantify the impacts since they will depend on the frequency with which the power is used. Another stated it would be premature to comment on the assessment of likely impact until the proposals have been clarified.

2.46 Further comments advised that any impact would ultimately depend on the final design of the Policy. The assessment of impacts, as far as it can be made at this stage, is based on the assumption that the new rules would be applied sparingly. In addition, it was stated that further work needs to be done to fully consider the impact on the Tribunal service of making these amendments. There will also be an increase in costs to both the taxpayer and the Tribunal service. One respondent said that given the costs to business of the proposals, they would prefer to see Alternative Dispute resolution as the first step, before any changes to enquiry closure rules.

3. Next steps

- 3.1. There is general consensus that the current enquiry process should be improved in terms of being able to close settled aspects of enquiries. Whilst the majority of respondents broadly agreed with HMRC's proposed approach, subject to certain caveats, equally a number of respondents felt that there are other, as equally practical, ways of achieving the same outcome.
- 3.2. There were two overwhelming views of respondents: firstly that any partial closure power should not rest exclusively with HMRC; and secondly that the safeguards regarding the use of any power should be more comprehensive and explicit.
- 3.3. HMRC proposes to proceed on the basis that there is a need to provide a partial closure provision. However, as the best, most practicable way to give that effect is not clear cut, HMRC proposes to develop a small number of alternative models. HMRC will then consult stakeholders in order to identify the optimum model.
- 3.4. HMRC's aim is to bring forward legislation in Finance Bill 2016. However, given the differing views of respondents on the optimum approach, and the time needed to consult further, it may be necessary to defer legislative change until Finance Bill 2017.

Annexe A: List of stakeholders consulted

HMRC is grateful to the following, who provided written responses to the consultation:

1. Aecom
2. AFME
3. Association of Accounting Technicians
4. Association of Taxation Technicians
5. AVN Venus Tax LLP
6. Baker Tilly
7. BDO LLP
8. British Bankers' Association
9. CBI
10. Chartered Accountants Ireland
11. Chartered Institute of Taxation
12. Clifford Chance
13. Deloitte
14. Elliot Wolfe & Rose Chartered Accountants
15. Ernst & Young LLP
16. Grant Thornton
17. Harcourt Capital LLP
18. Institute of Chartered Accountants of Scotland
19. Institute of Financial Accountants
20. Law Society of England and Wales: Tax Law Committee
21. Law Society of Scotland
22. Low Incomes Tax Reform Group
23. Lynam Tax
24. PricewaterhouseCoopers LLP
25. Reynolds Porter Chamberlain LLP
26. Wood & Co (Tisbury) Ltd

2 private individuals also provided responses.