Charter 08

Contributed by Mike Truman
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The subject of this year’s ICAEW Tax Faculty Wyman Debate, held at Chartered Accountants Hall on 10 July, was ‘This House believes that the balance between the rights of the citizen and the powers of the taxing authority has tilted too far towards HMRC’.

Speaking for the motion were Francesca Lagerberg, head of national tax at Grant Thornton; and Keith Gordon, barrister, of Atlas Chambers. Speaking against were Mark Neale, who heads HM Treasury’s Budget, Tax and Welfare Directorate; and Simon Norris, the head of HMRC’s powers review.Francesca LagerbergIn an ideal world all taxpayers would provide their information on time, and all inspectors would deal with them fairly, but the powers and safeguards regime is designed to deal with conflicts in the real world. The review was meant to be a review of both powers and safeguards, but the latter seems to have got lost.

Each power should have a separate safeguard, which would normally mean an effective right of appeal. However, the new business premises power of inspection does not have a right of appeal.

When HMRC apply to the first tribunal for permission to obtain information, the power does not give the taxpayer the right to be heard. HMRC have argued that we may need to let the powers ‘bed in’ before providing an appropriate safeguard, but Francesca disagreed – the right safeguard needs to be provided from the start in order to make the system fair.

The core rules should be in the legislation in black and white, so that they can be relied on in court. It is acceptable to have guidance supplementing the core rules, but it is not acceptable to have a core rule included only in guidance.

An example would be the promise by HMRC that all calls to the Tax Credit Office would be recorded – this has not happened, and works to the disadvantage of claimants, who cannot prove that they informed HMRC of changes.

Another example from the Finance Bill is the terminology about the ‘authorised officer’ who has a right to use certain powers. This person is meant to be better trained and more aware of how to use the power in a sensible way, but we need more certainty about what training they will have and who they will be, and also the right to challenge if an authorised officer is not used.

Safeguards need to be effective, and therefore need to be available for those who cannot afford to go to court. The new Taxpayers’ Charter therefore needs to be meaningful and to have teeth so that it will work.

We are at a crossroads. We have an opportunity to put safeguards right at the top alongside the powers themselves. We need to have a clear and transparent agreement about what the review is trying to achieve.
Mark NealeMark wanted to argue for three propositions, each of which he dealt with in turn:

- the great majority of taxpayers are honest and compliant, and at least as much energy should go into providing services for them as into considering the new powers;
- nevertheless HMRC need powers to ensure others cannot get away with underpaying tax; and
- the powers need to be proportionate and exercised reasonably in a framework of safeguards.To return to the first proposition; it is easy to lose sight of the fact that the tax system needs to work well for the compliant majority, and that the honest taxpayer needs to be supported.

This is why so much effort has gone into improving the customer experience, for example providing the facility for online returns and payments, and telephone advice centres.

Secondly, HMRC need powers to deal with the small minority of deliberately non-compliant taxpayers. If the idea that you can ‘get away with it’ takes hold, it will eat away at the credibility of the tax system; so it is important that HMRC have the powers they need to respond to non-compliance.

His third proposition was that the current powers, including the new ones in this year’s Finance Bill, are proportionate, and that they are exercised reasonably and with appropriate safeguards.

They are proportionate: they have been the subject of a long review and consultation and have swept away a ramshackle inheritance of inconsistent powers.

In its place is a consistent and transparent set of powers applying across tax base. What was disproportionate was the previous system, when taxpayers faced inconsistency from one tax to another.

They are exercised reasonably: it is not in the interests of HMRC to use powers in an arbitrary or unreasonable way. That is why HMRC are now consulting on a charter to set out rights and responsibilities of taxpayers, and why there is consultation on what will be in the guidance.

Guidance is not a poor substitute for legislation – how long would the Finance Bill have been if all the guidance was in it?

There are adequate safeguards: HMRC’s actions are subject to parliamentary scrutiny, there are rights of appeal, the taxpayer can go to the Revenue Adjudicator or Parliamentary Ombudsman, they can use the Freedom of Information Act and the Data Protection Act.
Keith M GordonPicking up on the point of using the Freedom of Information Act, Keith had submitted a request relating to the statutory codification of Sharkey v Wernher more than thirty working days ago, when the time limit for replying was supposed to be 20 days.

The typical practitioners he is seeing at lectures confirm that HMRC no longer seem to be interested in collecting the ‘right’ amount of tax, instead they want as much as they can get to fill the ‘black hole’ in the Treasury’s figures.

Two things confirm that in his view; the now established fact that Inspectors get a pay rise based in part on the money they bring in, and the recent comment from Dave Hartnett (The Dave Channel) that HMRC’s job is to ‘collect the maximum amount of tax allowed by law’.

Keith wanted to focus on Finance Bill 2008, Sch 36. It was sensible to have a single set of rules, but it needed to have checks and balances. His first example was the power which will allow the Revenue to request information from a taxpayer before, during or after an enquiry if HMRC ‘thinks’ there has been a loss of tax.

Therefore HMRC need not be on the verge of a discovery in order to ask for information. They might already know about the underpayment, or they may simply have failed to act during the enquiry window on the information in the return. Provided there is either insufficient disclosure, or fraudulent or negligent behaviour, the discovery powers can be used.

The next point was the inspection powers. The Finance Bill proposes to give HMRC more powers than the police in terms of being able to enter premises.

The constabulary only have the power of entry if they hold a warrant or have a suspect under arrest for a serious offence; Sch 36 para 12 allows HMRC to inspect premises without notice if the occupier has agreed to the inspection, or if the inspection has been approved or carried out by an authorised officer. Alternatively seven days notice can be given, which need not be in writing.

A taxpayer has no right of appeal against any such inspection, so if HMRC ‘really want to stitch up the taxpayer’ they could tell the first-tier tribunal that they believe premises are used by the taxpayer in connection with a business.

They would then receive authorisation for an inspection, turn up when the taxpayer is not present and have only to leave a copy of the notice in a prominent place, or give it to the person who appears to be in charge.

If the taxpayer returns and finds the officers raiding the property, it might not be unreasonable for the taxpayer to try to assert his or her legal rights. Actually, the taxpayer does not have any such legal rights, and will therefore be subject to a £300 penalty.

The original proposal was that this right of inspection would extend to any premises; it has now been limited to business premises. However, business premises is defined as being premises ‘that an officer of Revenue and Customs has reason to believe are … used in connection with the carrying on of a business’.

So even if you are not using the premises for business, an officer might reasonably think that you are, and that would be sufficient grounds for the search.
Simon NorrisThere is a danger that we think things were always better in the past, which is not true. While some powers have been levelled up, some have been levelled down.

The old penalties regime had no built-in safeguards, with the legislation giving only the statutory maximum percentage of penalty. By contrast, the new regime sets out in statute the proportionate penalties depending on culpability and on disclosure. The discretion of individual inspectors is therefore reduced.

The suspended penalty is the ‘jewel in the crown’, offering an incentive for good future behaviour rather than penalising bad past behaviour.

It is a myth that there are fewer safeguards. The long consultation of nearly two years has allowed many suggestions to be brought forward in meetings and workshops. In consultation on this year’s Finance Bill, HMRC agreed (among other things) to:

- retain the enquiry window for direct tax;
- require tribunal authorisation for third party information requests;
- require authorised officer approval for unannounced visits; and
- not to set out detailed record-keeping requirements in legislation.
- Sch 36 has 37 separate safeguards. More appeal rights than before are contained in primary legislation, and there is the new provision for a statutory review by HMRC.

Despite newspaper reports, HMRC have made it clear that they will only enter private homes where there is no ‘prime business use’ by invitation or criminal warrant. They have no power to search, and their power to enter can be refused by the taxpayer. The right to visit and inspect records is now significantly limited compared to current VAT powers.

Further changes have been made to the 2008 Finance Bill clauses during the consultation process which started in January 2008, and there have been further safeguards included in the progress of the Bill, including the clear prohibition on entering premises used solely as a dwelling, and extending the statutory period of notice from 24 hours to seven days.

Good consultation is about getting the right balance, but that does not mean accepting every proposal that is made. HMRC do not see, for example, why there needs to be a right of appeal against the right to see statutory business records which have to be kept, and not having one is in line with other OECD countries. The officer will still have to act reasonably in asking for the records.

It is not practical to put all safeguards in legislation; they have to be supplemented by guidance, and there will be full and open consultation on this. Officers will have to act reasonably and will have to take account of what the guidance says.

HMRC hope to have joint training for officers and advisers, so that they are working from the same script. They also intend that the new rules will change behaviour in HMRC, for example not expecting perfection in record keeping and accepting that taxpayers will sometimes make mistakes.

CommentAfter contributions from the floor, the motion was put to a vote, and (predictably) was lost by a large majority. Judged by the arguments put forward (as a debate should be), the proponents made their case far better than the opponents.

Mark Neale’s arguments, with respect, scarcely addressed the point of the debate at all, since the motion did not disagree with his first two propositions and he advanced little evidence for his third.

Simon Norris’s argument were much better, and he made valid points about VAT powers in particular being levelled down, and rightly highlighted the shift in emphasis evidenced by the suspended penalty.

However, the claim that HMRC have ‘made it clear’ that they will only go into premises where there is a ‘prime business use’ illustrated the difference between the two sides starkly – whilst HMRC may say that is the position, the legislation does not, for the reasons which Keith Gordon set out.

Ultimately it was only the proponents of the motion, and in particular Francesca Lagerberg, who set out any clear proposal for what the balance between powers and safeguards should be; namely that for each power there should be a corresponding right of appeal.

While it is too late to establish that principle on a power by power basis, it is not too late to do so by means of a statutorily overriding Taxpayers’ Charter – a proposition to which many speakers from the floor alluded and to which Taxation will return in the coming weeks.

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