HMRC Consultation Document - Tax Enquiries: Closure Rules
Response by the Chartered Institute of Taxation

1. Introduction

1.1. The Income Tax Self-Assessment (ITSA) and Corporation Tax Self-Assessment (CTSA) 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. In this consultation document, HMRC are proposing to introduce new legislation to enable them to refer matters to the Tribunal without the taxpayer’s consent with a view to achieving early resolution of one or more aspects of an enquiry into a tax return, where it is not appropriate to close the whole tax enquiry.

1.2. The consultation document examines the types of cases the proposal would apply to and proposes safeguards surrounding its use. The proposal also includes changes to rules governing payment, to allow earlier payment to be achieved in respect of the aspects of the enquiry concluded under the proposed power.

2. Executive summary

2.1. The Chartered Institute of Taxation (CIOT) agrees with HMRC that the current enquiry rules could be made more effective by allowing resolution of one or more issues without concluding the entire enquiry. We also agree that the tax paid under the self-assessment should reflect the issues determined in this way, although we consider that this may not be straightforward in many cases.

2.2. However, we do not support the proposals in this consultation document because they are one-sided in favour of HMRC. They propose to grant HMRC the power to seek early resolution of one or more aspects of an enquiry by making a sole referral to the Tribunal without the consent of the taxpayer, but do not include proposals to enable the taxpayer to make the same application. In order to ensure a fair and level
playing field, if these proposals are introduced, the taxpayer must be given the same right to seek a tribunal referral notice without needing the agreement of HMRC. In our view, many of HMRC’s arguments for early resolution apply equally to taxpayers.

2.3. Given our serious concerns about the one-sidedness of these proposals, we welcome this being a ‘Stage 1’ proposal ‘setting out objectives and identifying options’. In particular we welcome the statement in Chapter 7 that ‘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’. Notwithstanding our concerns, we can foresee that the discussions that will be prompted by this consultation might produce some ideas that could be developed into a more collaborative and less adversarial way of resolving open issues to the benefit of all multi-issue enquiries. Whilst the document refers mainly to ‘avoidance’, multi-issue enquiries are not limited to those concerning avoidance. We therefore look forward to taking part in a future consultation exercise which we hope will take on board our concerns and suggestions in determining the best option.

2.4. More broadly, this consultation provides an excellent opportunity to have a broader look at the whole current enquiry process. We believe it would be beneficial to look beyond ‘avoidance’ and try to work together towards a less controversial proposal. We would be pleased to assist HMRC in developing thinking on this issue.

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

3.1. We have identified four problems expressed in Chapter 3 of the document and we will consider each one in turn.

3.2. Problem 1: HMRC cannot close one aspect of an enquiry without closing the whole enquiry, and this is a particular problem with complex cases where there is significant tax under consideration or which involve issues which are novel or have wider impacts.

3.3. We agree that the self-assessment enquiry process can be cumbersome in its operation, especially where a taxpayer’s affairs are complex and involve multiple issues. We understand why HMRC are considering making changes to the current enquiry process, even though we do not fully agree with the proposals being made. However, we think the same or similar issues affect taxpayers as much as they affect HMRC.

3.4. Problem 2: In cases with a number of issues it is sometimes possible to reach agreement on some, but not all, aspects of the case and in these situations HMRC and the taxpayer may consider entering into a contract settlement covering the tax liabilities in respect of the areas of agreement. However, taxpayers are not under any obligation to enter into a contract settlement and some refuse to do so where other issues remain open.

3.5. The document implies that a taxpayer would refuse to enter a contract settlement in these circumstances merely to delay payment of tax which will ultimately have to be paid. It is not clear from the document how frequently this happens, but we have heard that this is a tactic that has been adopted in respect of certain marketed avoidance cases. However, we would also point out that there may be very good
reason why a taxpayer chooses not to settle, for example because other open issues involve losses that would cover the liability.

3.6. HMRC give an example in Annex C of the consultation document of a taxpayer (Mr A) who is refusing to enter a contract settlement to pay the tax due on a scheme that has been agreed does not work. Mr A is arguing that losses arising from another scheme in a later tax year would cover the additional tax arising from the agreement that the scheme used in the earlier year does not work. Although not all the facts of the case are available, we would point out that the claim for losses in the later year should not on its own prevent the finalisation of the liability for the earlier year. Schedule 1B TMA 1970 specifies that where a claim is made to carry back relief against the income of an earlier year, the assessment for the earlier year is not amended, but the relief is given by repayment or set-off for the later year.

3.7. **Problem 3:** Where HMRC could use the joint referral procedures under section 28ZA Taxes Management Act 1970 (TMA 1970), a taxpayer can adopt a tactic of refusing to progress matters in order to ensure that the dispute remains open and the tax remains unpaid for as long as possible.

3.8. Our impression is that it is rare that issues are litigated before the Tribunal under the current s28ZA joint referral procedure. This may simply be because few on either side are aware of the possibility provided by s28ZA, and we have also heard of some cases where it has been clear that taxpayers have sought a hearing even though the factual investigation process had not been fully completed. We also suspect that taxpayers are more likely to try to accelerate their case either by objecting to an HMRC information notice or by seeking a closure notice rather than by invoking the s28ZA procedure. However, we do not disagree with HMRC that there may be examples of some taxpayers deliberately using tactics to keep matters open for as long as possible, although we have not seen any direct proof of this.

3.9. We would be interested to see any data that HMRC hold which would provide some more evidence to explain why the joint referral procedure is being so infrequently used successfully, for example the number of requests made, by whom (HMRC or the taxpayer) and number of requests refused and why. If we can understand better why the joint procedure is not being successfully used at present, this would help in trying to determine how it can be used more effectively as part of a wider review of the closure notice rules. As we explain further below, we do see more effective use of the joint referral procedures as being something that should be encouraged and made to work better.

3.10. As we indicate above, the document assumes that only taxpayers delay resolution of enquiries, but HMRC sometimes do this as well. We have heard complaints from some of our members that in their experience HMRC can themselves be uncooperative in not consenting to joint referrals to the Tribunal. The view is that sometimes this is because HMRC wish to take another similar case to Tribunal which has a fact pattern more advantageous to them. Taxpayers therefore find themselves at a disadvantage here, as HMRC have the benefit of seeing all cases under enquiry and can select the cases it wishes to take to litigation to suit them. This means that where taxpayers consider that they have robust arguments on single issues which they would like to be heard under the joint referral procedure, HMRC deny them the opportunity of taking them to the Tribunal by withholding their consent under section 28ZA.
3.11. **Problem 4:**
The current situation makes it difficult for HMRC to pick representative cases to take to the Tribunal, because some of the population may be involved in multi-aspect disputes. This gives a specific advantage to taxpayers who are the subject of multi-aspect enquiries into their affairs. It will also make it harder for HMRC to obtain judgements that can be used as follower cases, as such cases need to be sufficiently clear and representative so as to reduce any doubt that the judgement applies to other scheme users too.

3.12. The introduction of a sole referral procedure only for HMRC will give HMRC an advantage over taxpayers as HMRC can see every case under enquiry so can select the cases they want to take to the Tribunal in order to obtain a favourable precedent. HMRC do not disguise that this is one of the reasons that they want this new power, and we do not object to this per se. But this does not help individual taxpayers accelerate the resolution of their own cases. We would be much less concerned about this if the proposals were to give the taxpayer a similar right to make a sole referral to the Tribunal.

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

4.1. No, the proposed changes do not have our support because they permit only HMRC to refer one or more areas of dispute with in a wider enquiry to the Tribunal but do not give the taxpayer a similar right. The ability to make a referral to a Tribunal should be mutual, so that the taxpayer as well as HMRC has the right to make a sole referral to the Tribunal.

4.2. In our view, it might be simpler to introduce a ‘single issue (or partial) closure notice procedure’ based on the current closure notice provisions in section 28A TMA 1970, provided that taxpayers also had the right to apply for partial closure notices. We discuss this in more detail below.

4.3. The selection of one issue is problematic because in a case with many open issues the taxpayer would probably prefer that the Tribunal take other issues into account at the same time. There is a risk that HMRC will focus on just one or two issues in a multi-issue enquiry, perhaps those where they think it will be easy to collect tax, and give other more ‘difficult’ issues less attention.

4.4. Similarly, once a single issue has been resolved under this new procedure and the tax collected, there is a risk that HMRC could delay the resolution of other open issues.

4.5. We envisage difficulties may arise in HMRC demanding payment of tax following the resolution of a single issue. A taxpayer company, especially one which is a member of a group, may have other claims that can be made which might affect the tax payable. In many cases it will be clear how much additional tax follows from conclusion of the issue or issues concluded. However in many cases it will not be possible to compute the tax payable on a single issue until there has been closure of all open points.

4.6. We would suggest that a better route would be for HMRC or the taxpayer to have the ability to propose an amendment to the tax payable under the self-assessment following the issue of a tribunal referral closure notice. If the other party does not agree then the Tribunal should resolve this, as it currently does in relation to
amendments of a self-assessment made by a closure notice on completion of an
enquiry under section 9A TMA 1970, in accordance with the provisions of section 55
TMA 1970.

4.7. We think that this is recognised by HMRC when they refer to the extension of the
jeopardy amendment provisions, as proposed in paragraph 4.4 of the consultation
document. Using section 55 would give the taxpayer the ability to apply for
postponement of tax if they have grounds for believing the amount charged is
excessive.

4.8. We also think that both HMRC and the taxpayer should have the right to join other
specified issues to the issue contained in the tribunal referral notice if this would
enable matters to be dealt with more efficiently.

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

5.1. We do not have any suggestions. However, we notice that the terminology in 4.2 of
the consultation document (Tribunal referral closure notice) does not agree with the
revised ‘process map’, which refers to ‘Tribunal aspect decision notice’. If we were to
choose between the two, we think ‘Tribunal referral closure notice’ would be a better
description, particularly if a decision were to be taken to model the new rules on the
current closure notice provisions.

6. 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?

6.1. Rather than adapting the proposals in this consultation document, we would suggest
that it might be simpler to introduce a ‘single issue (or partial) closure notice
procedure’, based on the current closure notice provisions in section 28A TMA1970,
provided that taxpayers also had the right to apply for partial closure notices.

6.2. We understand that HMRC are concerned that if the power is not one-sided they will
lose control and many more cases will end up at the Tribunal, which will have an
impact on both HMRC’s and the Tribunal service’s resources.

6.3. It is difficult to foresee what might happen if the power is not one-sided, but in our
experience few taxpayers in practice apply for closure notices or take appeals against
closure notices before the Tribunal unless it is absolutely necessary. We would
therefore expect that few will apply for partial closure notices or take appeals against
partial closure notices before the Tribunal, albeit we would anticipate that taxpayers
might use a partial closure notice application to put pressure on HMRC to accelerate
settlement of their case.

6.4. Also, the Tribunal has the power to strike out proceedings on the grounds that they
have no reasonable prospect of success, under rule 8(3) of the Tribunal Procedure
(First-tier Tribunal) (Tax Chamber) Rules 2009, which should help to reduce spurious
claims by taxpayers whose only intention is to delay their case.
7. **Q5: Do you agree with the proposed amendment to the joint referral process?**

7.1. Yes, but only on the basis that the issue of a ‘taxpayer referral closure notice’ is mandatory and not at HMRC’s discretion. We would be very concerned if HMRC did not act on the outcome of the Tribunal decision if they lost the appeal on the referred issue. The proposed amendment should not only enable HMRC to demand payment of tax but also require the repayment of tax where applicable.

7.2. We also refer to our comments in paragraph 4 above. 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.

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

8.1. We think it should be restricted to the taxes mentioned at paragraph 4.8 of the consultation document in the first instance.

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

9.1. We agree that a joint referral under section 28ZA should be explored in the first instance. In fact, we would suggest that this is a pre-requisite to the issue of a tribunal referral notice. Either side should be able to request that related issues be heard together. It can only be beneficial to both parties if the serious consideration of a joint referral results in a more collaborative way of working.

9.2. As the proposals stand, if HMRC refuse to consent to a joint referral then the taxpayer has no other option to progress the issue. But if the taxpayer refuses, then HMRC can then seek a sole referral without the taxpayer’s consent. This imbalance is a fundamental and very serious flaw with these proposals.

9.3. We are concerned that the preliminary safeguard proposed seems to be merely an operational safeguard, as described in paragraph 4.10 of the document, in that a nominated senior HMRC officer will approve the issue of the tribunal referral notice. We understand that HMRC are also considering using a Panel to review the decision to issue a Taxpayer Referral Notice. We would support a Panel if it were independent, or at least not made up solely of HMRC personnel, but wonder if it would just create another layer of bureaucracy without adding any substance to the process. An alternative might be to use existing resources within HMRC’s Alternative Dispute Resolution (ADR) service, which many of our members have had positive experiences of.

9.4. It will clearly be essential for the taxpayer to have the formal right of appeal to the Tribunal against the tribunal referral notice, especially since this is intended to be a sole referral procedure without requiring the consent of the taxpayer. We therefore agree with the proposal to give the taxpayer a formal right of appeal to the Tribunal against the tribunal referral notice.
9.5. The document does not indicate on what grounds an appeal to the Tribunal against the tribunal referral notice might be brought by the taxpayer. We think that there should be an unrestricted and meaningful right of appeal in order for the right of appeal to be an effective safeguard.

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

10.1. If, as HMRC say 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.

10.2. However, if HMRC are open to developing the idea of introducing a mechanism for resolving issues before the closure of the whole enquiry which give equal rights to both HMRC and the taxpayer and encourage more use of the joint referral procedure, we do not think that the proposal would need to be so constrained.

11. Q9: Do you agree with the assessment of impacts?

11.1. No comments.

12. The Chartered Institute of Taxation

12.1. The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.