

In the Select Committee hearings on the 12 and 17 of October, I agreed to provide a letter setting out HMRC's legal view in relation to the disclosure of taxpayer confidential information to a Parliamentary Committee.

The relevant legislation is contained in the Commissioners for Revenue and Customs Act 2005 (c 11), which so far as relevant, provides as follows:

*18 Confidentiality*

*(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.*

*(2) But subsection (1) does not apply to a disclosure-*

*(a) which-*

*(i) is made for the purposes of a function of the Revenue and Customs, and*

*(ii) does not contravene any restriction imposed by the Commissioners,*

*(b) which is made in accordance with section 20 or 21,*

*(c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,*

*(d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,*

*(e) which is made in pursuance of an order of a court,*

*(f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,*

*(g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or*

*(h) which is made with the consent of each person to whom the information relates.*

*(3) Subsection (1) is subject to any other enactment permitting disclosure.*

*(4) In this section-*

*(a) a reference to Revenue and Customs officials is a reference to any person*

who is or was-

(i) a Commissioner,

(ii) an officer of Revenue and Customs,

(iii) a person acting on behalf of the Commissioners or an officer of Revenue and Customs, or

(iv) a member of a committee established by the Commissioners,

(c) a reference to a function of the Revenue and Customs is a reference to a function of-

(i) the Commissioners, or

(ii) an officer of Revenue and Customs,

### **19 Wrongful disclosure**

(1) A person commits an offence if he contravenes section 18(1) or 20(9) by disclosing revenue and customs information relating to a person whose identity-

(a) is specified in the disclosure, or

(b) can be deduced from it.

(2) In subsection (1) "revenue and customs information relating to a person" means information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others).

(3) It is a defence for a person charged with an offence under this section of disclosing information to prove that he reasonably believed-

(a) that the disclosure was lawful, or

(b) that the information had already and lawfully been made available to the public.

(4) A person guilty of an offence under this section shall be liable-

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, or

*(b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum or to both.*

Five general features of this regime are to be noted.

First, the legislation provides a strong regime for ensuring the confidentiality of information in HMRC's hands - particularly where the information in question relates to an identifiable person's tax affairs. Section 18(1) prohibits the disclosure of information. It applies to HMRC Commissioners and officials, and to information held by HMRC in connection with a function of HMRC. Where the information disclosed is information relating to a person (including a company) whose identity is specified in the disclosure, or can be deduced from it, the prohibition on disclosure is backed by criminal sanctions. The criminal offence is set out in section 19 of the Act, and is subject to a defence of reasonable belief, which is for the official concerned to prove, that the disclosure was lawful, or that the information had already and lawfully been made available to the public. The existence of the criminal sanction justifies a properly cautious approach to requests for disclosure of information that might fall within the scope of the sanction. It is important to note that, although it is a defence to the criminal offence that the information was already lawfully in the public domain, this does not make a disclosure by HMRC lawful for the purposes of section 18(1).

Secondly, that section 18(1) prohibition is disapplied only in the situations specified in section 18(2). The effect of the disapplication is that the prohibition no longer applies.

Thirdly, there is no provision in the 2005 Act to prevent onward disclosure once it has been disclosed by HMRC. However, some bodies to which HMRC discloses information are themselves subject to legislative regimes controlling the extent of permissible onward disclosure by them. The National Audit Office is an example of such a body. The Committee of course is not such a body.

Fourthly, where a disclosure is not prohibited under section 18 (because it would be covered by one of the situations in section 18(2)) the effect of that is not to require disclosure. It is rather to require the Commissioner or official to make a decision as to whether or not it would be appropriate in the particular circumstances to disclose the information sought. The effect is thus to trigger a power, rather than an obligation, to disclose. This regime stands in contrast to the position where an obligation to disclose is imposed by an express statutory requirement. By way of relevant example, there is an obligation to disclose to the National Audit Office as the Comptroller and Auditor General has a right of access to all documents, information and explanation he requires to carry out his examinations under the National

Audit Act 1983 (c 44).

Fifthly, in exercising the power (and making the decision as to whether or not it would be appropriate to disclose the information), the decision maker is

bound to act consistently with both public law principles and other statutory obligations. The latter include the right to confidentiality enjoyed by both individuals and companies under article 8 of the European Convention of Human Rights, and the protection of individual data under the Data Protection Act 1988 (c 29). The former requires the decision maker to take into account all relevant considerations and to disregard irrelevant considerations, to apply fair process, and to reach (in summary) a reasonable decision. Where there is a power to disclose, a decision whether or not to disclose must be taken in respect of each identifiable piece of information, or identifiable category of information in which all pieces of information have similar characteristics.

The first issue that arises in the present context is whether disclosure of identifiable taxpayer information would, or might, be prohibited from disclosure. As noted above, that is an issue that arises in a particularly anxious context because of the possibility that disclosure might amount to a criminal offence.

There is no express power in the legislation to make disclosures to Parliament. The question is therefore whether disclosure would fall within the exception in section 18(2)(a), which permits disclosure for the purpose of HMRC's functions.

HMRC recognises that it is part of its functions properly to assist Parliament. On that basis, HMRC has consistently taken the view that it is lawful to pass non-identifying information to Select Committees through this gateway. However, it does not follow from this that it is necessarily properly part of HMRC's functions to provide disclosure of taxpayer specific information to a Select Committee. The question whether it would be so is far from free of doubt - and we emphasise again the potentially criminal context in which that question arises. It is far from free of doubt because for example (a) taxpayer specific information is of a different and much more sensitive character from non-identifying information, engaging different statutory duties (such as those arising out of the ECHR); (b) our assessment to date has been that, if taxpayers believe that their information may be disclosed, it will make it very much more difficult for us to collect tax - thus having a positively detrimental effect upon the functions identified specifically in section 5 of the Act.

The second issue assumes that there is no prohibition on disclosure and asks whether, as a matter of properly and lawfully exercised discretion, disclosure of the information sought (i.e. sensitive taxpayer specific information) should be made. That issue has some, perhaps many, features which overlap with the first issue. But it is convenient to consider it separately because it engages a wider range of considerations than the narrower "functions" question.

The broad factors that are to be taken into account have been the Subject in the past of the most careful consideration by HMRC. In 2009 Edward Leigh MP wrote to Gus O'Donnell in relation to HMRC's position on taxpayer confidentiality. Advice was taken from First Treasury Counsel, and there followed a discussion in the Executive Committee (Excom) as to the

appropriate course to take. A decision was taken to maintain the confidentiality of information which identifies and relates to specific taxpayers in responding to questions from the Committee. Excom took into account the following particular policy and operational considerations: First the damaging effect on voluntary compliance by taxpayers which would follow inevitably from any relaxation in our approach to taxpayer confidentiality. Any disclosure would undermine the open and transparent basis on which we seek to work with taxpayers, as the most effective and efficient way to collect tax, leading to a reduction in revenues collected without intervention and to additional costs for HMRC and taxpayers. Secondly the damaging effect on Ministers, who by long tradition remain at arm's length from taxpayer specific information, in order to protect them from allegations of impropriety or political interference. Thirdly, the damaging effect on our relationship with other Government Departments and agencies. Successive Ministers have insisted that information may only be disclosed through express gateways in legislation, often against strong opposition, and any change in our stance risks undermining our ability to insist on such express legal gateways. Fourthly, the damaging effect on our reputation for impartiality in the handling of individual cases. And last, the fact that it would be inappropriate and unfair to create any real risk of exposing officials to criminal sanction in the course of their duties.

Specifically in the context of disclosure to the Committee, it is also relevant to note the following:

- HMRC is already subject to detailed oversight and scrutiny in the public interest by the National Audit Office. That body has the power (which it has exercised) to call for any information including confidential information relating to an individual taxpayer's affairs. HMRC provides such information. There is thus no question of the clear and acknowledged public interest in effective oversight of HMRC's affairs not being fully met.
- HMRC provides this information on a confidential basis; and in the knowledge that there is a tailored legislative regime binding the National Audit Office to protect the confidentiality of the information in its hands subject to express statutory gateways governing onward disclosure by it. That is a feature of the regime which is of obvious importance because it effectively removes the risk of criminal liability and removes the risk of a disclosure being unlawful as a matter of civil law.

I hope that this explanation of HMRC's legal position on its obligations in respect of taxpayer confidentiality will be helpful. The Committee may wish to know that First Treasury Counsel, James Eadie QC, has seen a draft of this letter and agrees with it. I hope you find this information helpful.

I am copying in Amyas Morse in the NAO and Paula Diggle in HM Treasury.

*19 October 2011*