Response from ICAS to the HMRC Consultation

‘Direct Recovery of Debts’

25 July 2014
Direct Recovery of Debt: Consultation

About ICAS

1. The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants. We represent over 20,000 members who advise and lead businesses. Around half our members are based in Scotland, the other half work in the rest of the UK and in almost 100 countries around the world. Nearly two thirds of our members work in business, whilst a third work in accountancy practices. ICAS members play leading roles in around 80% of FTSE 100 companies. ICAS is also a public interest body.

General comments

2. ICAS welcomes the opportunity to comment on the consultation ‘Direct Recovery of Debt’ (‘DRD’), issued by HMRC on 6 May 2014.

3. ICAS agrees that a taxpayer has a responsibility to contribute the right amount of tax to the public purse but, equally, the state has a responsibility to ensure that the tax is assessed correctly and collected in a manner that is clearly understood and in accordance with the law.

4. HMRC needs mechanisms whereby the cost and staff time of tax collection is proportionate to the amounts being collected, so that collection proceeds without excessive delay and expense but whilst maintaining suitable protections to the taxpayer. It is noted that as tax debts can be collected through a PAYE code, the measures in this consultation are aimed at the self-employed and those who do not engage, presumably on estimated assessments, and tax credit claimants.

5. ICAS notes and agrees with the comments in the Treasury Select Committee report1; before proceeding with the DRD proposals the points raised in the Select Committee report need serious consideration and to be suitably addressed.

6. In terms of principle, ICAS understands that HMRC needs the means to drive contact with those who ‘can pay, but won’t pay’. However, it is a very big assumption that all those with debt are in this category. HMRC should undertake, or publish, further analysis to identify the causes of tax debt and those who incur it. Based on the experience of ICAS members, the categories of people who do not reply to correspondence and who might have outstanding debt include:

- Those who can pay but will not - ‘the obstinate’
- Those who need help to understand or manage their tax affairs, including the elderly – ‘the vulnerable’
- Those who are chronically disorganised, or hapless – ‘the chaotic’.

Different debt collection procedures are required for each of these groups. For example, if an elderly, vulnerable person requires assistance with their tax affairs there are significant obstacles in obtaining this. If a relative attempts to phone HMRC they need authorisation; the enquiry centres have been shut, and all services are moving online. This current proposal for Direct Recovery of Debt does not sit comfortably with the needs of the vulnerable and it would be a mismanagement of HMRC powers to apply ‘one size fits all’ without analysing and providing for different categories of non-payers.

For completeness, chasing ‘the chaotic’ by cash collection on its own will not solve their compliance issues. These are the ones most likely to receive estimated assessments;

---

1 House of Commons Treasury Committee: Budget 2014, see pages 79 onwards.
http://www.publications.parliament.uk/pa/cm201314/cmselect/cmtreasy/1189/1189.pdf
this leads to the wider strategy of what HMRC will propose so that their affairs can be brought up to date.

7. The consultation paper notes in paragraph 2.30 that current debt collection procedures require a judgement from the court, but that this gives the debtor time to shift their funds. As HMRC’s prime information source on bank details is apparently the annual interest return by banks, by definition it will be some time if not years later, that this power will apply. It is naïve to think that anyone with a determined approach to delay payment of their tax will not already have moved their funds before DRD can be implemented. ICAS questions whether the DRD proposal will be effective or if other means should be considered such as higher penalties.

8. HMRC should give wider consideration to the impact of the proposal and its potential unintended consequences. For example, it should publish a view on its impact if there is a resulting insolvency; insolvency practitioners have questioned whether DRD is appropriate or gives HMRC preference over other creditors contrary to other government policy areas. More invidious, is the potential effect on the taxpayer’s banking relationships once the bank is aware of HMRC’s concerns. DRD may lead to a bank deciding to reduce its lending facilities or to seek further security; or the reduction in funds may lead to a default event or may result in a breach of covenants and affect credit ratings. All of these have to be factors to be considered by HMRC when requesting bank information, and of course if HMRC causes such losses, for which compensation might be liable.

9. There is risk of errors, both by HMRC and by the banks. ICAS members have a lack of faith that the DRD proposals will be operated completely correctly and error free.

10. Some of our members report that access to Time To Pay arrangements (TTP) can be inconsistent and they are not always available. Anecdotal evidence from our members suggests that set criteria are not always applied by HMRC staff, and a request for a TTP arrangement appears to be treated more favourably if requested by the taxpayer than by the agent. There is the impression that whilst a taxpayer can request a TTP it may not always be granted by HMRC, so it is not always the safeguard it might seem.

11. If the policy proposals for Direct Recovery of Debt are to proceed, further consultation is required on detailed proposals for safeguards to ensure they will actually provide adequate taxpayer protection. These include:

- A fail-safe mechanism to ensure that the calculation of the tax debt is the minimum that is reasonable and justifiable before DRD collection commences. It is noted that for the self-employed the example in the document is with an estimated bill. Some ICAS members have said that they do not have confidence that every HMRC demand for tax meets this at present.
- A recognition that some taxpayers on low incomes can have most cumbersome tax affairs, particularly if there are a variety of small sources of income and tax credits, and low income taxpayers are least likely to be able to pay for advice, so clarity on the support to be available to them is needed.
- That some taxpayers may be in a vulnerable position and require support to tidy up their affairs, rather than removal of their funds.
- The self-employed may have cash flow problems and simply need time to pay. Nor is it guaranteed that a sum in their bank is surplus if, for example, cash is needed to pay wages, fund their working capital or replace an essential asset when it breaks down.

12. To ensure such concerns are met there needs to be a proper consideration of each individual’s circumstances, and this needs to be conducted by experienced HMRC staff. It should not simply be the result of automated processes. It is noted that HMRC proposes to put in place:

- A specialist team within HMRC that will be responsible for all DRD cases, and
- A dedicated helpline will be available to debtors and deposit takers.
Nevertheless, further consideration that there are proper tribunal safeguards is required. It may also be questionable whether the proposed DRD powers will be compliant with article 6 of the European Convention on Human Rights if accounts have money removed before the taxpayer has had any access to a court.
Specific questions

**Question 1** - Is 12 months’ worth of account information sufficient for HMRC to establish how much the debtor needs to pay upcoming regular expenses?

The question about a 12 month period of bank records and whether this is adequate to establish a taxpayer’s cash needs should be re-considered. The completeness of the financial picture, not the time here, is critical. For example, liabilities are not mentioned at all, yet commonly multiple bank accounts are held with a provider for different purposes such as mortgages or loan accounts.

Part of the consideration also needs to be an awareness of whether calling for a freeze on an element of taxpayer’s funds may trigger adverse action by the bank. If it suggests cash flow difficulties DRD may lead to the bank deciding to reduce its lending facilities or to seek further security; or the reduction in funds may lead to a default event, may result in a breach of covenants and affect credit ratings.

However, rather than attempt to list the range of information that HMRC should automatically have access to and should be taken into consideration, which could in some instances be an invasion of privacy, it may be preferable for the DRD rules to put the onus on the taxpayer to establish how much cash they need to retain. This also needs to give weight to the commitments that the taxpayer may have, such as a mortgage, and other outgoings.

**Question 2** - Is 5 working days sufficient time for deposit takers to comply with account information requests?

ICAS members question whether 5 working days would be an adequate time scale but this will be for deposit takers to comment upon.

**Question 3** - By leaving a minimum balance in a debtor’s account, HMRC needs to strike a sensible balance between avoiding putting taxpayers into hardship and collecting money owed to the Government in an efficient manner. Is £5,000 a proportionate and appropriate sum to meet these objectives?

See comments in relation to question 1

**Question 4** - What changes will deposit takers need to make to their systems to administer this policy and will this impose any administrative burdens?

No comments

**Question 5** - Is 14 days an appropriate length of time for the debtor to object to HMRC or pay by other means?

The 14 day period is too short particularly if the problem has arisen due to communication difficulties. There may also be insufficient time to respond, for example, to cater for slow post, for holidays, or for obtaining underlying records. ICAS recommends that the period should be a minimum of 28 days.

It is also suggested that for debts of over, say, 5 years there should be a different process because inevitably it takes longer to investigate an old debt.

**Question 6** - What would be a suitable time limit for the deposit taker to comply with an order to release funds, either to the debtor or to HMRC?

No comments
Question 7 - What sort of sanction should fall on deposit takers who do not comply either with the initial notice to supply account information or the instruction to release the held amount to HMRC?

No comments

Question 8 - Is protecting a proportion of the credit balances of joint accounts the best way to protect non-debtor account holders?

Access to the balance, or part of the balance, in a joint account could be problematic and requires careful consideration by HMRC about how to access funds without disadvantaging any joint account holder. It is also an interesting proposition that HMRC should be able to access a joint account in the names of husband and wife as this runs contrary to the notion of independent taxation.

There are some instances where it would be inappropriate to assume 50:50 in a joint account, for instance where older people have made one of their children a signatory in order that their affairs could be dealt with in an emergency.

If there is to be access to joint accounts then it is an essential safeguard that there is advance notification to the other joint account holder in writing by letter at least: confidentiality issues will need to be specifically provided for here.

Question 9 - Are these safeguards appropriate and proportionate?

Have the debts been correctly calculated?

It is noted that the examples in the consultation paper are based on estimates. Concerns have also been expressed by some of our members about whether the records upon which HMRC debts are calculated are up to date. Assurances are sought that there will be a process built into the DRD rules that requires adequate checking that the debt exists, and is the minimum calculated and due on a reasonable and justifiable basis.

Further assurances are sought if the debts are beyond a certain age. If DRD is to be applied to all existing HMRC ‘debts’ some may be very elderly and some are without question incorrect. For example, our members have noted instances where incorrect amounts are recorded as outstanding from pre-computerisation of HMRC records and such claims for payment have been extremely difficult to deal with due to the age and nature of the incorrect records. It is suggested that there should be a different process and longer time periods for any debt over, say, 5 years because it can take considerable time to extract old records to verify whether there is outstanding debt and if so to confirm the correct amount.

The consultation document suggests that amounts could be directly recovered from an ISA account. Of course, the difficulty with this is if the amounts are incorrect because once an amount has been withdrawn from a tax free wrapper it cannot be returned, even if it is an HMRC mistake. This requires a suitable safeguard, for example, legislation that will enable the tax relief to be reinstated.

Further detailed comments

Number of contacts with taxpayer before DRD is implemented

Paragraph 3.4 of the consultation paper states that ‘… a debtor in self-assessment who has a good history of compliance will typically have been contacted by HMRC around nine times in total (including by letter and telephone). At a minimum, they will have been contacted four times’. The same point is made in paragraph 4.2. However, there is a discrepancy between four and nine and assurances are sought that the contact process will be more clearly defined.
ICAS considers that the contact process should address:

- The detailed number of contacts that should take place before DRD is initiated. This should include a set number of written communications
- At least one letter should be by registered post
- Any telephone calls should be an active discussion with the taxpayer concerned and not simply leaving a message that HMRC has called, and
- A certain number of the HMRC letters must expressly say that failure to pay may lead to Direct Recovery of Debt by HMRC.

Other points that should also be considered in developing a suitable contact process include:

- Whether letters that are to be issued by the new DRD Unit will be on a timely basis (given that there is a very tight turnaround period) or whether it would follow the current HMRC convention of dating by month only. The contact policy should also address how postal time delays will be dealt with in DRD.
- That taxpayer addresses should be verified by sending a field officer to the address to check mail has been received by the taxpayer before DRD is used.
- Whether letter procedures are to be reviewed so that, for instance, they have an indicator that the contents are not simply a circular.

There is a need for a fully documented process, which should be subject to further consultation before implementation.

**Identifying the vulnerable who may need help rather than DRD procedures**

It is understood that HMRC has a vulnerable persons’ unit, and will aim to liaise with it to ensure appropriate measures are used. This would be a welcome measure but broader safeguards are essential. For example, there needs to be a general protection for the vulnerable and this could include bankers putting a request for funds on hold for any account where they hold notices of power of attorney. Further thought should be given to measures such as before accessing a joint account of any potential DRD debtor over the age of, say, 70 the case should be should be flagged for separate consideration.

Assurances are sought that there will always be the opportunity for a face to face discussion. In a debt situation which might lead the vulnerable to panic or be distressed, many people would want to be able to have a face to face discussion to resolve matters regardless of how good the online guidance and facilities are. As noted under point 6 in the general introductory comments above the HMRC procedures to support vulnerable taxpayers are currently being diminished.

If a relative of a taxpayer attempts to phone HMRC they need authorisation which can cause difficulties in dealing with vulnerable persons affairs. Likewise, there should be a deemed consent process or an instant agent appointment process by phone for those who might not normally use an agent but need one in order to deal specifically with DRD.

**The specialist DRD Unit**

ICAS members would be concerned if the operation of any DRD Unit was to be outsourced. The handling of such a debt collection process, which gives unprecedented powers to the tax authority, should not be capable of delegation.

**Time To Pay (TTP) facilities**

There should be more definitive guidelines, consistently applied, for when TTP is to be granted. A taxpayer should be offered a level of certainty that if key criteria are met, such as being a first time debtor, there will be a TTP facility available.
An appropriate mechanism to appeal against DRD

There is a lack of clarity in the consultation paper regarding the appeal mechanisms. HMRC should not be able to take funds from a taxpayer’s account without the taxpayer having the right to be able to appeal against such action. Such an appeal mechanism needs to incorporate the following:

- DRD should not be entered into if the appeal period had not yet lapsed; if the case was before the Tribunal; or if there was on-going negotiation regarding the amount,
- There should be a review mechanism within HMRC if the taxpayer wished to dispute the DRD.
- The timescale to be able to go to Tribunal in a DRD situation will be crucial and will need to be prompt, cost effective and independent

It would not be helpful to set up a different review mechanism – the existing mechanisms should be used although they may need, say, fast entry.