ICAEW
REPRESENTATION 69/20

TACKLING PROMOTERS OF TAX AVOIDANCE

Issued 15 September 2020

ICAEW welcomes the opportunity to comment on the Tackling promoters of tax avoidance consultation published by HMRC on 21 July 2020, a copy of which is available from this link.

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This response of 15 September 2020 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 186,500 chartered accountant members and students around the world. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

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BACKGROUND AND OVERVIEW

1. ICAEW fully supports HMRC's efforts to challenge those individuals and organisations involved in promoting aggressive tax avoidance arrangements. It is important to note at the outset that our members' view is that the promoters this regime is targeting are abusing the tax system and should not be considered as equivalent to bona fide tax advisors. Our members should not be involved in such activity. If HMRC became aware of any ICAEW members or member firms acting in this manner we would urge them to contact us so we can investigate them under the appropriate disciplinary procedures.
2. Because our members see the regime as challenging behaviours so far removed from what they would expect to see of a competent and ethical professional, many of the questions are viewed to be outside of their core expertise and experience. The vast majority of ICAEW members would not (and as noted above should not) be associated with such activity in any way at all. We have therefore not received the level of feedback necessary, particularly in the short time available, to provide HMRC with a comprehensive response to all questions. However, where members have provided us with specific comments, we have answered those specific questions posed in the consultation document.
3. In this response, therefore, we have sought to set out our high-level thoughts and note any key areas of concern which have been raised by members.
4. We understand the concerns raised in the consultation document and the issues around the current regime to challenge Promoters which relies heavily on protracted litigation. The challenges with the existing system allow Promoters to stagnate proceedings for significant periods of time such that they can continue to market schemes to taxpayers. ICAEW supports any new measures introduced to disrupt this model provided they are managed with appropriate safeguards to ensure such measures cannot unduly affect compliant tax advisors.
5. These measures will need to be targeted carefully so that they only impact upon Promoters and do not impact upon the vast majority of bona fide agents who, in principle, should support the proposed approach. HMRC should seek to actively 'scope out' the competent and ethical professionals and could apply, for example, some form of 'hallmarking' or other methodology to exclude such complaint advisers. There appears to be no benefit to the Exchequer or the Economy in adding to compliant advisers' existing risk compliance burden. HMRC has already at its disposal, for example, the Business Risk Review which could be widened to include agents of all sizes and the ensuing rating which might inform a view, Further, there would seem to be a natural nexus with the objectives of the Call for Evidence for Raising Standards Across the Tax Advice Market and potentially tailoring these proposed measures to follow on from those conclusions.

KEY ISSUES AND CONCERNS

Disclosure of Tax Avoidance Schemes ("DOTAS")

6. Broadly we support the changes to the rules around DOTAS which effectively enables HMRC to issue a Scheme Reference Number (SRN) in the absence of cooperation and the provision on information by the Promoter. We acknowledge that there is a right of appeal to the Tribunal against the SRN which offers some objective assessment of the application of the law.
7. We note that there is no right of appeal against the information notice. We do not have any strong objections to this as we would expect compliant advisors to cooperate with such a notice. However, we consider there should be substantial internal governance and review around these notices because we would not want compliant advisors receiving unduly onerous information notices. This would place unnecessary and potentially significant costs on their end clients. Therefore, we would urge HMRC to only use them in limited and prescribed circumstances. Measures should be in place such that these notices cannot be

used in the course of a standard enquiry or intervention and 'reasonable grounds' should be actively tested through a layer of governance such as for example, a closed hearing

8. Members also raised concerns around whether these measures would change behaviours, particularly as the arrangements described appeared to involve fraudulent misconduct as opposed to tax avoidance. The issue of an SRN might not concern the promoters being targeted. However, we note the proposals introduce measures to enable HMRC to publish details of the scheme and those who have received an SRN. While members felt that this would have greater impact than the SRN, they did stress that the way in which this was publicised would be very important. For example, HMRC already has a 'spotlight' system for highlighting avoidance schemes and it is not felt that these are being widely read or gaining the attention of affected taxpayers. Perhaps the tax return instructions/prompts should cross refer people to the info that HMRC is going to publish so they at least check it before returns are filed containing scheme entries.

Promoters of Tax Avoidance Schemes (POTAS)

9. The main concern raised by members in respect of these changes is the low threshold for their application which, combined with an absence of clear definitions, could make their application particularly subjective in the absence of appropriate statutory safeguards. Members expressed a specific concern around the interaction with DAC 6. It appears that a failure under DAC 6 could contribute towards inclusion in the POTAS regime. Given that some of the hallmarks within DAC 6 do not even require a tax avoidance motive or indeed any tax advantage at all, this would appear unreasonable. It is generally accepted that the rules around DAC 6 are complex and wide-ranging and will affect some benign arrangements. It is therefore likely that innocent omissions will occur. We would question whether DAC 6 should interact with POTAS at all. If there is a desire to retain some interaction, we would advise scoping out certain hallmarks: for example those where there is no main benefit test and certainly ensuring there is some flexibility to exclude omissions which have been made in oversight.

Penalties for enablers of defeated tax avoidance

10. They key concern from members in regards to this regime was the potential to apply the measure retrospectively. Members felt that applying the law in this way was not a positive step. Ensuring that the law operates prospectively will at least give the opportunity for affected enablers to consider changing their behaviours and practices which is a key purpose of the legislation. Also given the litigious nature of some individuals who undertake these practices, and the political landscape around some anti-avoidance measures, retrospective application of the law could result in increased challenge.

ICAEW RESPONSES TO SPECIFIC QUESTIONS POSED IN THE CONSULTATION DOCUMENT

Q1. *Would 30 days give a reasonable amount of time to furnish HMRC with information on the schemes that the promoters or enablers have been promoting or enabling?*

11. Time is of the essence and we would encourage HMRC to consider the use of electronic means of delivery such as email. If HMRC sends out the information notices by post, the 30-day period for responses is too short: post can take up to 2 weeks to arrive. In that case, a longer period, say, 45 or 60 days would be more realistic but this runs counter to the need to act quickly.

Q2 *Would the proposed approach prevent persons from obstructing enquiries by claiming not to be a promoter, or in other ways such as by restructuring or moving offshore? If not, why not?*

12. It is unclear how effective this proposal will be. If someone is already uncooperative then we doubt it would alter behaviour materially. We are also concerned about how the proposed approach will interact with legal privilege e.g. if a lawyer is one of the people in the supply chain?

Q6 ***Would naming those in the supply chains for promoting tax avoidance schemes help make taxpayers aware that they risk falling into a scheme that HMRC suspects does not work?***

13. The key question is: how would taxpayers' know that someone in the supply chain was named? Unless taxpayers are told directly it is hard to see that they would find out or know to look on gov.uk. Further, some less scrupulous promoters change their names or tell their clients to ignore whatever HMRC says about the scheme/its effectiveness etc. If taxpayers know about the naming then the same place on gov.uk should recommend they seek independent professional advice before filing their return.

Q11. ***Do the conditions for issuing earlier stop notices achieve a sensible balance between ensuring appropriate safeguards are in place, whilst ensuring that HMRC is able to promptly tackle schemes that are destined to fail for the benefit of taxpayers? If not, how could they be better targeted to achieve this balance?***

14. In principle the conditions achieve a sensible balance but we have set out some comments below on the accompanying draft legislation.
15. In para 236A(1) (as inserted by para 1 of schedule 1), the power to issue a stop notice is based on whether the authorised officer 'suspects' that the person promotes arrangements. We think that 'suspects', or the triggers for a suspicion, should be set out in the legislation or in accompanying guidance.
16. In para 236A(3)(b), Condition A includes provisions that the arrangements are similar to arrangements previously notified under the DOTAS provisions set out in FA 2004. This could potentially include anyone who made a DOTAS disclosure since 2004, including protective disclosures. The legislation should make it clear that condition A will not be applied retroactively.
17. In Condition B in para 236A(4)(a), 'marketed' is not defined. To ensure that this measure is properly targeted at those abusing the system, it should be defined quite narrowly.

Q17. ***Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposal?***

18. There should be suitable governance around decisions to issue stop notices to ensure they are based on reasonable suspicions and only issued in circumstances which are consistent with the policy intention of this draft legislation.

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).