



TOUGHER CONSEQUENCES FOR PROMOTERS OF TAX AVOIDANCE

Issued 21 June 2023

ICAEW welcomes the opportunity to comment on “Tougher consequences for promoters of tax avoidance” published by HMRC on 27 April 2023, a copy of which is available from this [link](#).

For questions on this response, please contact the ICAEW Tax Faculty at taxfac@icaew.com quoting REP 58/23.

This response of 21 June 2023 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW 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 Tax Faculty’s Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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KEY POINTS

1. We support measures that enhance HMRC's powers to tackle the promotion of marketed tax avoidance arrangements in the UK.
2. However, we are concerned that persons could be found guilty of the proposed criminal offence even where the stop notice is subsequently overturned. We suggest safeguards below that would help to prevent this outcome.
3. We also recommend that a more thorough process is completed for stop notices to be issued if failure to comply with the notice could result in a criminal conviction.
4. The government may wish to include a sunset clause for the criminal offence measure such that its effectiveness and necessity must be assessed in the future. It could also be the subject of independent parliamentary scrutiny after several years.
5. The consultation document does not set out the level of punishment or sanctions that a conviction would carry. It would be useful to know what HMRC envisages here.
6. On the director disqualification measure, we believe that a safeguard should be introduced to allow directors to demonstrate that they had no knowledge of the promoter activities of the company concerned and that they have not been appointed to conceal the identity of individuals instrumental in promoting these activities who were acting as 'shadow directors.

ANSWERS TO SPECIFIC QUESTIONS

A CRIMINAL OFFENCE FOR PROMOTERS FOR FAILING TO COMPLY WITH A STOP NOTICE

Proposed changes

Question 1: Do you agree that focusing a criminal offence on the continued promotion of a scheme covered by a Stop Notice will help to deter promoters?

7. We believe that having tough sanctions against the behaviours identified would give HMRC a good chance of deterring promoters from carrying on that behaviour. However, this will only be the case if:
 - HMRC publicises its greater powers; and
 - those powers are enforceable on promoters based outside the UK as well as those in the UK.
8. Publicity should increase awareness of the offence and therefore improve the offence's deterrent effect. Consequently, HMRC should publicise the offence as early as possible in the stop notice process eg, when it starts looking at whether to issue a stop notice and in particular, in the letter sending the stop notice. It could also send the notices directly to the directors, so they are aware of the stop notice and the consequences of not complying with it.
9. On enforceability, will the offence require non-residents to be extradited to the UK? If not, and the person simply does not come to the UK then can they avoid a prison sentence? If their punishment is a criminal fine, then the Proceeds of Crime Act 2002 could potentially be used by HMRC to freeze/seize UK assets to enforce it. However, if they have no UK assets, can the fine be collected? HMRC will need to investigate these points in deciding how effective this measure would be in deterring non-UK resident individuals from continuing promoting tax avoidance schemes.
10. We note that, despite the significant financial penalties chargeable under existing civil measures, there remain a hard core of promoters determined to continue promoting avoidance schemes. In the light of this, we question whether any measure introduced would

have the impact that HMRC desires. We would be interested to understand what form of punishment HMRC envisages arising from being convicted of the proposed offence in assessing its effectiveness.

Question 2: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a comprehensive deterrent for promoters?

11. We agree that the combination of civil penalties and a criminal offence is a comprehensive one, but we have concerns over whether they will be an effective deterrent in relation to promoters located elsewhere in the world.

Question 3: In the circumstances set out in the example provided, as Mr A is significantly influencing the continued promotion activity, do you agree that Mr A is in scope of the criminal offence?

12. In the context of the example given, it appears that Mr A is the party that is dictating the activities that X Ltd and Y Ltd are carrying out and it therefore makes sense that he is the subject of the criminal offence. If it is to have any impact, the offence must be aimed at the persons that are influencing the activities of the entities involved in the arrangements.
13. In terms of applying the offence in the real world, however, it will be necessary to define and apply concepts such as “control” and “significantly influence” which might be difficult and involve careful subjective judgment. Sufficient safeguards will need to be in place to ensure that any persons who are not able to influence the activities of any entities concerned are not caught.

Question 4: Do you agree that these other obligations, where they do not relate to continued promotion, should not be subject to the criminal offence?

14. Yes, we agree that if the criminal offence is introduced, its purpose should be limited to encouraging persons to cease the promoting activity that is the subject of the stop notice.

Safeguards and protections

Question 5: Do you agree that these safeguards provide the right level of protection for those who may face potential criminal prosecution?

15. HMRC already has a process for issuing stop notices. However, it remains possible that misunderstandings may occur such as to the nature of the arrangements. It is important that compliant advisers do not fall foul of the proposed criminal offence simply because a piece of advice turns out not to be correct. Consequently, we suggest further safeguards are introduced.
16. The proposed offence is scoped in a way that could result in a person being successfully prosecuted for failing to comply with a stop notice despite it being struck down by the tax tribunal. We don't believe that a person should be convicted of an offence for not dealing with a notice that should never have been issued in the first place.
17. A suitable safeguard could be that the criminal offence case is referred to the crown prosecution service when the person doesn't comply with the stop notice, but if the person wins their appeal against the notice, then the criminal case is not taken to court. An alternative would be to alter the scope of the reasonable excuse defence so that a person has a reasonable excuse if they successfully appeal against the stop notice. Then that person knows that if they lose their appeal against the stop notice the offence is still relevant, so it would still have potential deterrent effect.

18. We also believe that if a criminal offence is introduced for non-compliance with a stop notice, such notices should be issued through a decision taken at a higher level of seniority within HMRC than it is at present.. For example, it could be added to the list of responsibilities of HMRC's Tax Dispute Resolution Board (or the Tax Assurance Commissioners).
19. HMRC could also look to provide the promoter with a more meaningful opportunity to demonstrate that it has a reasonable excuse for failing to comply with the stop notice. Inspiration could be taken from the corporate criminal offence rules which allows an organisation to plead a defence that it has put in place measures, procedures and safeguards to prevent facilitation of tax evasion. Perhaps the person could demonstrate that they are taking measures to wind down the promotion activity that is the subject of the notice, for example.

EXPEDITING THE DISQUALIFICATION OF DIRECTORS OF COMPANIES INVOLVED IN TAX AVOIDANCE

Proposed changes

Question 6: Do you agree that allowing HMRC to consider and bring disqualification proceedings against directors and those who control or exercise influence over a company involved in promoting tax avoidance will help deter and tackle tax avoidance?

20. We agree that the proposed measure would make it difficult for UK companies to operate without the directors that have been subject to the disqualification. However, we do not believe that this would have a significant impact in the following situations:
 - Non-UK companies operating in the UK tax avoidance market (as we assume that HMRC would not have jurisdiction to disqualify people from being directors of these companies)
 - Entities such as LLPs that are constituted differently to companies and therefore do not require directors to operate.

Gathering evidence

Question 7: What other factors should HMRC consider when considering a director disqualification?

21. There is already a comprehensive list of factors included in the consultation document. We believe that evidence would need to show that any director subject to the disqualification exercised control or influence over the company's affairs.

Scope – who this would apply to

Question 8: Do you have any suggestions for ensuring these proposals deal effectively with those who directly or indirectly control or exercise influence over a company, for example shadow directors?

22. We welcome HMRC's assurance at paragraph 3.27 of the consultation document that the proposals should not have any impact on directors of companies not involved in tax avoidance. However, we believe that this should go further with the inclusion of a safeguard to allow directors to demonstrate that they had no knowledge of the promoter activities of the company concerned and have not been appointed to conceal the identity of individuals instrumental in these activities and who were effectively acting as 'shadow directors'.
23. We do not have any specific suggestions as to how HMRC can deal effectively with shadow directors, other than to consider the reason for appointment of directors in the round, both in terms of the activities they carry out and those they facilitate others carrying out.

Undertakings

Question 9: Should undertakings form part of HMRC's approach to director disqualification?

24. This sounds sensible but we don't have sufficient expertise to comment further.

Sanctions for breaching a disqualification

Question 10: Do you consider the current sanctions for breaching a disqualification or undertaking are sufficient for tax avoidance-related disqualifications?

25. Yes, these sanctions already appear severe, so we do not believe that any additional or more stringent sanctions are required.

Safeguards and protections

Question 11: Do you consider the current safeguards outlined above are sufficient and provide adequate protections for directors? If not, what additional safeguards could be introduced?

26. Provided these safeguards are made clear to directors against whom HMRC takes disqualification action, we believe that they should be sufficient.

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>).