‘Enablers of Tax Avoidance’ – HMRC consultation

Management of taxes

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HMRC is seeking views on proposals to introduce sanctions against those who enable or use tax avoidance arrangements that are later defeated.

HMRC’s discussion document, Strengthening Tax Avoidance Sanctions and Deterrents, was published on 17 August 2016 and is the latest in a series of proposals to tackle those who profit from tax avoidance schemes.

In her foreword, the Financial Secretary to the Treasury, Jane Ellison, says the consultation is intended to tackle a ‘shrinking but persistent minority’ of people who ‘seek to exploit tax laws in a way parliament never intended and secure for themselves or their clients an unfair financial advantage’. In its introduction, HMRC recognises that ‘the vast majority of taxpayers in the UK comply in full with their tax obligations’ but that ‘a minority attempt to pay less than their fair share by using tax avoidance arrangements’.

The challenge for the government is to frame legislation that will achieve its objectives, while maintaining the right of ordinary taxpayers to obtain full and expert advice on complicated and often unclear areas of law, enabling them to sensibly plan their tax affairs within the law and not lay themselves open to large, unintended tax bills.

HMRC is seeking views on these specific proposals:

1. Financial sanctions for those who design, market or facilitate the use of tax avoidance arrangements which are defeated by HMRC, with the aim of deterring what are referred to as ‘enablers of tax avoidance’ (Q1–Q9).

The focus of the proposals is on those who benefit financially from enabling others to

implement tax avoidance arrangements. This includes but is not limited to:

- those who develop, or advise/assist those developing, such arrangements and schemes;
- independent financial advisers, accountants and others who earn fees and commissions in connection with marketing such arrangements, whether or not their activities amount to the promotion of arrangements; and

company formation agents, banks, trustees, accountants, lawyers and others who are intrinsic in, and necessary to, the machinery or implementation of, the avoidance.

HMRC believes that currently many enablers of tax avoidance do not feel affected by the sanctions and deterrents designed to influence avoider behaviour and see few downsides to their continued involvement with such arrangements.

The consultation paper proposes developing a definition of ‘tax avoidance enabler’ based on the new ‘enabling’ offshore tax evasion offence in Finance Bill 2016.

The government does not propose linking the new avoidance enabler penalty to a penalty being charged on the user of avoidance which is defeated. Instead, the proposal is to use the defeat of the tax avoidance arrangements as the trigger for enabler penalties (see 3 below).

The government is seeking comments on whether a tax-geared penalty is the right approach. This could be based on the amount of tax understated by the user as a result of the avoidance scheme being defeated. An alternative approach could be a penalty based on the financial benefit enjoyed by the enabler, possibly up to 100% of that benefit. Views are sought on how to ensure that the penalties imposed are proportionate, whether new information powers are needed, what safeguards would be appropriate and what categories of people should be excluded from the definition of enabler.

Readers may be interested to read HMRC’s current thinking on the steps that an agent needs to show to prove that they have advised their client appropriately about tax avoidance arrangements. This is set out in para 2.30 of the consultation document, which says the following:

‘An agent who provides general accounting and taxation services may submit a return for a client, which is later found to be incorrect as a result of avoidance arrangements being defeated. If the agent could show that they had advised their client not to implement the arrangements, or that their client had not discussed the issue with them before implementing the arrangements, we would not want a penalty as long as they could also show that all appropriate disclosures were made when that return was submitted.’

2. Changing the way the penalty regime works for those whose tax returns are found to be inaccurate as a result of using such arrangements by defining what does not constitute the taking of ‘reasonable care’ and placing the requirement to prove ‘reasonable care’ on to the taxpayer (Q10–Q12).

The consultation paper describes how it can be more difficult for HMRC to establish failure to take reasonable care when a person has entered into complex tax avoidance arrangements. They set out several reasons why they think that the present position puts them at a disadvantage, including difficulties they encounter in obtaining basic factual information about the arrangements and the taxpayer’s reliance on generic or theoretical ‘expert’ statements and advice. They provide some case studies to illustrate the point;

3. Defining what is meant by ‘defeated tax avoidance arrangements’ (Q13). HMRC is proposing that a wide definition of ‘arrangements’ is adopted for these proposals, as is already used in other parts of tax legislation.

A ‘relevant defeat’ would apply to arrangements when there is a final determination of a tribunal or court that they do not achieve their purported tax advantage or, in the absence of such a decision, there is agreement between the taxpayer and HMRC that the arrangements do not work. There is no specific reference to when a defeat would count as a ‘relevant defeat’, but the consultation refers to recent changes to the promoters of tax avoidance scheme legislation in Finance Act 2016 where the concept of ‘relevant defeat’ first appears. This suggests that a ‘relevant defeat’ would include defeats of schemes that have been marketed and entered into in the past, rather than solely future schemes.

HMRC is proposing that a ‘relevant defeat’ would arise on arrangements that:

- have been counteracted by the general anti-abuse rule;
- have been given a follower notice;
- are notifiable under the disclosure of tax avoidance schemes or VAT
- disclosure regimes; or
- have been the subject of a targeted avoidance-related rule or unallowable purpose test contained within a specific piece of legislation or regime.

4. Seeking further ways to discourage avoidance and shrink the avoidance market (Q14–Q15). The final chapter introduces a framework for thinking about the chain of decisions that users will face as they consider and then enter avoidance arrangements, and sets out policy aims for changed behaviour. It also suggests some possible new interventions for influencing choices. HMRC is inviting respondents to comment on its analysis and suggest additional ways of achieving their objectives.

The consultation is taking place during Stage 1 of tax policy development, which involves setting out objectives and identifying options. Further consultation on a specific proposal for reform will take place later.

The consultation runs until 12 October 2016. Send responses to HMRC at ca.consultation@hmrc.gsi.gov.uk

The CIOT and ATT are each intending to submit a response to the consultation. Readers may submit comments for possible inclusion in that response to technical@ciot.org.uk or atttechnical@att.org.uk no later than Wednesday 5 October.