Draft Finance Bill legislation: new criminal offence for promoters of tax avoidance

Management of taxes **General Features**



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The CIOT has met with and written to HMRC to express concerns about the draft Finance Bill legislation (tinyurl.com/zmm6jurz) which introduces a new strict liability criminal offence for a person who, without reasonable excuse, fails to comply with a stop notice issued by HMRC requiring them to stop promoting a tax avoidance scheme.

The CIOT strongly supports taking a robust approach to those who continue to promote tax avoidance schemes but this needs to be done in a way that has due process with adequate safeguards and appropriate governance. In our view, the proposed new criminal offence fails this test because an important constitutional line is being crossed; namely, that (in principle at least) something can potentially be a crime on HMRC's say-so, given that a decision to issue a stop notice will rest entirely with HMRC with no external oversight. We had previously set out these concerns in

our response to HMRC's recent consultation document (see www.tax.org.uk/ref1127).

The proposal as it stands places a very high level of reliance on HMRC's internal governance working effectively. We would support HMRC publishing the steps involved in the decision to issue a stop notice so external stakeholders can have a clearer understanding of HMRC's governance process. However, in our view this is not enough. The lack of external scrutiny prior to the issue of the notice presents a risk that it could be incorrectly issued and/or inappropriately targeted with significant consequences for the promoter concerned. Using the existing safeguards which were designed for a regime attracting civil financial penalties, rather than criminal sanctions, will not be adequate.

The position is exacerbated by the following facts:

a) If, on appeal against the stop notice, the tribunal determines that the stop notice shall 'cease to have effect' *ab initio,* it is unclear that this rescinds the criminal offence which has already been committed.

b) Even if such a decision by the tribunal does rescind the criminal offence, this puts pressure on a tribunal in deciding from what date the stop notice should cease to have effect. If the tribunal chooses that the cessation should be prospective only, then it will be confirming the criminal offence.

c) Even if the avoidance scheme is ultimately found to work by the courts, the criminal offence of failure to comply with the stop notice will still have been committed.

We have therefore suggested to HMRC that they should have to make an ex parte application to the Upper Tribunal (Tax and Chancery Chamber) for 'judicial' approval before a criminal stop notice can be issued. We do not believe that adding this additional step would significantly slow down the process of issuing a notice. However, it would provide an extra level of assurance for all the parties involved, including HMRC, that a stop notice that carried with it serious consequences if ignored had been appropriately issued. We also make some suggestions about how the exact question for the Upper Tribunal could be framed.

Given that the likely number of such notices will remain limited, we do not think that this places an undue resource demand on the Upper Tribunal.

In terms of how effective the criminal offence will be, we think this will largely depend on how realistic promoters believe the prospect of a criminal conviction is. There may be a higher deterrent effect on promoters based in the UK than on those overseas. We ask if HMRC would explain how the offence will affect promoters situated outside the UK, particularly those with no assets here. For example, we would welcome accessing mutual assistance legal treaties to help enforce the measure as a positive step. We agree with HMRC that prosecution should be reserved for the most serious cases, where they need to send a strong deterrent message or where civil investigations are ineffective.

Finally, we express some surprise that the draft legislation was published so quickly after the consultation closed. We recognise that there is ministerial appetite to introduce the offence, and it was helpful to hear HMRC's assurances as to the consideration given to the consultation responses received. However, in our view the speed at which it is being brought in and the failure to address the concerns that were raised by consultees undermine the consultation process.

The CIOT's letter can be found here: www.tax.org.uk/ref1198.

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