TAXREP 55/13

(ICAEW REP 144/13)

ICAEW TAX REPRESENTATION

RAISING THE STAKES ON TAX AVOIDANCE

Comments submitted on 9 October 2013 by ICAEW Tax Faculty in response to HMRC consultation document *Raising the stakes on tax avoidance* published on 12 August 2013

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation document Raising the stakes on tax avoidance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227763/130807_condoc_Raising_the_stakes_on_tax_avoidance.pdf published by HM Revenue & Customs (HMRC) on 12 August 2013.

2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

3. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system.

WHO WE ARE

4. ICAEW is a professional membership organisation, supporting over 140,000 chartered accountants around the world. Through our technical knowledge, skills and expertise, we provide insight and leadership to the global accountancy and finance profession.

5. Our members provide financial knowledge and guidance based on the highest professional, technical and ethical standards. We develop and support individuals, organisations and communities to help them achieve long-term, sustainable economic value.

6. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

KEY POINT SUMMARY

7. We are very pleased to note the government statement towards the beginning of the Consultation Document (paragraph 3.1) that "tax advisers are vital to the administration of the tax system. They provide invaluable support to taxpayers to help them comply with their tax obligations."

8. ICAEW supports reasonable and proportionate measures by the government to tackle tax avoidance. We have in principle supported the government's previous discussions and proposals on how to tackle the promoters of dubious tax avoidance schemes. The question is: how do you take proportionate action against tax advisers who are intent on undermining the tax system and achieving results for their clients which are quite outside what Parliament intended or what is a reasonable view of how the tax system should operate in practice.

9. We understand that these proposals are aimed at only around 20 promoters, in other words a very small segment of the tax advice market. We understand that many of these promoter firms operate outside of any oversight by a professional body and that a number of them are outside the UK, making it a difficult group to target.

10. In order for any proposals to succeed in tackling such promoters, the proposals need the support of the wider tax profession – in other words they need to be properly targeted at this group, the measures must be proportionate to the problem and they should not impose undue and unreasonable burdens on the vast majority of tax advisers who are not involved in such activity.

11. We are concerned that the proposals as currently suggested may be too widely targeted and will result in substantial extra compliance burdens and costs imposed on tax advisers who are not engaged in promoting dubious tax schemes. The danger then is that the proposals will not succeed. The 20 or so promoters at whom the measures are aimed continue to operate in exactly the same way as they do now but considerable extra compliance costs have been imposed on everyone else to no useful purpose.

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12. If action is to be taken against high-risk promoters then before any individual or firm is designated as such we believe that there should be a system of independent review of the relevant HMRC proposal similar to the Advisory Panel under the recently introduced General Anti-Abuse Rule (GAAR). It is not acceptable for HMRC to act as judge and jury in what is a highly sensitive area, particularly given that the measures appear to be too widely targeted.

RESPONSES TO CONSULTATION QUESTIONS

Identifying a high-risk promoter

Q1 - Do you think that the objective criteria in Approach One are, on their own, sufficient to identify high-risk promoters or do you agree that the second approach would be more effective?

13. We do not believe that the criteria laid down in paragraph 3.13 are sufficiently robust. For instance if a promoter has legal advice that a particular scheme is not notifiable under DOTAS, and that is not an unreasonable position to take, then it does not seem reasonable to treat the person as a high risk promoter.

Q2 - Do you consider that the suggested objective criteria would provide effective reassurance for advisers who are not high-risk promoters?

14. No for the reasons given above.

Q3 - In relation to the objective criterion based on disciplinary proceedings, do you think it is necessary to narrow the criterion to specific disciplinary matters?

15. There is no mention of disciplinary proceedings under Approach 2, only under Approach 1, and paragraph 3.16 indicates that the Government does not intend to proceed with Approach 1.

Q4 - Are there any other objective criteria you would suggest?

16. We have no other criteria to put forward.

Q5 - Are there any other factors you would suggest for the second approach?

17. No.

Q6 - Are there any other circumstances where you think it would be appropriate for an immediate high-risk designation?

18. No.

Q7 - Should a high-risk designation apply from the date of designation or the date that any appeal against the designation is dismissed?

19. Whether or not a promoter satisfies the conditions to become a high risk promoter will be a matter of judgement. It would be unrealistic to determine the decision based solely on an HMRC evaluation. There needs to be an independent and robust means of assessment before such a decision is reached. As we note in our Key Points Summary there needs to be something akin to the Advisory Panel set up under the GAAR regime.

Q8 - Do you think that these safeguards are sufficient to ensure that only promoters that are genuinely high-risk will be designated as such?

20. As noted above the designation should be the subject of independent review.

Q9 - Do you have any suggestions to improve the procedures supporting the high-risk promoter regime?
21. As above.

Q10 - Do you think it is reasonable to include in the objective criteria or factors for designating a promoter high-risk the fact that an entity is a successor entity or associated entity of an existing high-risk promoter?
22. Yes.

Q11 - Do you think that whether or not an entity is a successor or associated entity could be established through key individuals?
23. As long as long as "key individual" is closely defined this should not be a problem.

24. It should be restricted to those individuals who control the business and not to other individuals who work in the business.

The high-risk promoter regime

Q12 - Do you think that the proposed information powers will be both appropriate and sufficient to provide HMRC with the information necessary to understand the promoter's products and trace its intermediaries and users?
25. We have no objections to the powers in relation to the promoter's products but we do have concerns about the extra powers in relation to promoters and we believe that appropriate powers may already be available under the DOTAS regime.

Q13 - Are there any other information powers that it would be useful to apply to high-risk promoters?
26. No.

Q14 - Do you agree that naming high-risk promoters will serve to put their intermediaries, users and the public on notice of their high-risk status and the consequences?
27. There is a danger that promoters will use this to their advantage and seek to gain some kudos from the fact that their schemes have been vetted by HMRC and they are at the most provocative end of the spectrum.

Q15 - What safeguards should be provided?
28. As mentioned above this could be a double edged sword.

Q16 - Are there any issues with the proposed obligations on the intermediary?
29. If there is a robust system for designating high risk promoters then we can see the merits in ensuring that HMRC has powers to ensure that it can have relevant information about intermediaries that introduce their clients to the schemes of those high risk promoters.

Q17 - Are there any further obligations that should be imposed on an intermediary acting for a high-risk promoter?
30. We cannot think of any.

Q18 - Should there be any further safeguards provided for an intermediary acting for a high-risk promoter?
31. No.

Q19 - Do you agree that the user of a product marketed or implemented by a high-risk promoter should be required to declare to HMRC that they have done so?
32. We have no objection to the proposals set out in paragraph 4.22.

Q20 - Do you think it is reasonable that users of products marketed or implemented by high-risk promoters should be subject to extended time limits for assessing?

33. If there is a failure of a user to notify HMRC of the high-risk promoter reference number (paragraph 4.23) then it is reasonable for there to be an extended time limit. But 20 years seems to us to be too long and it would be better to have a limit of four years after the end of the year of assessment in which the notification is given.

Q21 - Is this proposal to create a specific rule that will allow intermediaries and users to disclose information to HMRC reasonable?

34. Very experienced members of our Institute have told us that they have never had experience of clients who having entered into a non-disclosure agreement behind their back have then withheld information about a tax scheme they have entered into.

Q22 - What would this legislation need to achieve to be effective? Do you think it will achieve its aim of improving transparency and encouraging users to provide information to HMRC?

35. Any legislation would also need to take account of whether such information might be subject to a claim for Legal Advice Privilege and, if so, what should be the approach given that there should be a level playing field for all tax advice.

Q23 - Is this level of penalties appropriate for high-risk promoters?

36. We are concerned that the proposed level of penalties is too high.

Q24 - Do you have any other suggestions on the level of penalty appropriate for high-risk promoters?

37. Penalties linked to the level of fees earned by the promoter would seem to be more appropriate and would be commensurate with the benefit the promoter is, potentially, deriving from the scheme.

Q25 - Do you foresee any issues with imposing the higher standard for reasonable excuse and reasonable care?

38. We think that there needs to be a distinction between the taxpayer and his adviser, the intermediary. The taxpayer should be able to rely on his adviser giving appropriate advice in all the relevant circumstances. They are unlikely to have relevant technical expertise so they will depend on their advisers to make sure the advice provided is correct and accurate, taking into account all the facts of the particular case.

Q26 - Is it reasonable to extend the higher standard to other circumstances for high-risk promoters?

39. We should like more information about the circumstances in which this would apply before coming to a firm decision on this.

Penalties for other users of failed schemes

Q27 - Should there be a statutory limit for the period that HMRC allows for taxpayers to amend their returns?

Q28 - Alternatively should there be a statutory minimum period which could be extended at HMRC's discretion?

40. We think there should be some objective mechanisms to be applied when taxpayers do not think that the appeal decision applies to their particular circumstances and before HMRC can apply a penalty.

Q29 - Should HMRC be able to impose this requirement if they win a case at any point at a Tribunal or court where the taxpayer does not appeal further, or is there a minimum level in the court hierarchy that should be reached before the requirement can be imposed?

41. HMRC should not be able to impose such a requirement.

Q30 - Would defining a scheme as "any scheme or arrangement for which it would be reasonable to conclude that the obtaining of a tax advantage was the sole or main purpose" capture the tax avoidance schemes that this measure is intended to catch?

42. We would have thought that the newly introduced GAAR would be sufficient to catch the most egregious of schemes.

Q31 - Are there any other suitable criteria that could be applied?

43. We cannot think of any.

Q32 - Do you agree that once notified that the avoidance scheme they have used has been proven to fail in litigation, other users of the scheme should be required to amend their self-assessments to negate the tax advantage they had gained?

44. While this may be the case when absolutely standard and identical schemes have been used we are concerned that this would not be the case where there are materially differences between the litigated case and other similar but distinct sets of circumstances.

Q33 - Are there other ways to bring the tax to account without offering scheme users further opportunities to delay settlement?

45. For reasons set out above we are not clear it is always going to be clearcut that one scheme is on all fours with another.

Q34 - Do you agree that a penalty should work in this way to encourage taxpayers to comply with these obligations?

46. HMRC are already entitled to interest and under the current proposals will know who has used the scheme.

Q35 - Do you have any further comments on how this new requirement and penalty should work in detail?

47. No.

Q36 - Are there any other penalty models or structures which you believe would work more effectively?

48. None that we think are directly relevant to this particular situation.

DOTAS – Prescribed information

Q37 - Do you think it is reasonable for the prescribed information to include all material provided to prospective users of an arrangement, sample copies of all documents signed by users, a full analysis of the tax advantage that the arrangement is designed to obtain and an explanation of how the arrangement produces the tax advantage?

49. Yes.

Q38 - Alternatively do you think that such material should only be provided following a specific request from HMRC?

50. No.

Assessment of Impacts

Q39 - Do you think that the high-risk promoter and follower penalty proposals will have a wider impact on individuals and households than that already identified?

51. Yes.

Q40 - Do you have any comments on the assessment of the equality impacts for either proposal?

52. No.

Q41 - The high-risk promoter proposals will only impact a small number of promoters some of which may change their behaviours to avoid being designated high-risk. The impact of the proposals on promoters designated high-risk will vary depending on the type of information power and level of penalties to which the promoter is subject. What do you think will be the cost to the high-risk promoter of the following?
a) Providing information under the specific information power
b) Providing information under the general information power
c) Informing intermediaries and users of their high-risk designation.
53. No comment.

Q42 - What changes in costs will businesses face in complying with the follower penalty proposal compared to the current situation?
Please refer to compliance costs not potential penalties and tax settlements.
54. We are concerned that the costs involved could be significant.

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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 icaew.com/en/technical/tax/tax-faculty/~/media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)