CLAUSE 64 FINANCE BILL 2016 – PROMOTERS OF TAX AVOIDANCE SCHEMES

ICAEW welcomes the opportunity to comment on the draft clauses to be included in Finance Bill 2016

This response of 3 February 2016 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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General comments

1. The target of these new provisions, clause 64 Finance Bill 2016 – Promoters of tax avoidance schemes, is a very limited number of promoters who engage in such schemes on a continuing basis.

2. We are concerned that without appropriate safeguards the provisions, as currently drafted, will create a compliance and regulatory burden for a large number of professional firms of accountants who are not the intended target.

3. This is likely to be particularly true of the very largest professional firms who could become enmeshed in these proposed measures simply because they have a significant client base and will almost, by definition, breach the threshold conditions.

Detailed comments – introduction

4. Under these provisions a conduct notice can be issued if a promoter meets the threshold conditions which include provisions, new sections 237(1ZA) and (1ZB), under which if three sets of arrangements are defeated within an 8 year period then the threshold condition will apply.

Grandfathering of the provisions

5. The 8 year period is retrospective and is not limited to periods beginning before the date of Royal Assent to Finance Act 2016.

6. As a result, the current provisions are likely to impact every large firm of accountants which are almost certain to have clients involved in three sets of arrangements which have been "defeated" simply on the basis of the very significant number of clients for whom they act. Plus the current broad impact of the current definition of "defeat".

7. We believe that the best solution would be to make the new provisions operational from the date of Royal Assent to Finance Act 2016. So only tax arrangements entered into, created or marketed after that date would potentially "count" towards the threshold if they are subsequently defeated.

The legislation should take account of firms with a significant number of clients

8. We believe that, in addition, it is essential that the legislation provides that HMRC should be required to take into account "the size of the tax practice of the relevant firm when considering if the tax at risk is substantial" and thus whether the threshold has been breached.

There should be appropriate oversight of the regime

9. We also think that in order to ensure that the provisions are applied in a consistent way there should be a requirement for any conduct notice to be subject to approval by a senior official in HMRC so that any discretion that is applied should be properly scrutinised and not be at the sole discretion of an individual HMRC employee without appropriate oversight.

Other matters

10. In relation to arrangements which fall only within condition F ("avoidance-related rule") we note that this is subject to a judicial ruling which "states, or necessarily implies" that the TAAR in question applies in relation to the person's tax affairs. As the rules in question frequently turn on the subjective intention of the person in question, we believe that this condition should be clarified to ensure that the ruling in question relates specifically to the person's tax affairs, rather than that implications or inferences are drawn for the person's tax affairs from a ruling involving a third party.

What arrangements should "count"

11. We are also concerned that defining a "defeat" of arrangements as automatically including out of court settlements with HMRC (whether by contract settlement or agreed adjustments to a return or claim) represents a poor proxy for the failure of promoted arrangements in question and an inadequate and unfair basis to take action against the promoter. This is because individual taxpayers, or groups of taxpayers, can, and do, settle with HMRC, often on a without prejudice basis, in order to save the ongoing cost and uncertainty of potentially protracted litigation. There may be limited opportunity for a promoter (at least in relation to existing arrangements) to influence the taxpayer's decision on whether or not to settle.

12. More generally, both for clause 64 and clause 63 (serial tax avoidance) defining a "defeat" of arrangements as automatically including out of court settlements with HMRC may also undermine collaborative enquiry and dispute resolution processes to the detriment both of HMRC and taxpayers, leading to additional costs for both parties in disputes being litigated which might, in the future, no longer be settled by agreement.

13. It is also the case that the current proposals set up a potential conflict of interest for advisory firms which could feel that recommending that clients settle a particular dispute, while it may be in the best interests of their clients, to do so would represent a "defeat" and could bring the advisory firm within the proposed new regime as counting towards the three defeats. So the most appropriate advice may not be given if there is a concern that it would bring the firm within this, proposed new, legislation.

14. This problem could be mitigated were the legislation to provide for HMRC to have discretion to set down settlement terms, and in relation to future settlements only, on the basis that those would treat acceptance as a "defeat". This would permit (but not require) HMRC to determine whether a relevant out of court settlement should be treated as not involving a "defeat", while ensuring that the taxpayer is clear on the consequences of either accepting or not accepting particular settlement terms before amendments or a contract settlement are agreed.

The need for guidance

15. For the reasons set out above we are concerned that the draft legislation may potentially apply to firms who are not the intended targets. We have suggested in our comments above how there could be improvements to the draft legislation.

16. Whatever the form of the final legislation it will be important to ensure that the guidance issued to support that legislation is well drafted and clear.

17. We would be very happy to review any draft guidance, prior to its finalisation, to ensure that it clearly reflects the legislation that is enacted by Parliament.

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 via http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax).