TAXREP 33/14 (ICAEW REPRESENTATION 78/14)

FINANCE BILL 2014

PART 4: FOLLOWER NOTICES AND ACCELERATED PAYMENTS

PART 5: PROMOTERS OF TAX AVOIDANCE SCHEMES

ICAEW welcomes the opportunity to comment on the Finance Bill published on 27 March.

The Finance Bill was introduced during the 2013-14 Parliamentary session as Finance (No. 2) Bill 2013-14 and was carried over into the new 2014-15 Parliamentary Session when its name changed to Finance Bill 2014-15.

This briefing 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.

The Institute of Chartered Accountants in England and Wales
Chartered Accountants' Hall
Moorgate Place London EC2R 6EA UK
icaew.com/taxfac

T +44 (0)20 7920 8646
F +44 (0)20 7920 0547
E taxfac@icaew.com

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ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

For more information, please contact ICAEW Tax Faculty: taxfac@icaew.com

icaew.com

INTRODUCTORY COMMENTS

1. Draft legislation was published on 24 January 2014 and commentators had a month to submit their responses. The publication of draft clauses was coupled with a consultation into Tackling marketed tax avoidance.

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2. Our response to the consultation, and to the draft clauses, was published as TAXREP 16/14 Tackling Marketed Tax Avoidance.

3. We have always been supportive of the government's efforts to tackle tax avoidance and in our submission to the January consultation, and draft clauses, we restated our general position:

> "ICAEW has consistently supported reasonable measures to tackle tax avoidance and in principle we understand why the Government wishes to take further measures in the area of mass marketed tax avoidance schemes. However, we have stressed consistently that for any measures to succeed they need to be aimed at the minority engaged in this activity and be supported by the wider tax profession."

4. In our response we also set out the policy criteria that any proposed measures, and statutory provisions, ought to respect.

5. Such measures must be:

- properly targeted and proportionate to the problem identified;
- reasonable in comparison to the policy objective being sought; and
- not impose unreasonable costs and burdens on the wider population of businesses and taxpayers.

6. We also stated that any proposed measures must respect the legitimate expectations of taxpayers.

7. A particular concern about the provisions in the January draft clauses related to Follower Notices which could be issued by HMRC without any independent scrutiny of the correctness of the HMRC decision to issue the Notice. That is still the case in respect of the provisions now contained in Finance Bill 2014-15 and we urge the government to reconsider the policy criteria set out above and amend the Finance Bill clauses appropriately.

PART 4: FOLLOWER NOTICES AND ACCELERATED PAYMENTS

Follower Notices

8. A Follower Notice will be issued to taxpayers involved in avoidance schemes where there has been a final judicial decision in another taxpayer's case in relation to the same or similar arrangements. (Clause 197) The notice will give the taxpayer the opportunity to amend their tax return (if the return is still under enquiry) or agree to settle the dispute (where a closure notice or tax assessment or determination has been made or is under appeal). (Clause 201)

9. The taxpayer can make representations to HMRC to the effect that the Follower Notice has been issued without satisfying the conditions laid down in clause 197, and HMRC must consider those representations, but it is up to HMRC to determine whether the Follower Notice should stand or be withdrawn.

10. HMRC is in effect judge and jury of their original decision to issue the Follower Notice.

11. In our earlier representation, TAXREP 16/14, we suggested that there needed to be some independent assessment of that original decision:

> "We do not see the need for a fully independent Advisory Panel, as under the GAAR, but we would strongly recommend that some more independent review is put in place such as the Independent Reviewer under the proposed strengthening of the Code of conduct on taxation for banks."

12. The provisions in clause 198 (3) (b) to determine whether the Follower case is similar to a decided case ought to be amended to ensure that the decided case is a proper precedent for the Follower case. We recommend that a judicial ruling should only be considered to be relevant if it relates to tax arrangements which are the same or similar to the arrangements in the decided case. We also think that the principles laid down in the ruling should only set the precedent for the Follower case if the principles could reasonably be considered to be applicable to the arrangements in question on the basis of a similarity in fact pattern or the question of law on which the tax treatment depends.

13. The final judicial decision which triggers the Follower Notice (clause 198 (3)(c)) could be one made in the First Tier Tribunal which does not set a legal precedent for other tax purposes. In addition the decision in that First Tier Tribunal may go against the taxpayer because the particular taxpayer has not implemented a scheme correctly and it is the failed implementation that has led to the adverse decision rather than the legal merits of the tax arrangement itself.

Accelerated payments

14. The issue of a Follower Notice is one of the conditions that triggers the requirement for the taxpayer to pay over the tax that has hitherto been sheltered from payment as a result of the tax arrangements. Once the payment has been made there is no incentive for HMRC to proceed swiftly with the case if it is still under dispute.

15. We believe there is merit in requiring the tax at stake to be paid into an escrow account and for that money, and the related interest, to be paid to either HMRC or the taxpayer depending on who is ultimately successful in the particular case.

Tax arrangements notified under DOTAS

16. Another condition which triggers the accelerated payment is if the tax arrangement has been the subject of a DOTAS (Disclosure of Tax Avoidance Schemes) notification under the provisions of FA 2004 et seq.

17. This has the air of retrospection in that taxpayers will now be subject to the accelerated payment regime for tax arrangements that could have been entered into many years previously and which were notified at the time under DOTAS.

18. We understand HMRC are reviewing all the DOTAS schemes where the tax position has not yet been resolved and will by the time of Royal Assent to the Finance Bill, which will be sometime in July, notify participants in those schemes to which they are going to apply the accelerated payments regime.

19. We think that the government ought to reconsider this provision and only apply the accelerated payments regime to schemes notified under DOTAS after Royal Assent to Finance Act 2014.

PART 5: PROMOTERS OF TAX AVOIDANCE SCHEMES

20. The basic proposal is that a promoter who satisfies one of eleven threshold conditions (clause 230 and Schedule 30) may be issued with a conduct notice which will 'last' for a period of up to two years. Breach of the conduct notice may then lead to the promoter being designated a monitored promoter and there is a right of appeal against such a designation. HMRC will have power to name the monitored promoter and require that promoter to inform its intermediaries and clients. The naming details will include information on the nature of the breach of the conduct notice. The normal defence of reasonable excuse will not be available to the

monitored promoter. A monitored promoter will be subject to specific information powers and penalties for non-compliance of up to £1m (Schedule 31).

21. Intermediaries who continue to act for a monitored promoter will be subject to the same information powers and penalties. Clients of a monitored promoter will be supplied by the monitored promoter with a reference number that they have to report to HMRC so that the clients can be identified and compliance action by HMRC accurately targeted. Clients of a monitored prompter will also be subject to an extended assessing period of 20 years if any tax is lost because they fail to pass on the reference number and a penalty.

Our concerns about the high risk promoter provisions

22. The definition of "relevant arrangements" with regard to a "tax advantage" is too wide, As currently drafted (Clause 227(2)-(4)) assisting with/making a tax treaty claim for any client would cause the tax adviser/agent to be involved in promotion of a "relevant proposal". This would be draconian and unreasonable. The routine making of tax treaty claims should be scoped out of the legislation.

23. It is equally unreasonable for failure to comply with DOTAS where there is a reasonable excuse to be taken as meeting a threshold condition (paragraph 5(2) Schedule 30). Paragraph 5(2) should in our view be deleted.

24. The conduct notice can be issued in respect of behaviour which triggers the threshold conditions in a three year period prior to the issue of that notice. This means that the behaviour in question could have taken place up to three years prior to Royal Assent to Finance Act 2014.

25. When assessing whether the parts of the DOTAS regime have been complied with the normal defence of reasonable excuse will not be available (paragraph 5(2) Schedule 30).

26. We believe that the primary legislation (paragraph 8 Schedule 30) should make it clear that the disciplinary action by a professional body, which satisfies one of the threshold conditions, should be specifically in relation to taxation matters.

27. It is proposed that amendments to the threshold conditions can be effected by Regulation (paragraph 14 Schedule 30). We believe that such power should only be used after appropriate consultation and then only through primary legislation.

28. The draft legislation states (paragraph (3)(f) clause 231) that a conduct notice may include conditions to ensure that a promoter does not promote relevant proposals or relevant arrangements "which rely on, or involve a proposal to rely on, one or more contrived or abnormal steps to produce a tax advantage." We think that this provision ought to mirror the relevant GAAR provision in section 206 (1) Finance Act 2013 which requires tax arrangements to be abusive if they are to come within the GAAR regime. As the GAAR guidance makes clear, at paragraph B12.2, the GAAR provisions

> "prevent the GAAR operating in relation to arrangements entered into for the purpose of avoiding an inappropriate tax charge that would otherwise have been triggered by a more straightforward transaction. Tax charges of this sort (sometimes referred to as 'bear traps') can be encountered from time to time. For example, where a taxpayer has to take what appear to be contrived steps in order to ensure that they are not taxed on more than the economic gains, such an arrangement would not generally be regarded as abusive."

29. We should be interested to learn whether HM Treasury has taken legal advice to satisfy itself that the proposals would be acceptable as complying with competition law?

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)