



TAXREP 16/14
(ICAEW REP 37/14)

ICAEW TAX REPRESENTATION

TACKLING MARKETED TAX AVOIDANCE

Comments submitted on 26 February 2014 by ICAEW Tax Faculty in response to HM Revenue & Customs consultation document *Tackling marketed tax avoidance* published on 24 January 2014

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation document *Tackling marketed tax avoidance* published by HM Revenue & Customs (HMRC) on 24 January 2014.
2. On 11 February 2014 we attended a meeting with HMRC at which we were able to put forward some key comments and concerns and discuss aspects of the consultation document.
3. We have arranged a further meeting with HMRC to discuss our comments.
4. 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

5. ICAEW is a world leading professional membership organisation that promotes, develops and supports over 142,000 chartered accountants worldwide. We provide qualifications and professional development, share our knowledge, insight and technical expertise, and protect the quality and integrity of the accountancy and finance profession.
6. As leaders in accountancy, finance and business our members have the knowledge, skills and commitment to maintain the highest professional standards and integrity. Together we contribute to the success of individuals, organisations, communities and economies around the world.
7. 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.

BACKGROUND

8. HMRC published a number of documents on 24 January 2014:
 - A consultation document *Tackling marketed tax avoidance* (the Consultation Document) ¹
 - A Summary of responses and Draft Legislation *Raising the stakes on tax avoidance*²
 - Promoters of Tax Avoidance Schemes and DOTAS TIIN, Draft legislation and Explanatory Notes.³
9. In this representation we propose to cover not only the proposals in the Consultation Document but also the proposals and draft clauses in the two other documents.

1

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275070/Tackling_marketed_tax_avoidance.pdf

2

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275071/Raising_the_stakes_on_tax_avoidance.pdf

3

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275147/promoters_of_tax_avoidance_schemes_amendment_of_return_to_take_account_of_relevant_judicial_rulings_and_dotas.pdf

10. The three documents follow on from the announcement of the Chancellor of the Exchequer in his Autumn Statement of 5 December 2013 that legislation would be introduced in the 2014 Finance Bill to:
- Establish the criteria for a promoter to be designated a 'High Risk Promoter' and the consequences that flow from that designation;
 - Put in place a requirement for taxpayers to settle their dispute on receipt of a notice (a 'follower notice') that their case is on the same or substantially the same grounds as a case already decided in the tribunal or court; and
 - Require payment of the tax in dispute where a taxpayer who has received a 'follower notice' chooses not to settle the dispute on receipt of the notice.
11. That announcement came after a period of consultation over Summer 2013 *Raising the stakes on tax avoidance* to which Tax Faculty submitted representations in October 2013 TAXREP 55/13 Raising the stakes on tax avoidance.⁴
12. The detailed proposals contained in the most recent Consultation Document and the two other documents listed above are described below.

MAJOR CONCERNS

13. 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. We have been consistently informed by HMRC that the target for these measures is a very limited number of promoters, a figures as low as 20 has been mentioned to us.
14. Any such measures must therefore 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.
15. We also believe that any proposed measures must respect the legitimate expectations of taxpayers.
16. While ICAEW supports the overall policy objective, the precise details fail a number of the above criteria and therefore ICAEW opposes the measures as drafted.
17. It is disappointing that HMRC have not put forward a clear overview of what is now being proposed. The details of the proposals in relation to the first two bullet points are littered throughout the response document while the consultation document itself deals with the accelerated payments proposals plus an additional proposal in chapter 4 Proposed extensions of the accelerated payments measures. All the draft legislation is contained in the document Promoters of Tax Avoidance Schemes and DOTAS and the Consultation Document and the follower, or failure, notice provisions are also reproduced in the Consultation Document.
18. But for such complex proposals, with so little time for comment, a much clearer description and much better signposting was absolutely essential.

⁴ <http://www.icaew.com/~media/Files/Technical/Tax/Tax-faculty/TAXREPs/2013/taxrep-55-13-raising-the-stakes-on-tax-avoidance.pdf>

19. The proposals in the Chapter 4 Proposed extension of the accelerated payments measure have been the cause of very considerable concern amongst our members. The chapter proposes that taxpayers who have participated in DOTAS schemes right back to 2004, which have still not been settled, will be required to pay the tax that would become payable if the schemes are ultimately held not to succeed.
20. What is now being proposed is a far reaching overhaul of the legislation to tackle unacceptable tax avoidance and it is very disappointing that there has not been more time to review the detailed proposals. We, and many of those who contacted us, are extremely concerned by the very short period of time in which to respond to the latest proposals. One month is not long enough given their length, complexity and contentious nature. More time is needed for proper consultation - see our suggestion below.
21. The proposals have created a very considerable amount of concern amongst our members, quite a number of whom have sent it their own representations to HMRC, while others have contacted us to make sure that their concerns are appropriately reflected in this representation from their profession body ICAEW.
22. The earlier consultation Raising the Stakes on Tax Avoidance ended on 4 October 2014 but detailed proposals were not published at the time, 10 December 2013, when almost all the draft clauses were published for inclusion in Finance Bill 2014. The current proposals were only published on 24 January with a deadline for comment of 24 February which is only 23 days before the Budget on 19 March 2014.
23. Finance Bill 2014 will be published, probably before the end of March or in early April. In the light of the concern about these legislative proposals we strongly urge the government to withhold those of the current draft clauses which they accept will need further improvement. We would welcome the opportunity to work with HMRC to deliver the necessary amendments and the improved clauses can then be introduced, as a Government amendment, during the course of the Public Bill debates on the Finance Bill.

Raising the stakes on tax avoidance

High risk promoter

Proposal

24. A promoter who triggers one of eleven threshold conditions may be issued with a conduct notice which will 'last' for a period of up to two years. Breach of the conduct notice may 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 it to inform its intermediaries and clients. The naming details will include information on the nature of the breach of the conduct notice. A higher standard for the defence of reasonable excuse and reasonable care will apply to the monitored promoter. A monitored promoter will be subject to specific information powers and penalties for non-compliance of up to £1m.
25. 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 promoter 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.

Comments

26. As we noted in our response, TAXREP 55/13, to last summer's consultation Raising the stakes on tax avoidance there needs to be some independent review of HMRC's view. In our Key Point Summary we wrote:

“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.”

27. Given that these measures could put a monitored promoter into financial difficulties, we therefore welcome the fact that a promoter will have a right of appeal to an independent tribunal.

Threshold conditions – paragraph 8 – Disciplinary action by a professional body

28. This covers disciplinary action by ICAEW amongst other named professional bodies and paragraph 8(2) and the explanatory notes indicate that HMRC will specify the misconduct and sanctions to which the paragraph applies and paragraph 39 indicates that “prescribed” will be defined by Statutory Instrument (Regulations).
29. We presume that only tax or tax avoidance actions that have been the subject of disciplinary proceedings will be prescribed in the Regulations, as was recommended in responses to the earlier consultation – see paragraph 3.22 of the Response Document – but we would welcome clarification on this point.
30. We would also ask to be consulted before the Statutory Instrument is laid before Parliament.
31. We are also not clear why some bodies whose members advise on tax have been specifically named in paragraph 8 but not all such professional bodies.

Settling disputes when a follower notice has been issued for taxpayers who have participate in marketed or widely used avoidance schemes

Proposal

32. 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 on the same or similar arrangements. The notice will require the taxpayer 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).

Our comments

33. We are concerned that there are insufficient safeguards before a failure notice is issued.
34. The proposals put forward are fundamentally flawed and we are not convinced they will result in the desired policy outcome. We do not believe a clear case has been made for reform.
35. The proposals are potentially contrary to the principles of natural justice and are retrospective. Under them HMRC is being given powers akin to prosecutor, judge and jury with no right of independent appeal. The tax authorities cannot reasonably be the sole arbiters of the tax law. It is the independent tribunals and courts who perform that function. This principle is the bedrock of the UK tax system and has stood the test of time and must not be changed without clear and compelling reasons.
36. We believe there should be a more robust system to ensure that the failure notice has been issued in appropriate circumstances, in particular if it is on the grounds that there is a judicial ruling whose principles would deny the advantage claimed by the taxpayer to whom a failure notice is about to be issued.

37. The taxpayer can object to the issue of a failure notice (paragraph 7(1)) but HMRC just has to consider the representations and can reject them without any independent oversight of that decision.
38. 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.
39. We note that the success or otherwise of the taxpayer's scheme is not determined by a decision of a lower Court. FTT decisions are often reversed on appeal. Also a particular scheme may fail in the Courts because of inadequate implementation even though the structure of the scheme would succeed by reference to the law itself.

Tackling marketed tax avoidance schemes

Require payment of the tax in dispute where a taxpayer who has received a 'follower notice' chooses not to settle the dispute on receipt of the notice

Proposal

40. A payment notice will be issued alongside a follower notice. The follower notice has a 90 day response time and the 'accelerated payment' would become due on the expiry of that time limit, or the extended period when the taxpayers asks for a review of the 'follower notice'.

Our comments

41. These proposals are the subject of the current consultation and the main provisions are summarised in chapter 3 of the consultation document. The relevant questions in the consultation are questions 1 to 9 and again we have set out our responses to these below.

Proposed extension of the accelerated payments measure

Proposal

42. These proposals are set out in chapter 4 of the Consultation Document and would require accelerated payments of tax in dispute in cases where a DOTAS scheme has been entered into even if the scheme has, incorrectly, not been disclosed. The accelerated payment would also apply to schemes which are sufficiently abusive to fit the GAAR criterion.
43. These proposals would apply to any DOTAS, or potential DOTAS scheme, right back to the introduction of DOTAS in 2004.

Our comments

44. This proposal has caused considerable concern among our members, many of whom have submitted direct responses to the consultation.
45. While we understand the policy purpose, this is in effect retrospective legislation as it means that all DOTAS registered tax planning arrangements under enquiry by HMRC would come within the accelerated payment scheme, even if they were entered into many years previously and in some cases a DOTAS registration was submitted as a precautionary measure. In principle we believe that retrospective legislation of this nature is wrong.
46. We have seen a proposal that the accelerated payment regime should not apply to existing DOTAS registered schemes 'where it can be shown that the promoters/taxpayers have taken all reasonable measures, and have acted with reasonable expedition, to enable the dispute to be brought before the statutory appeals tribunal.' That sounds a reasonable suggestion.

47. The proposal is also likely to lead to a perverse outcome in that it will offer no incentive for HMRC to reach closure on the case. Given that the tax may not legally be due that sounds completely contrary to natural justice and must inevitably result in further litigation.

RESPONSES TO CONSULTATION QUESTIONS

Q1: Do you agree with the proposals for the timing and issue of payment notices?

48. The payment notice follows on from the issue of what is called a 'follower notice' in the body of the Consultation Document but is termed a 'failure notice' in the draft legislation.
49. We have commented above about our concern in relation to the current proposals on follower or failure notices.
50. We also believe that HMRC already has adequate powers to ensure that tax becomes payable, and before yet further measures are proposed HMRC should justify why existing measures are not sufficient to achieve this.

Q2: Do you agree with this proposed method for establishing the payment amount?

51. If there is to be a payment notice then the amount payable mirrors the 'countering the tax advantages' provisions in s 209 FA 2014 re the GAAR. In the latter legislation the adjustment has to be 'fair and reasonable' and this is explained in the section B13 of HMRC's GAAR Guidance. It is clear from that Guidance that while counteraction may often be a relatively straightforward exercise there will also be cases where that is not straightforward, see para B13.3.
52. If counteraction is to go ahead in the current context then we would suggest that the provisions should mirror those in the GAAR legislation so that there will be a common approach in both areas of taxation.

Q3: Do you agree with these grounds for objection to an accelerated payment notice?

53. Under the proposals a taxpayer will only be able to challenge a payment notice on the grounds that HMRC has erred in process – for example, it was sent to the wrong person.
54. This seems completely wrong in principle. Of course it would only be right for someone to challenge a notice if it was sent to the wrong person but there should be a more general right to challenge such a notice. The UK's (unwritten) constitution depends on separation between the law, the legislature and the administration by the State. We suspect that such a measure is likely to challenge in the courts.

Q4: Should there be any additional grounds for objection to an accelerated payment notice?

55. There must be some potential uncertainty about the correctness of an accelerated payment notice and there needs to be some mechanism to enable taxpayers to challenge the notice when that is the case.
56. This could be on the grounds that the taxpayer believes there are other relevant arguments that were not put to the Court, or that the taxpayer transaction is materially different from that considered by the Court, or even that although the precise arrangements were similar the actual facts of implementation were different and that was the reason why an earlier appeal failed.

Q5: Do you agree that accelerated payments for cases under appeal should be handled by way of adapting the existing rules for postponed tax in TMA 1970?

57. The same comments apply as to Question 4 above. The issue of a 'follower notice' does seem likely to amount to a 'change of circumstances' under s 55(4), TMA 1970.

Q6: Do you agree with this proposed approach to interest on unpaid and repaid amounts in relation to accelerated payments?

58. The basic proposal is that interest would be charged on an amount of tax that is ultimately agreed to be payable between the normal due date and the date the tax becomes payable under a payment notice.

59. This looks reasonable in principle where tax is payable. However, it would be unfair if the taxpayer won and there is actually no tax to pay. Under the current proposal the taxpayer would have to pay 3% payment interest on £20,000, as per the example in para 3.32, for 4¼ years, which will not be refunded to him even though he has won, and get back repayment interest at only 0.5% for the future period for which HMRC are holding his money.

Q7: Do you agree that the accelerated payment should be subject to a late payment penalty and that the proposed amounts are reasonable and proportionate?

60. All these answers are predicated on there being an acceptable means for issuing a failure notice and determining the amount payable to be covered by the payment notice. If that is the case then a proposed late payment penalty might be reasonable but, given our concerns about these proposals and how they might be addressed, we think including such a penalty now is premature until the proposals are revised in a way that is reasonable and proportionate.

Q8: Do you agree to this treatment for payment of tax for cases in litigation?

61. We do not believe that HMRC should be able to withhold repayment as proposed in para 3.37. This appears to give HMRC carte blanche to ignore the ruling of a court of law. If HMRC were to seek this perhaps the court should be asked to rule on this as an ancillary matter.

Q9: Do you have any further comments on the principles or application of the proposal to issue accelerated payment notices in cases where a 'follower notice' is issued?

62. While we understand the policy aims to tackle mass marketed aggressive tax avoidance schemes, we remain concerned that any measures to not hinder the integrity and trust underpinning the UK tax system. The proposals lead to a potential position that taxpayers are guilty until proven innocent with wide powers given to HMRC at the expense of taxpayers that could be abused and be used in inappropriate cases, for example where the tax planning works but HMRC just do not like it. The right solution in that case is to change the law for the future not potentially penalise those who may have used it.

Q10: Do you have any comments about how information may be provided in such a way as to provide a reasonable balance between providing early certainty for taxpayers and not opening up a route to assist the development of future avoidance schemes?

63. Taxpayers should have certainty when they file their self-assessment tax return that the law will not be changed arbitrarily by the tax authorities afterwards.

64. Non-high risk promoters will often err on the side of caution and disclose any planning even where, strictly, there is no requirement for them to do so. However, these measures will potentially discourage that behaviour

65. Where HMRC thinks that the tax paid is inadequate, it should use its powers to make determinations or raise assessments and should conduct its enquiry swiftly without all the delays that currently so often characterise the HMRC approach. If agreement cannot be reached with the taxpayer and professional agent acting, the matter needs to be resolved by the independent tribunals and courts. It is an approach which accords with the law and natural justice.

Q11: Do you agree that the proposed time limit for payment of an accelerated payment as a result of a DOTAS scheme should be the same as for accelerated payments linked to a ‘follower’ notice?

66. The proposed time limit for payment of an accelerated payment is, in general, 90 days from issue of the Payment Notice and that seems reasonable.

Q12: Do you have any further comments about the proposed extension of this measure to cases involving schemes disclosed under DOTAS?

67. It is not clear how the proposal will operate. How does a taxpayer know if his details feature on a DOTAS client list? What if he has not used the scheme but simply enquired about it and walked away? If a person has issued a DOTAS SRN on his tax return, how does he know whether HMRC regard the transaction as tax avoidance?

68. The pre-payment procedure depends on the ultimate outcome being determined by litigation. It does not seem reasonable to ask people to pay money just in case HMRC might decide to litigate a scheme in three or four years’ time. A fairer trigger would be that HMRC can collect money from followers once the first litigant has notified his appeal to the Tribunal. An alternative might be that they should be able to collect tax only from those who enter into a DOTAS scheme after HMRC have highlighted the scheme in Spotlights as one they intend to attack.

Q13: Do you agree that the scheme being challenged under the GAAR should be a criterion for issuing an accelerated payment notice?

69. Accelerated payment would only be required when HMRC decides to proceed to counteraction after receiving a GAAR Advisory Panel opinion on the arrangements. But if the GAAR Advisory Panel issues an opinion that the GAAR does not apply and HMRC decide to litigate anyway then it would be unreasonable to require an accelerated payment.

Q14: Do you agree with the timing proposal for the issue of an accelerated payment notice in a case being challenged by the GAAR?

70. It seems reasonable.

Q15: Do you have any further comments about the application of the policy to schemes that are challenged under the GAAR?

71. No.

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