



# TAXREP 56/14 (ICAEW REPRESENTATION 136/14)

## STRENGTHENING THE TAX AVOIDANCE DISCLOSURE REGIMES

ICAEW welcomes the opportunity to comment on the consultation document [Strengthening the tax avoidance disclosure regime](#) published by HM Revenue & Customs (HMRC) on 31 July 2014.

This response of 23 October 2014 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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## **MAJOR POINTS**

### **General comments**

1. We continue to support the government's efforts to attack tax avoidance which seeks to exploit the law in ways which were clearly not intended.
2. We have also supported the government's efforts to ensure that, through the DOTAS regime, it can obtain contemporaneous information about tax avoidance schemes to ensure that it can take action against those schemes which it considers to be unacceptable.

## **RESPONSES TO SPECIFIC QUESTIONS**

### **Changes to grandfathering**

**Q1: Will removing grandfathering in this way deliver greater consistency in the application of this hallmark?**

**Q2: Do you foresee any issues with removing grandfathering prospectively for schemes made available or implemented from a certain date?**

3. The ICAEW members that we have consulted tell us that they do not rely on this hallmark and on this evidence we do not believe that the removal of this grandfathering hallmark will make a significant difference to the existing regime.
4. In answer to question 2 we do not foresee any issues arising.

### **A new focus on what is being offered**

**Q3 – Will recasting the hallmark to consider the overall product being offered rather than the underlying documentation and scheme structure ensure greater consistency in the application of this hallmark?**

**Q4 – Do you agree that widening the main purpose test to “the, or one of the, main purposes” will help ensure the policy objective is met?**

**Q5 – Would including additional characteristics such as the existence of a fighting fund in this hallmark ensure disclosure of all schemes which include such elements or would a separate hallmark be a better way to achieve this?**

5. We can see the merit in recasting the hallmark to consider the overall product being offered rather than specific elements of the proposition.

### **The loss hallmark**

**Q6 – Do you think that a combination of the new draft Financial Products hallmark and the revisions proposed to the loss hallmark will result in more tax avoidance schemes being disclosable without adversely impacting on normal business activity?**

6. We would reiterate the points made in relation to earlier consultations that there need to be sufficient safeguards in place to ensure that ordinary business start-ups are not likely to be caught by any new provisions targeting loss making adventures.

### **Inheritance tax**

**Q7 – To what extent do the proposals strike the right balance between ensuring that IHT avoidance is brought within DOTAS but that legitimate estate planning is not disclosable? If not, how might this balance be best achieved?**

**Q8 – Does the proposed approach ensure so far as possible that legitimate claiming of reliefs and exemptions does not have to be disclosed? If not, what alternative proposals would achieve that aim?**

7. We would be extremely concerned if standard IHT planning stratagems were likely to be caught by the new provisions. This is an extremely complex area of taxation and we believe

that any proposals need to be fully discussed with relevant experts. We also fully support the proposal that HMRC work with interested parties 'to provide greater clarity in guidance as to when disclosure would be required' once the nature of the proposals have been determined.

#### **Introducers to tax avoidance schemes**

**Q9 – To what extent will these changes help ensure that HMRC is able to identify those responsible for making a disclosure where people are seeking to sidestep their obligations?**

**Q10 – Do you think this will help ensure there is consistent treatment of users of avoidance schemes and their promoters irrespective of where the scheme was designed?**

**Q11 – To what extent would requiring persons working with the offshore promoter ensure the proposed special rule applies appropriately?**

**Q12 – Are there any other steps which could be taken to strengthen DOTAS in this area to ensure that those required to disclose comply with their obligations?**

**8.** We accept the need to ensure that there is adequate disclosure by introducers of those persons who have benefitted from disclosable schemes. But the provisions need to be proportionate and we need to see the detailed provisions before reaching an informed comment on this.

#### **Penalties for scheme users who fail to correctly report use of a disclosed scheme**

**Q13 - Do you agree that aligning penalties in this way is proportionate given the significant financial gains users can obtain through failing to correctly report their use of a disclosed tax avoidance scheme?**

**9.** We agree that the current penalty regime appears to be out of line and needs amendment.

#### **Notifying HMRC of employee users of employment schemes**

**Q14 – To what extent will this help ensure employees are fully aware of the fact that they are becoming involved in tax avoidance?**

**Q15 – Do you think that the Government's preferred option is the more effective and least burdensome way to achieve this objective?**

**Q16 – Are there other ways in which this information could be cost effectively obtained from employers or employees?**

**10.** We support the second option proposed in the consultation document which would put the onus on the employer to provide the relevant information to HMRC.

#### **Protection for Whistleblowers**

**Q17 – To what extent would a provision of this nature provide a suitable safeguard to those wishing to provide information about avoidance to HMRC?**

**11.** We believe that such a provision would provide the necessary safeguards.

#### **SRNs and Accelerated Payments**

##### **How to provide greater certainty**

**Q18 – To what extent would a threshold condition in HRP ensure promoters do not seek to use DOTAS as a test-bed or clearance regime when devising new schemes and what other steps might the Government take to prevent abuse of this sort?**

**12.** We can see the merit in ensuring that promoters do not 'use' the regime as a de facto advance clearance regime. We will, however, wait until we see the detailed proposals to assess whether the actual proposals are proportionate.

**Q19 – To what extent would the preferred option deliver a balance between providing greater certainty for the taxpayer while ensuring HMRC can give due consideration to the need to issue a SRN?**

**Q20 – Are there other ways in which this could be achieved?**

**13.** The proposal, the government's preferred option, is to extend the period during which HMRC issues SRNs to 90 days, rather than the current 30 day limit, so that HMRC can ensure that it is appropriate to issue an SRN. In principle we think that this makes sense but, again, we would like to see the detailed proposals before coming to a considered view on this.

#### **A new hallmark for Financial Products**

**Q21 – To what extent does the draft hallmark deliver the policy objective of bringing arrangements involving financial products into the view of DOTAS?**

**Q22 – Does the approach deliver the safeguards requested by respondents to the previous consultation?**

- 14.** Our members are concerned that this Hallmark is very widely drawn and could cause problems.
- 15.** We are aware that some of our member firms have submitted amendments to the current proposals and we urge the government to engage actively with our members to ensure that the proposals meet the government's objectives while at the same time being reasonable and proportionate.

#### **VAT Disclosure**

**Q23 – Which form of VADR (user-based/promoter-based/include in DOTAS) is likely to be most effective in achieving the policy objectives?**

**16.** We believe that a mixture of user based and promoter based disclosure will be required, on the basis that if it is only promoter based, then all schemes that are developed in-house would be out of scope.

**Q24 – Which form of VADR would best contribute to achieving consistency and fairness for users and promoters of avoidance schemes across all regimes?**

**17.** We believe it should be a mix of user and promoter. If there is a promoter, then it should be the promoter who discloses, and the user can confirm the scheme. On the other hand if the scheme is not devised by a promoter, then the user should have to disclose. We know that some large businesses consider the regime when considering the appropriateness of their planning and don't go ahead when the planning would need to be disclosed.

**Q25 – Which form of VADR would minimise the administrative burden on businesses, other than those who design and promote avoidance and their clients?**

**18.** As discussed we believe it should be a mixture of promoter and user. Widely marketed generic schemes would be caught by the promoter disclosures while complex individual schemes, often developed in-house by the user, would be disclosable by the user. Large businesses do not consider the VADR to be a major administrative burden, it is used more as a checklist against which they can rate their planning ideas for acceptability. If it needs to be disclosed then the planning is often not proceeded with.

#### **Further issues**

##### **Transparency of supply chain**

**19.** No comment.

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