



TAXREP 12/10

DISCLOSURE OF TAX AVOIDANCE SCHEMES (DOTAS) – CONSULTATION DOCUMENT

Memorandum submitted on 1 March 2010 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to the consultation document published on 9 December 2009.

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INTRODUCTION

1. We are writing with general comments on the consultation document published on 9 December 2009.
2. We apologise for not having met the deadline for responses of 19 February 2010. We have seen the responses that have been made by some other organisations and wanted to express our general support for many of those comments.
3. Several of our members also attended, and spoke at, the Stakeholders' event organised by HM Revenue & Customs on 1 February 2010.
4. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Appendix A. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Appendix B.

GENERAL COMMENTS

5. The consultation document proposes a package of five measures to enhance the existing DOTAS regime that was introduced in 2004 and has been amended periodically since then.
6. The introduction to the consultation document recognises that DOTAS has been a success but cautions that this very success

‘has encouraged some of the small number of businesses who promote tax avoidance schemes to seek not to comply with the rules, or to find loopholes in them. Moreover, tax avoidance is a highly changeable market and a number of the schemes operating in the current global economic downturn are beyond what DOTAS currently targets.’
7. We support the aim of DOTAS to provide intelligence about avoidance schemes so that the Government can take informed decisions as to whether it is appropriate to prevent the use of those schemes that undermine the tax system and which the Government decides need to be closed down.
8. However we feel that some of the proposed measures are too draconian and go further than is necessary to achieve the objectives outlined in the consultation document.
9. We have not sought to answer the specific questions in the consultation document but have provided our general views on the five measures that are put forward.

SPECIFIC COMMENTS

Measure 1: A change to the time when a promoter must disclose a marketed scheme to HMRC

10. We appreciate the concern that some promoters currently leave schemes technically incomplete so that when final implementation takes place a considerable number of taxpayers will have used the schemes before any counter measures are possible.
11. Along with others we believe that the current proposals will require promoters to disclose planning that is not fully developed, and which may not ultimately work, and could lead to multiple disclosures of slightly different planning of the same piece of advice as it is developed to fit the requirements of the client.

Measure 2: A power to require persons who introduce potential clients to a promoter to provide information about the promoter

12. We agree with other commentators that this measure is a reasonable one.

Measure 3: Increased penalties for failure to disclose a scheme

13. We accept that there are a small minority of promoters and users who deliberately do not comply with the DOTAS requirements and for whom the advantage of not doing so, in terms of the potential tax advantage in implementing the scheme before HMRC discovers the avoidance, can far outweigh the consequential penalty.
14. Although the Consultation Document favours Option 2 we believe that there is merit continuing to design a measure along the lines of Option 1 which provides for an increase in the penalty to the extent that there has been non compliant behaviour by the promoter or user.

Measure 4: Promoters to provide HMRC with periodic information about clients to whom they have issued a scheme reference number (SRN)

15. The intention of the measure is to obtain information about users of the scheme. So we can appreciate that it would be logical to require the scheme user to send in the SRN when they use the scheme rather than when they submit their return, which is the current requirement. This is in effect Option 1 and would reduce the 'risk assessment weakness' identified in the Consultation Document. But it would be burdensome and it is more likely that the client would expect the promoter to deal with the notification to HMRC.

Measure 5: Revisions and extensions to the 'hallmarks' (description of main regime schemes that must be disclosed)

16. The proposals are to introduce three new hallmarks and to extend significantly two existing ones.

17. We believe that the proposed changes should be more clearly targeted to provide HMRC with information in relation to the types of arrangements which it has concerns about. We are concerned that the existing proposals would lead to a significant increase in disclosures of straightforward planning which will not provide HMRC with information of value.
18. This is particularly the case with regard to the employment hallmark. We believe that, as indicated by HMRC in the Stakeholder event, there should be a short list of areas where disclosure is required, instead of the current draft proposals.
19. In the context of 'income into capital' we strongly recommend that some commonplace transactions which might otherwise fall within the definition, such as incorporation of a company and rollover of a business into it, should specifically be excluded.

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ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
2. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter TAXline to more than 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

THE 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 <http://www.icaew.co.uk/index.cfm?route=128518>.