ICAEW
REPRESENTATION 85/21

PROMOTERS OF TAX AVOIDANCE SCHEMES

Issued 14 September 2021

ICAEW welcomes the opportunity to comment on the draft legislation relating to promoters of tax avoidance arrangements published by HMRC on 20 July 2021, a copy of which is available from this link.

This response of 14 September 2021 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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EXECUTIVE SUMMARY

1. There are several places in the draft legislation where subjective terms are used. These include “has a good arguable case”, “in a significant respect” and “it is expedient in the public interest”. We appreciate that this is a fairly subjective area by virtue of its nature and it can be difficult to be perfectly prescriptive in some cases without making the legislation tortuously long and complicated. Where we believe that an alternative test might be suitable, or links to other parts of the tax legislation are needed we have suggested these below. Otherwise, we request that HMRC’s interpretation of the terms concerned are set out clearly in guidance.
2. The two-year window in which HMRC has to raise an assessment to penalties for facilitating avoidance schemes of non-resident promoters seems long although we now understand, following a meeting with HMRC on 6 September 2021, that is so that HMRC can issue a second penalty if the promoter continues to promote tax avoidance schemes after an initial penalty has been raised.

THE MEASURE

3. A package of measures is being introduced designed to clamp down on promoters of tax avoidance schemes. These measures are:
    - Clause 1: A new power for HMRC to seek freezing orders that would prevent promoters from dissipating or hiding their assets before paying the penalties that are charged as a result of them breaching their obligations under the anti-avoidance regimes
    - Clause 2: New legislation that would enable HMRC to name promoters, details of the way they promote tax avoidance, and the schemes they promote, at the earliest possible stage, to warn taxpayers of the risks and help those already involved to get out of avoidance
    - Clause 3: New rules that would enable HMRC to make a UK entity, who facilitates the promotion of tax avoidance by offshore promoters, subject to a significant additional penalty
    - Clause 4: A new power to enable HMRC to present winding-up petitions to the Court for companies operating against the public interest

4. We set out our comments on each of these clauses below.

DETAILED COMMENTS

Clause 1: Applications for freezing orders in relation to penalties

The measure

5. Under Para (1) (b), the Court granting the freezing order must satisfy itself that HMRC “has a good arguable case” in relation to the penalties being sought.

Our concern

6. Our concern is that this is a very subjective test. How will the Court determine whether a case is arguable? Could guidance be provided by HMRC, or is this a term that the Courts are used to considering?

Our recommendation

7. If this is not already a well-recognised legal term, we recommend that guidance is provided to assist courts in their decision-making process.

Suggested amendment

8. Alternatively, a more objective test could be included in the legislation, such as whether penalties have been raised against the promoter concerned in the past.

Clause 2: Publication by HMRC of information about tax avoidance schemes

The measure

9. Under para (7), "An authorised officer must amend or withdraw published information if the officer subsequently considers it to be incorrect or misleading in a significant respect."

Our concern

10. It is not clear what "in a significant respect" means. We assume that this phrase was inserted so that the officer concerned did not need to amend anything inconsequential.
11. We also think that the person being reported on should have the right by law to require HMRC to amend or withdraw incorrect or misleading information. Situations where this right would be applied are likely to be rare, given, the ability of the person to make representations before the information is published but this would provide an important safeguard.

Our recommendation

12. If the purpose of para (7) is to prevent the withdrawal of inconsequential information, we recommend that the words "in a significant respect" are replaced with "other than anything inconsequential that would not materially damage the reputation of the person or organisation concerned in any respect".
13. We recommend that this para is supplemented by the following: "If the person believes that the information published is incorrect or misleading, that person may apply to the First Tier Tax Tribunal that such information is removed or amended appropriately".

Clause 3: Penalties for facilitating avoidance schemes of non-resident promoters

The measure

14. There are a few terms used in this clause that may require additional explanation or defining to ensure that it is clear how the law is expected to be operated. These are set out below:
    a) Para 1 (6): "a non-resident promoter" being a person who carries on a business as a promoter and is "resident outside the UK".
    b) Para 2 (1) (a) (ii): "proposals or arrangements that are *substantially* the same as the facilitated proposal or arrangements
    c) Para 3 (4): "An assessment of a penalty is to be treated for *procedural purposes* in the same way as an assessment to tax".

Our concern

15. Para 1 (6): It is not entirely clear what "resident outside the UK" means and this will be different depending on whether the promoter is an individual, a corporate or another form of entity.
16. Para 2 (1) (a) (ii): It may not be immediately obvious whether one proposal or arrangement is substantially the same as another.
17. Para 3 (4): Although intuitively it is clear what "for procedural purposes" means, is this a sufficiently precise legal term for the legislation to be upheld in a court of law?

Our recommendation

18. Where the promoter is an individual, we recommend that reference is made to Schedule 45 FA 2013 to make it clear that the statutory residence test is to be applied in determining whether the promoter is UK resident.

19. Where the promoter is an entity, such as a company, we recommend that HMRC provides links to existing guidance (such as INTM120000+) so that is easy to determine whether the promoter is resident outside the UK.
20. We recommend that HMRC provides guidance on the circumstances in which one proposal or arrangement is substantially the same as another.
21. Paras 5 & 6 make it clear that various provisions in TMA 1970 and Schedule 36 FA 2008 respectively apply for the purposes of this Part. We recommend that any other provisions setting out procedures that are expected to apply to this Part are also referenced in these paragraphs.

Clause 4: Winding up petition by an officer of HMRC

The measure

22. The petition can be made where it appears to an officer of HMRC that it is expedient in the public interest for the purposes of protecting the public revenue.

Our concern

23. We support reasonable measures to disrupt the activities of those promoters that are the target of this measure. It is, however, a very wide-ranging power with extremely serious consequences so we would welcome a statement about the types of circumstances in which HMRC might invoke this power and what procedures HMRC will have to ensure that the power is properly applied and there are HMRC safeguards to make sure that it is only invoked in extremis

Our recommendation

24. We recommend that a statement is published detailing how HMRC will determine whether a winding up petition is expedient in the public interest and what safeguards it will have in place to ensure that this power is properly exercised.

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 https://goo.gl/x6UjJ5).