

## Clamping Down on Promoters of Tax Avoidance – HMRC Consultation

### Response by the Chartered Institute of Taxation

#### 1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 The Government is right to be taking a robust approach to those who continue to devise, promote or sell tax avoidance schemes. There should be no place for such people and their schemes in the tax services market.
- 1.3 It is welcome to see this consultation document, like the 2020 consultation document<sup>1</sup>, recognise that most tax advisers adhere to high professional standards and provide sound advice and support to taxpayers, and that the extensions being proposed to HMRC's powers are not aimed at advisers adhering to high professional standards (see the Summary (page 3) and para 1.12) but are aimed at promoters who seek to exploit every opportunity to profit personally by sidestepping the rules. We would like to see a clear statement from the Financial Secretary to the Treasury to this effect. Indeed, many of these promoters – perhaps a majority – are not tax advisers or tax agents at all but rather operate in a small number of boutique firms focused mostly or entirely around such avoidance schemes, many of which are known to HMRC.
- 1.4 HMRC's figures indicate that around 20 promoters have left the tax avoidance market since 2014, so the introduction of various measures to tackle promoters since then is having some success. However, there are around 20 to 30 active promoters still operating. We understand that the nature of promoters' behaviour, much of which is set out in HMRC's consultation document and previous consultations, means that existing measures can be side-stepped or frustrated. We have yet to see any meaningful statistics or assessment on how much use HMRC are making of their existing powers, how many penalties under the various anti-avoidance regimes have been successfully charged, how many Promoters of Tax Avoidance (POTAS) 'stop', 'conduct' and 'monitoring' notices have been issued etc. It is therefore difficult for us to gain an understanding of how effective those powers are being in reducing avoidance and tackling the 20 to 30 promoters still in the market. We do wonder how successful more legislative and other measures will be in tackling this 'hard core'

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<sup>1</sup> Tackling promoters of tax avoidance - HMRC consultation <https://www.gov.uk/government/consultations/tackling-promoters-of-tax-avoidance>

of promoters who clearly do not wish to play by the rules, and whether they just move the goalposts so that this game of 'cat and mouse' with HMRC will continue ad infinitum.

- 1.5 As noted above, the number of promoters has significantly shrunk since 2014. HMRC estimate that there are only around 20 to 30 active promoters currently in operation. Ideally, we favour HMRC targeting their resources on the activities of this small number of promoters, rather than introducing new rules which might place additional compliance obligations on all tax advisers and tax agents (even if that obligation is limited to ensuring they are not caught by those rules). Our focus in this response is on identifying if the new measures might inadvertently impact upon tax advisers who do adhere to high professional standards and who are explicitly not the intended target of these proposals.
- 1.6 We are surprised that these proposals, which build on the measures in the current Finance Bill, were not consulted on last year at the same time as the consultation into the measures in the Finance Bill. We would expect HMRC to have been aware of these issues at the time and we cannot see that there can be any objective evidence that the operation of the Finance Bill measures is deficient given that they have not yet been enacted. We would not want to see future measures fragmented in this way.
- 1.7 We are pleased that in Chapter 5 of the consultation document HMRC are exploring more ways in which they can support taxpayers to identify and steer clear or exit tax avoidance. We have been calling for wider communications around the risks of avoidance and the types of schemes being promoted. However, we have concerns, which we set out in paragraph 7 below, that the measures proposed will not be enough to address all the issues we are seeing today in the current tax avoidance market.
- 1.8 A general comment about the measures proposed in Chapters 2, 3 and 4 is that they are very serious proposals and bordering on the type of action that would usually be taken to address criminal behaviour. By the stage that a person or entity is threatened with any of these sanctions, this will be well outside the expertise of a tax adviser, even those experienced in dispute resolution. Any person or entity in this situation would need to be taking legal advice from a suitably qualified and experienced lawyer. Our comments on these measures are therefore necessarily limited since only a minority of tax advisers are lawyers.
- 1.9 In our view the proposed measures in Chapters, 2, 3 and 4 should cover future actions and not have any retrospective effect given that the intention behind them is to change these behaviours and stop these schemes once and for all. The provisions should all be widely published before being brought in, as well as targeted at the active promoters and enablers HMRC know about, so that anyone who might be affected is put on notice to change their behaviour.
- 1.10 Other angles that should be explored by the Government to tackle recalcitrant promoters of tax avoidance include:
- i. ensuring that regulatory or similar interventions bite on the provision into the UK of services from abroad;
  - ii. ensuring that the professional bodies enforce the provisions of Professional Conduct in Relation to Taxation<sup>2</sup> (PCRT) (entailing a still more active referral of people falling short of it into their disciplinary processes);
  - iii. effectively extending the requirements of PCRT to those parts of the market not subject to it; and

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<sup>2</sup> [https://www.tax.org.uk/sites/default/files/200601%20Professional\\_Conduct\\_in\\_Relation\\_to\\_Taxation\\_2019.pdf](https://www.tax.org.uk/sites/default/files/200601%20Professional_Conduct_in_Relation_to_Taxation_2019.pdf). PCRT sets out the principles and standards of behaviour that all members, affiliates and students of the seven professional bodies must follow in their tax work.

- iv. continuing to focus on tackling misleading advertising of schemes in conjunction with the Advertising Standards Authority and ensuring that any Enforcement Notices are publicised to the taxpayers (or type of taxpayers) that HMRC understand are involved in the arrangement in a way that the message actually reaches those who need to see it.

1.11 We recommend that a formal and consultative review of this anti-avoidance legislation, and HMRC's powers in relation to it, should take place in about three to five years' time. These measures are being introduced to tackle specific problems in the tax avoidance market that exist now, but in five years' time the tax avoidance market may look very different to the way it looks today. A future review would enable the measures to be examined to ensure that they were still fit for purpose and operating effectively and as intended. This may be something for HMRC's Powers and Safeguards Evaluation Forum to consider.

## **2 About us**

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

## **3 Introduction**

- 3.1 This consultation<sup>3</sup> is seeking views on further proposals to tackle promoters of tax avoidance schemes which complement proposals consulted on in summer 2020 that are being legislated for in the current Finance Bill. These latest proposals would give HMRC the ability to intervene earlier than they can now to disrupt promoters' activities, ring-fence assets to protect HMRC's ability to collect penalties and apply strong sanctions for promoting or enabling tax avoidance. The consultation document seeks views on whether the proposals achieve an appropriate balance between the powers and associated sanctions needed for HMRC

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<sup>3</sup> Clamping Down on Promoters of Tax Avoidance - HMRC consultation. Publication date 23 March 2021 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/973478/Clamping\\_down\\_on\\_promoters\\_of\\_tax\\_avoidance\\_-\\_consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973478/Clamping_down_on_promoters_of_tax_avoidance_-_consultation.pdf)

to discharge their responsibilities and effectively deal with non-compliance, whilst providing the right level of protection and safeguards for anyone subject to these sanctions<sup>4</sup>.

### 3.2 The proposals in this consultation aim to:

- Clamp down on promoters who dissipate or hide their assets to avoid paying penalties, by ensuring HMRC can protect its position to secure promoters' assets to pay these penalties at the earliest point possible.
- Tackle offshore promoters through the UK entities that support them, by pursuing the UK entities for penalties linked to their involvement in the offshore promoter's business.
- Disrupt the business activities of companies involved in promoting or enabling tax avoidance by closing them down where it has been shown they are not operating in the public interest and disqualifying the directors at the earliest point possible.
- Support taxpayers to steer clear of tax avoidance schemes, or get out of tax avoidance quickly, by providing more information on promoters and their schemes, so they can make informed decisions.

### 3.3 The CIOT's stated objectives for the tax system which are relevant to this consultation include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

**4 Chapter 2** proposes changes to deal with promoters who dissipate or hide assets to avoid paying penalties. This would create a new power for HMRC to seek an order from a court or tribunal to ring-fence the assets of a promoter of tax avoidance (or directors or individuals linked to the promoter) where certain prescribed conditions are met.

#### 4.1 **Q1. Are the circumstances outlined in paragraph 2.18 reasonable situations for seeking an order to ring-fence assets?**

We do not have any objection to the idea of taking action to protect HMRC's position where one of the penalties outlined in paragraph 2.18 is to be imposed and agree that the provisions look reasonable. However, we would like HMRC to be clear that they would not use the 'ring-fencing' process as a mechanism to prevent

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<sup>4</sup> This balance is at the heart of the principles set out in the Evaluation of HMRC's Implementation of Powers, Obligations and Safeguards Introduced Since 2012.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/958474/Evaluation\\_of\\_HMRC\\_s\\_implementation\\_of\\_powers\\_obligations\\_and\\_safeguards\\_introduced\\_since\\_2012.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958474/Evaluation_of_HMRC_s_implementation_of_powers_obligations_and_safeguards_introduced_since_2012.pdf)

a promoter from having access to funds to defend their position. We would like to see HMRC giving some specific commitment that a promoter would have access to funds to defend any proceedings.

**4.2 Q2. Are the conditions outlined in paragraphs 2.19 and 2.20 reasonable for determining the grounds that need to be met before HMRC can seek a court order to ring-fence a promoter's assets, or are there other conditions that you think HMRC should meet before seeking an order?**

The conditions seem reasonable. To ensure that this proposed new power works as intended, it would seem key that HMRC can ask the Tribunal to issue an order before the promoter may have time to dissipate or hide their assets. However, we note that it will probably already have taken HMRC some time to reach a position where they are about to issue one of the penalties in paragraph 2.18, and during this time the promoter may already have taken action to dissipate or hide their assets. We are therefore uncertain how effective this new power will be at addressing the problem.

We also doubt that this new power on its own will deter a promoter from continuing to operate in the tax avoidance market, even if it is effective in ensuring they pay a penalty imposed on them under one of the regimes listed in paragraph 2.18. There is likely to be too much money at stake. It makes sense that this measure (as with the other measures being consulted on) is intended to complement other powers such as those consulted on in 2020.

One thing about which we are unclear is when these proposed measures will apply instead of the power recently introduced in Para 5 Sch 13 Finance Act 2020 (which introduces joint and several liability of company directors in cases involving a penalty for facilitating avoidance or evasion). In other words, which measure will take precedence? Please would HMRC make that clear - in guidance if not before. This also raises an important question about whether HMRC should try using the new power in Finance Act 2020 first, before seeking more powers.

**4.3 Q3. Is the timing outlined in paragraph 2.19 the most appropriate point at which HMRC should be able to request an order to ring-fence assets, or do you consider this could apply at an earlier point in the POTAS, DOTAS or Enablers penalty regimes?**

Following on from our previous comment, we think that an earlier point should be explored although we do not have any specific suggestions to make. We anticipate that each case may be dependent on its own facts and the knowledge and experience that HMRC have had in tackling a particular promoter and the behaviours the promoter has demonstrated in the past. If a promoter has a history of taking steps to dissipate or hide their assets from HMRC, we do not in principle object to HMRC seeking an order to ring-fence their assets earlier; perhaps it might be possible to do this on a temporary basis whilst further enquiries are carried out? Ultimately, the right balance must be struck between ensuring that the new power effectively tackles the mischief it is designed to address and that it provides sufficient safeguards for those who may be affected by it.

**4.4 Q4. Do you agree with the principle of requiring a security payment or obtaining an asset freezing order in the circumstances described?**

Yes.

**4.5 Q5. Which option do you think would best achieve the policy aim to ensure that promoters could not escape penalties or use the time taken to determine appeals to dissipate their assets?**

We are not sure. We are not very familiar with freezing orders since they are not that common and tend to be dealt with by lawyers rather than tax advisers. We think it will depend on which option is most likely to prevent the promoter trying to dissipate or hide their assets. Would a freezing order be preferable because it might enable the safeguard we mention at paragraph 4.1 above (a commitment that a promoter should have access to funds to defend any proceedings) to be built in?

4.6 **Q6. Do you consider the sanctions that currently apply in respect of security payments and asset freezing are appropriate to apply to promoters of tax avoidance in the circumstances outlined above?**

Yes.

4.7 **Q7. Is the High Court or Upper Tribunal the appropriate court for seeking either a security or asset freezing order, or would another court be more appropriate?**

We are not sure. Different procedures and timescales may apply depending on which court or tribunal is used. It would probably be appropriate to consider the length of time it may take for a particular court or tribunal to hear the case in reaching an answer to this question, given that time may be of the essence in seeking to prevent dissipation of assets. Again, because this is an area that will usually be dealt with by a lawyer not a tax adviser (and only a minority of tax advisers are lawyers), we are not that well placed to make an assessment.

4.8 **Q8. Do the provisions set out above provide appropriate safeguards for freezing orders or securities for promoters in penalty proceedings?**

They appear reasonable, with the caveat that this is an area that will usually be dealt with by a lawyer not a tax adviser (and only a minority of tax advisers are lawyers), so we are not that well placed to make an assessment.

4.9 **Q9. To what extent would this opportunity to present evidence and the later review, alongside existing appeal rights for the penalties, provide adequate avenues for challenge by promoters?**

They appear reasonable, again with the caveat that this is an area that will usually be dealt with by a lawyer not a tax adviser (and only a minority of tax advisers are lawyers), so we are not that well placed to make an assessment.

4.10 **Q10. Are there any other safeguards that HMRC should consider, to ensure the proposed power is only used in appropriate cases?**

We note the references in paragraph 2.36 to HMRC's pre-existing internal governance processes that would be applied when considering whether to proceed with either a security deposit or a freezing order. In comments we made to HMRC at the Powers and Safeguards Evaluation Forum last year we said that HMRC's internal governance processes tend to lack transparency and are not well understood by anyone outside of HMRC, and that this consequently affects trust in HMRC's decision making<sup>5</sup>. This led to Commitment 14: 'HMRC will explore how improving awareness around internal governance processes could promote public trust in decisions to apply the General Anti-Abuse Rule, Accelerated Payment Notices, Follower Notices and

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<sup>5</sup> See para 6.29 onwards

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/958474/Evaluation\\_of\\_HMRC\\_s\\_implementation\\_of\\_powers\\_obligations\\_and\\_safeguards\\_introduced\\_since\\_2012.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958474/Evaluation_of_HMRC_s_implementation_of_powers_obligations_and_safeguards_introduced_since_2012.pdf)

the powers underpinning the Diverted Profits Tax'. We would ask that HMRC also consider exploring raising awareness of internal governance processes that apply to other decisions, such as the present proposal.

**4.11 Q11. Are there any other steps that would be appropriate in this process?**

We have no other suggestions.

**5 Chapter 3** proposes measures to tackle offshore promoter and the UK entities that support them with the introduction of an additional penalty on the UK entity for facilitating the offshore promoter's business activities in the UK.

5.1 We make the following general comments about the proposals in this chapter.

5.2 We appreciate the difficulties in tackling tax avoidance that are posed by promoters being based offshore and support the proposals put forward by HMRC in the consultation document to deal with the problem (subject to our comments below). It is however disappointing that even more draconian measures are needed and that existing measures, such as the enabling penalty in Finance (No 2) Act 2017 Schedule 16, have, it appears, so far been insufficient in deterring entities based in the UK from continuing to facilitate abusive tax avoidance schemes.

5.3 Rather than introducing an additional penalty, would a simpler solution be to make the UK entity jointly and severally liable with the offshore entity for the penalty, conditional on the three tests in paragraph 3.9 of the consultation being met?

5.4 The UK has cross-border agreements with overseas tax authorities for the enforcement of tax debts. Surely HMRC could reach cross-border agreements with the countries in which the problematic offshore promoters are based so that the offshore authority will collect the penalty and pass it to HMRC, just as they do for ordinary tax debts? Perhaps that may be easier than introducing the proposals in Chapter 3.

5.5 We note the proposal in paragraph 3.23 of the consultation document that each UK entity involved would be charged the full amount of the penalty based on the total fees earned by all those involved in the development and sale of the scheme. Presumably, the idea behind this is that it will act as a very strong deterrent and make UK entities stop what they are doing, which is reasonable, but it still sounds very draconian.

5.6 It will therefore be essential that HMRC publicise this measure, should it become law, as fully and widely as possible so UK entities who may be affected are aware of the change and have time to take appropriate action to minimise their risk of a penalty. HMRC should also consider how the measure might affect individuals or groups showing protected characteristics and provide support to them, as appropriate (eg publicising the measure in languages other than English).

5.7 We are unclear what the position would be where a UK entity had already stopped their own involvement (promoting, enabling etc) in a tax avoidance scheme before the point at which this new penalty became chargeable. Are they still at risk from being charged the penalty?

5.8 We are also unclear when the new penalty would first apply. Assuming the legislation that introduces the penalty does not come into force until Royal Assent to the relevant Finance Act, is it the intention that the penalty will only have effect in relation to arrangements entered into on or after Royal Assent? We would agree with that position. Ensuring that the law operates prospectively will at least give the opportunity for UK

entities potentially affected by this measure to consider changing their behaviours and practices which must be a key purpose of the legislation.

- 5.9 We are pleased to note HMRC's comments in paragraph 3.15 that the proposals are not intended to catch persons or entities that have provided advice on matters unrelated to the tax avoidance objective. It is important that such persons or entities are excluded from the proposals. This exemption should be expanded to include those who realistically were not aware they could be caught and cases where there is genuine uncertainty as to whether they came within these provisions.
- 5.10 We note that the proposed new penalty will apply to GAAR-type arrangements only so that genuine cross-border tax planning (eg if a person is moving between countries or dealing with an existing family trust) is not caught. This is mentioned as a safeguard at paragraph 3.27 of the consultation document, and it should also be included explicitly in the proposed legislation.
- 5.11 Q21 asks whether the proposed approach outlined in this chapter is proportionate to the harms caused by offshore promoters. We are unable to comment on whether the measure is proportionate as there is insufficient published data on the 'harms' that are caused or on the use and effectiveness of existing powers.

**6 Chapter 4** proposes measures to close down companies that promote tax avoidance schemes and tackle the directors of those companies.

- 6.1 We have only one comment on these measures as we do not have the necessary expertise to comment more fully because, as previously noted, this is an area that would normally be dealt with by a lawyer not a tax agent/adviser (and only a minority of tax advisers are lawyers).
- 6.2 The proposals for a winding-up petition concern us because the winding-up petition is intended to be presented in advance of the penalty being determined. If the entity charged a penalty is a corporate body, the appointment of a liquidator would presumably impact the conduct of the appeal against the penalty. In those circumstances, the winding-up petition would potentially undermine the appeal process against the notice because a liquidator may not be motivated to dispute the penalty notice for understandable commercial reasons. Because of that, we cannot see that setting the threshold condition as the point that HMRC intend to issue a penalty notice can be appropriate. We would also be concerned that this is self-defeating because HMRC might struggle to persuade a court that the entity should be wound up if the penalty has not been determined.
- 6.3 We can see that a public interest winding-up might be appropriate where a penalty is final and wonder whether that should be the threshold condition instead.

**7 Chapter 5** sets out ways to support taxpayers to identify and steer clear or exit tax avoidance. It is specifically seeking views on two proposals that would (1) ensure taxpayers were aware that HMRC were looking into a specific scheme or promoter and (2) enable HMRC to publicly challenge misleading information provided by a promoter.

7.1 **Q32. How helpful would this information be to taxpayers?**

- i. We completely agree that it would be helpful for taxpayers to have as much information as possible about HMRC's view of the claims made by promoters and the potential risks of entering a scheme. The more information that is in the public domain which can make the position more transparent for individuals who have bought, or might buy into tax avoidance schemes, the better. HMRC should also consider the impact on individuals and groups showing protected characteristics (eg people not speaking English as a first language) and provide and target support to them appropriately.
- ii. Publishing information about promoters and schemes sooner will also help tax agents and advisers, including our members, to identify avoidance schemes which will in turn help them have more constructive and open conversations with clients who may be tempted to enter into a scheme being marketed to them by a very persuasive promoter or enabler, or clients who have already entered into a scheme and can be helped to exit it. At the moment, many regular advisers can feel that they are on the back foot when trying to dissuade and advise clients and that they are hampered by the lack of information available in the public domain. The CIOT would be willing to work with HMRC about the best way to get this information out to our members and the public at large.
- iii. The consultation proposes that the information would be published on GOV.UK (paragraph 5.27). We query whether this will be sufficient – we already know that existing publications on GOV.UK such as HMRC's 'Spotlights' do not have a wide reach - so we would encourage HMRC to publish and share the information more widely, including using social media and the mainstream press. Targeted sharing with businesses, agencies and employers known to HMRC to be involved in disguised remuneration (DR) tax avoidance supply chains – whether knowingly or unknowingly - should also be considered, as should publicising the information through industry specific magazines, newsletters, webinars, professional websites etc. Issuing letters directly to known users of other/previous schemes is another option. Messages could also be posted directly into personal tax accounts.
- iv. However, we have a major concern about the effectiveness of the proposals. This is because of the way in which the avoidance market has changed in recent years, primarily the proliferation of DR schemes<sup>6</sup>. There is an implicit assumption in the consultation document that those buying schemes - including DR schemes - are 'in the market for tax avoidance'. Whilst there are undoubtedly still people who have an appetite to use tax avoidance schemes and who make an active decision to use one, we do not believe this is the 'norm' any longer and we are concerned that the consultation misunderstands the current position and consequently the measures will fail to be effective. DR schemes today are not being marketed as tax avoidance schemes; if anything, the promoters are trying to avoid mentioning that reducing tax plays a part in making the scheme work, and in some cases the users are being effectively forced into schemes if they want to take up a particular job. We endorse the comments made by the CIOT's Low Incomes Tax Reform Group in its response<sup>7</sup> to this consultation which sets out the position in more detail.

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<sup>6</sup> HMRC statistics show that contractor loan and disguised remuneration avoidance arrangements were the principal type of avoidance in existence by 2018/19 (98% of the market compared to 60% in 2013/14) and the number of individuals involved in avoidance increased from 2013/14 to 2018/19. See Use of Marketed Tax Avoidance Schemes in the UK <https://www.gov.uk/government/publications/use-of-marketed-tax-avoidance-schemes-in-the-uk/use-of-marketed-tax-avoidance-schemes-in-the-uk>.

<sup>7</sup> <https://www.litrg.org.uk/latest-news/submissions/210601-clamping-down-promoters-tax-avoidance>

- v. In short, it appears that HMRC's view is that those going into DR schemes know or should have known they are tax avoidance schemes, whilst the numbers of schemes and the fact that they are apparently growing and focused on middle to lower earners would appear to show that users are being placed in schemes that they do not know, and cannot reasonably be expected to know, involve tax avoidance. Therefore, there appears to be a strong case for decoupling the DR type schemes from HMRC's other efforts and presumptions in tackling tax avoidance. Indeed, many of these DR schemes appear not even to try to put forward a clever technical (or any argument) as to why they are not within Part 7A ITEPA 2003 and are in reality not tax avoidance at all; they are fraudulent abuse of the tax system.
- vi. HMRC should be working with third parties, such as the Advertising Standards Authority (ASA) to ensure that misleading information about schemes cannot be publicised. Similarly, HMRC could promote awareness of the risks of abusive DR tax avoidance and promote use of tax compliant employment arrangements by working with the Employment Agency Standards Inspectorate. The existence and dangers of DR schemes could be publicised by requiring employment agencies to provide factsheets alongside the 'Key Information Documents' that were introduced in April 2020 to give transparency and which require agencies to give workers information about rates, how much they will receive, who will employ them etc, and umbrella companies could be required to include such information with payslips. Given that many of DR arrangements do not comply with National Minimum Wage (NMW) or employment rights legislation (eg holiday pay entitlement), cross-government body targeted enforcement could also be used to tackle the providers of such schemes.
- vii. Equally important to making taxpayers aware of a specific scheme or promoter and challenging misleading information provided by a promoter, is helping taxpayers to get out of, for example, DR schemes they have unknowingly entered into. While, ultimately, the taxpayer is responsible for their own tax affairs, help should range from penalty free escapes from schemes where the taxpayer voluntarily comes forward unprompted, to PAYE/NIC credits where the taxpayer did not know their working arrangement involved tax avoidance. It is not enough just to provide information to help identify these schemes, taxpayers that are placed in DR arrangements will need HMRC's help to escape them.
- viii. We said in our response<sup>8</sup> to HMRC's recent Call for Evidence on Tackling Disguised Remuneration Tax Avoidance<sup>9</sup> that one option open to the government is to ensure that liabilities to tax and NIC arising from the use of proven sham arrangements can be transferred to the parties involved in promoting, enabling or managing any aspect of the scheme (including the shareholders and directors of any umbrella company used to facilitate such arrangements). Obviously, this would require further consultation to ensure that it is properly targeted and had sufficient and robust safeguards to prevent innocent parties being caught in the crossfire. Great care would also need to be taken that ordinary tax advisers who make an inadvertent mistake do not become liable under any such provision. Tax advice is complex but is an essential part of access to justice. Anything which restricts access to proper tax advice and access to justice must be avoided. So, any passing on of the tax and NIC liability to

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<sup>8</sup> <https://assets-eu-01.kc-usercontent.com/220a4c02-94bf-019b-9bac-51cdc7bf0d99/b27413c9-a4e1-4e34-8fff-0db3c1900eac/201013%20Tackling%20disguised%20remuneration%20tax%20avoidance%20-%20CIOT%20response.pdf> see paragraphs 5.6 and 5.7 of our response.

<sup>9</sup> <https://www.gov.uk/government/consultations/call-for-evidence-tackling-disguised-remuneration-tax-avoidance>

promoters and enablers must only happen where there is proven criminality. A further option might be to consider an equivalent to the transfer of liability rules in the Off-Payroll Working rules.

**7.2 Q33. How can HMRC ensure that taxpayers do not incorrectly assume that if a promoter or scheme was not on the list then they cannot be involved in tax avoidance?**

Caveats to the information published, as described in paragraph 5.33, may be sufficient. But we share HMRC's concern that the use of a list of promoters who are subject to the naming provisions is likely to be spun by promoters who are not on the list as an indication that they have some form of HMRC approval. This is always going to be the risk if any sort of list is published on GOV.UK. Perhaps HMRC should revisit the question of regulating umbrella companies as a way to protect taxpayers who might otherwise inadvertently get caught up in a DR tax avoidance scheme?

**7.3 Q34. To what extent would information of the sort described here help taxpayers understand the risk of entering into tax avoidance? Q35. What other information would be helpful for HMRC to share with taxpayers to clarify claims made by promoters?**

This information would be helpful. It would obviously need to be explained in non-technical language unless aimed specifically at tax professionals/agents. We think it would also be helpful briefly to explain the consequences of entering into the tax avoidance scheme; this would act as a further deterrent to any potential user. As noted above, in the case of DR schemes, often the promoter is not making any claims that this is a tax avoidance arrangement; rather than providing clarity on chances of success, the key with these types of arrangements is to get across to ordinary taxpayers that there is 'a scheme' and that it is a sham.

**7.4 Q36. Do you agree that a 30 day period strikes the right balance between giving promoters sufficient time to make representations and ensuring that taxpayers can be informed quickly?**

Yes.

**7.5 Q37. Do these proposals strike the right balance between safeguarding promoters and acting swiftly? Q38. To what extent do the safeguards described above, provide adequate protection for those on whom information is shared?**

We have concerns about the proposal that an appeal could be made against the decision to publish information after the information has been published, particularly given that HMRC would not compensate businesses if it subsequently transpired that the information was incorrect (paragraph 5.54). Publication could have profound commercial implications for businesses and a subsequent retraction by HMRC is unlikely to mitigate those commercial implications. The governance process described at paragraph 5.46 is not sufficient to deal with these issues because it does not involve any third party scrutiny.

We are not therefore convinced that the additional few months which this provision buys HMRC can justify this very significant power as proposed. Having said that, if HMRC were willing to provide commercial compensation in the event that the published information is subsequently withdrawn or determined to be incorrect, the lack of appeal right would be more justifiable. If HMRC wish to go down this route (and as already noted we think making this sort of information available is a good idea), we think they must accept that their actions might expose them to compensation claims if they get it wrong.

## **8 Acknowledgement of submission**

- 8.1 We would be grateful if you could acknowledge safe receipt of this submission and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

4 June 2021