



## Part 7, Chapter 2 – Tax Advisers – Conduct etc.

**Conduct of Tax Advisers: Clause 247 and Schedule 21**

**Power to Publish Information: Clauses 248 - 250**

### Executive Summary

This measure should be viewed in conjunction with other measures in this Bill which are aimed at tax advisers. The impact on compliant tax advisers, even though they are not the target of these measures, should not be under-estimated. It may cause some advisers to withdraw from giving advice on matters where the law is unclear or uncertain in its application. It is likely to lead to an increase in the cost of tax advice, which in turn may cause some taxpayers to file returns without recourse to professional advice, increasing errors, HMRC's workload and the tax gap. It will make the UK a less attractive place to do business, harming the economy.

It could also lead to more advice being provided by non-UK advisers, who will be less susceptible to the sanctions.

In addition to the severe civil and criminal sanctions in this legislation, if a tax adviser is penalised under this measure, HMRC may use clause 229 of the Bill to suspend their registration. This effectively forces a firm to cease to trade.

### Clause 247 and Schedule 21 - Conduct of Tax Advisers

This legislation amends the regime for tackling tax advisers who facilitate non-compliance in their clients' tax affairs. It does this by amending the tax agent 'dishonest conduct' rules (Schedule 38 of Finance Act 2012), renaming them 'sanctionable conduct' rules.

Moving from a high threshold (dishonesty) to one that is lower and potentially ambiguous (sanctionable conduct, as defined) lowers the bar considerably. In this representation we set out examples of behaviour which is not dishonest or deliberate wrongdoing but nevertheless could fall within the definition of sanctionable conduct. At the same time the consequences for non-compliance are being made significantly more severe. While the government say their intention is to target only those advisers who *deliberately* facilitate non-compliance this is not what the legislation says. We would like to see the wording of the legislation amended so it captures only deliberate facilitation of non-compliance and not, for instance, differences of technical interpretation of the law. Aiding this, a clear statement from the minister to Parliament that the measure is targeted at advisers who *deliberately* facilitate non-compliance, and not at differences of legal interpretation and genuine errors, would be helpful.

Additionally the term 'sanctionable conduct' is new and untested, making appeals likely in the early days. This will consume HMRC's time and money as well as that of advisers. Amending the legislation to target 'deliberate behaviour' would be more straightforward as this is a term the courts have already defined clearly.

Finally we suggest an amendment to make clear that references to a client paying the tax required, or claiming the relief to which they are entitled, by law include HMRC guidance and extra-statutory concessions within their scope as well as legislation.

### **Clauses 248 – 250 Power to Publish Information**

This provision gives HMRC wide powers to publish information relating to misconduct by tax advisers with no external safeguards. HMRC should publish their internal governance processes around the use of this power, to provide transparency and confidence that the power will be used appropriately and not abused.

The legislation should be amended to prevent a firm being named when one of their people misbehaves if the firm can demonstrate it had in place reasonable procedures to prevent such misbehaviour taking place.

## **1 Introduction**

This measure should be considered in conjunction with the other measures in the Bill which are aimed at tax advisers (i.e. mandatory tax adviser registration in Part 7, Chapter 1 and the avoidance measures in Part 6). The impact on tax advisers in making sure they comply with all these new rules – both in terms of the administrative burdens and associated costs of designing and implementing new policies and procedures, and the ranges of tax services they may choose to offer once the measures are in force - should not be under-estimated. Higher costs are likely to be passed on to clients making tax advice more expensive. This may cause some taxpayers to decide to file returns without recourse to professional advice, which may increase tax return errors, HMRC's workload and the tax gap.

- 1.1 In addition the consequences of non-compliance are so severe – in many cases firm-ending (certainly if agent registration is lost due to receiving an avoidance-related penalty or a sanctionable conduct penalty, but also as a consequence of the financial impact of a sanctionable conduct penalty) – that many tax advisers may decide to err on the side of caution and withdraw from offering tax advice in some areas of the law, for example where there is genuine uncertainty in its interpretation. If taxpayers cannot obtain the tax advice they need, there could be knock-on impacts to the UK economy as this will make the UK a less attractive place to do business.
- 1.2 The significant increase in risk aversion of (in particular) UK advisers who need to be registered with HMRC will provide a major competitive advantage to those effectively outside the scope of the rules. This could lead to much more advice being provided by non-UK advisers and those who choose not to interact with HMRC. This will make it harder for HMRC to use their information powers and conduct compliance checks. It will not be good for overall compliance and is likely to negatively impact the tax gap.

## **2 Conduct of Tax Advisers: Clause 247 and Schedule 21**

- 2.1 This legislation significantly amends the regime for tackling tax advisers who facilitate non-compliance in their clients' tax affairs. It does this by amending the tax agent dishonest conduct provision in Schedule 38 of Finance Act 2012, renaming it "Tax advisers: sanctionable conduct" (para 2 Sch 21) and very significantly increasing the penalty for the conduct in scope (para 18 Sch 21).  
2.2 This means that a tax adviser's conduct no longer needs to be dishonest to attract a sanction under this provision, thus potentially capturing honest behaviour, and lowering the bar considerably as to the severity of the type of behaviour that HMRC may wish to target with

this measure. Coupled with that, the penalty is now to be calculated based on the tax lost due to the adviser's conduct – which could be significant and disproportionate in relation to the adviser's fees. In short, we are moving from what is now an extremely high threshold (dishonesty) to one that is potentially ambiguous (sanctionable conduct) with much more severe consequences for non-compliance. This makes it all the more crucial that the definition of sanctionable conduct should be clear and unambiguous, leaving no room for doubt about the sort of behaviour that is caught.

- 2.3 It is important to note at the outset that [the policy objective](#) of the measure is to “*deter tax advisers from contributing to the tax gap and hold advisers accountable when their actions deliberately facilitate non-compliance. It supports a fairer and more transparent tax system by strengthening HMRC's ability to act effectively where advisers harm the tax system. This will help protect compliant taxpayers and tax advisers, improve trust in the tax system, and reduce the tax gap by addressing harmful behaviours that undermine compliance*”. Additionally, HMRC say that “*tax advisers who deliberately facilitate non-compliance in their client's tax affairs, and their clients*” are the people who are likely to be affected by the measure.
- 2.4 The policy intent is therefore clearly to target **deliberate** behaviour. However, the definition of “sanctionable conduct” unhelpfully does not mention the word “deliberate”. In our view, calling it “sanctionable conduct” rather than “deliberate conduct” makes the label itself entirely neutral whereas “deliberate” carries with it some connotation of both consciousness and seriousness. We consider that, in order to match HMRC's stated policy intent (as set out above), the wording should be 'deliberate conduct' instead of sanctionable conduct (see our suggested amendment in para 1.9 below).
- 2.5 The legislation says that an adviser's conduct is sanctionable “*if, in the course of acting as a tax adviser, the person does something with the intention of bringing about a loss of tax revenue*” (para 5(2)(a) Sch 21 inserting new para 3(1) into Sch 38 FA 2012).
- 2.6 A “loss of tax revenue” would be brought about for these purposes if clients were to:
  - (a) account for less tax than they are required to account for by law,
  - (b) obtain more tax relief than they are entitled to obtain by law,
  - (c) account for tax later than they are required to account for it by law, or
  - (d) obtain tax relief earlier than they are entitled to obtain it by law.

(See existing para 3(4) Schedule 38 FA 2012)

- 2.7 The Government has said that it is not its intention for the measure to encompass positions where there are genuine differences of technical interpretation - that the measure does “*not target tax advisers who make genuine one-off accidental errors or differences of legal interpretation*” (see HMRC's [consultation response](#)). HMRC have said that guidance will make this clear. However, this is insufficient, as the Tribunals and Courts are not obliged to follow guidance when they interpret the meaning of legislation. They can ignore guidance completely. It is therefore essential that the legislative wording is revised to match the official policy intent, otherwise HMRC could in future use the legislation to penalise advisers for mistakes outside the original policy intent.
- 2.8 It is not clear from the legislation that there is any requirement for the tax adviser to know or intend that what they are doing is wrong or inaccurate. We remain concerned that the wording could encompass legal interpretation issues and genuine errors, as well as dishonest behaviour or fraud and meritless technical arguments (see examples below). This is creating uncertainty for tax advisers about the breadth of the measure and whether to

cease providing some types of advice (this could include anything in scope of the Uncertain Tax Treatment rules, or that involves a very new (and hence untested) piece of legislation), as well as undermining trust in HMRC. We do not consider that this is in the public interest.

2.9 In order to make it more likely that the Tribunals and Courts will interpret the legislation consistently with HMRC's policy intent, we consider that the test in para 3(1) would be improved and more clearly targeted if it was amended as follows:

**Suggested amendments:**

**Page 513, schedule 21, line 25, remove 'sanctionable' and insert 'deliberate'**

*Explanatory statement: This amendment would make the schedule heading match HMRC's stated policy intent that it is aimed at deliberate behaviour*

**Page 514, schedule 21, line 35, leave out sub-paragraph 5(2)(a) and insert -**

**(a) for sub-paragraph (1) substitute—**

**“(1) For the purposes of this Schedule, a person “engages in deliberate conduct” if, in the course of acting as a tax adviser, the person does something with the intention of bringing about what they know to be a loss of tax revenue”.**

*Explanatory statement: This amendment would help ensure this legislation targets deliberate behaviour in line with HMRC's stated policy intent*

**Page 514, schedule 21, line 38, at end insert -**

**(aa) after sub-paragraph (4) insert -**

**“(4A) A loss of tax revenue would not be brought about in circumstances to the extent there is a genuine difference of view in how a specific tax law applies in a particular situation”**

*Explanatory statement: This amendment would ensure that conduct caught by these provisions would not include situations where there is a genuine difference of interpretation of the law*

2.10 We would also like to see a clear statement from the government to Parliament that the measure is targeted at tax advisers who deliberately, intentionally and knowingly facilitate non-compliance in their client's tax affairs, and that differences of legal interpretation and genuine errors are not the intended target of this measure. It would be helpful if the minister could make it clear during the debate that HMRC will not seek to operate the legislation in those situations. Such clarification is essential and is particularly crucial if the legislation is not amended.

2.11 Using an untested definition of the new term “sanctionable conduct” means that it is likely that appeals will be made as HMRC test what is and is not in scope of the penalty. This will use HMRC's resources (time and money). The solution is to amend the legislation as suggested above as the Courts have already defined 'deliberate behaviour' clearly, creating precedent which could be relied on if HMRC was to rectify the wording in this new legislation.

2.12 'Deliberate' behaviour is now relatively well understood. Current case law shows that deliberate behaviour applies to both acts and omissions:

- Deliberate behaviour includes intentionally making a statement which, at that time, the person knew was inaccurate, i.e. they intended to mislead HMRC ([HMRC v Tooth \[2021\] UKSC 17 at \[42\] – \[47\]](#) and [CF Booth Ltd v HMRC \[2022\] UKUT 217 \(TCC\)](#)).
- Deliberate behaviour can also occur where a person suspects that a document contains a mistake ‘but deliberately and without good reason chooses not to confirm the true position before submitting’ it to HMRC ([CPR Commercials Ltd v HMRC \[2023\] UKUT 61 \(TCC\)](#)).

2.13 However, any decision on the word ‘deliberate’ or ‘deliberately’ in another context (especially in a different Act of Parliament) does not guarantee that the tax tribunals / courts will impute the same restricted meaning as in the above cases. Even with the word ‘deliberate’ or ‘deliberately’ included in the test, it could still encompass situations where an adviser consciously facilitates making a claim for tax relief which they consider that the client is entitled to, given their facts and the law at that time, but it later transpires that the client is not. The intention is that their client’s tax liability will be an amount which is lower than turns out to be required by law.

2.14 In our view, it is essential that the definition conveys clearly that the adviser knew that the position they are advising the client to take is incorrect – at the time they give the advice – given HMRC’s policy intent is to include deliberate behaviour. We consider that this would best be achieved by also including the phrase ‘what they know to be’ in the definition (see above). In particular, if an adviser thinks that the position is correct then they do not meet the test, thus protecting legitimate technical arguments from being caught by the test.

2.15 Another way of saying this is that a known underpayment at the time the advice is given / the return is filed needs to be the target of the test, not an amount being accounted for in a return which (it turns out later) is an under-declaration/excessive claim etc.

2.16 We think it would be helpful to illustrate the problem with some examples.

2.17 **EXAMPLE 1:** a loss of tax revenue (as defined in para 3(4)) can occur factually if Firm X submits a return for client X which states that £1,000 tax is due whereas the correct factual and technical position is that £3,000 tax is due based on the law at the time the return is submitted – the return accounts for £2,000 less tax than is required by law. The £2,000 shortfall may be caused by an inadvertent error, carelessness or deliberate behaviour. It is only the latter that HMRC wish to encompass in the test but the words ‘with the intention of’ in para 3(1) are insufficiently precise and so do not clearly achieve this. In the words of para 3(4)(a), the adviser’s intention is that the client will “account for less tax” (ie £1,000) “than they are required to account for by law” (ie £3,000).

2.18 **EXAMPLE 2:** Firm F submits a client’s return stating that £10,000 tax is due based on their interpretation of some new, uncertain law given the client’s facts. It is submitting the return with a view to HMRC agreeing that £10,000 is due, as they think it is the correct answer at that time. Subsequently, during a compliance check, the client decides to accept HMRC’s view that £50,000 is due as it will cost more to argue the point than pay the tax and interest in Tribunal. HMRC then say to firm F, you met the ‘person does something with the intention of bringing about a loss of tax revenue’ test as you did something (submitted your client’s return) with the intention of accounting for less tax than your client was required to account for by law (as the return said £10,000 when it should have said £50,000)”.

2.19 **EXAMPLE 3:** Firm G submitted a client’s return containing a claim for a £40,000 tax repayment. The law is clarified in the Supreme Court eight years after the tax return amendment window, such that no repayment is due. It is unclear whether the test means

that the firm is required to (a) realise that the new case law affects the return they filed many years ago; and (b) consider whether HMRC are in time to assess the tax. They may not be acting for the client then. The staff may have changed and no-one remembers what was done that long ago to know to revisit it.

2.20 **EXAMPLE 4:** Firm J prepares their client's corporation tax return. HMRC open an enquiry and, after several months of reviewing facts and the legislation in relation to a transaction, says that it considers that the return was incorrect when it was submitted (because the position was not in accordance with HMRC guidance). The client appeals the resulting enquiry closure notice. Eventually the technical point is addressed in an Upper Tribunal (UT) decision which confirms that the return is correct after all. If HMRC's proposed test in para 3 is applied at the time the return was submitted, could HMRC penalise Firm J. We would argue not because the UT decision clarifies the law as it was when the return was filed. But what if the UT decision is only known after HMRC have penalised firm J under Sch 38?

2.21 **EXAMPLE 5:** Firm K is a member firm of the CIOT and prepares their client's personal tax return. Following submission, the adviser realises that there was a mistake in the tax return and their client has underpaid tax by £10,000. Professional obligations (the Professional Conduct in Relation to Taxation (PCRT) rules) require that Firm K advises the client of the need to correct the error or, if not in time, to disclose this to HMRC. If the client does not permit Firm K to do this, then professional obligations – in particular confidentiality – prevent Firm K from unilaterally correcting the tax return or disclosing to HMRC. They are required to make a Suspicious Activity Report under money laundering provisions and to cease to advise the client, but they cannot directly correct the error without permission. As the definition of sanctionable conduct includes both acts and omissions, it would appear that Firm K could be subject to the sanctionable conduct rules and penalties despite doing everything required and permitted from a professional perspective.

2.22 None of the behaviours in the examples above are deliberate wrongdoing as we understand deliberate to mean, so none of them should face a conduct penalty. However, the lack of clarity in the definition of sanctionable conduct means that there is considerable uncertainty about whether it could apply in these sorts of scenarios. This is completely unsatisfactory.

2.23 Clarification is also needed about the meaning of the term “in the course of acting as a tax adviser” used in new para 3(1) Sch 38. In relation to Example 5 above, does it mean that if a tax adviser has ceased to act for a client they are no longer “acting as a tax adviser”? Or can a wider meaning be imputed, such that it would cover a situation where the tax adviser is still in business as a tax adviser (albeit no longer acting for that particular client)? This needs to be clarified, ideally in the legislation itself.

2.24 The test as it stands has implications for firms' willingness to provide UK tax advice, regardless of whether that advice is given as part of a tax return preparation service or standalone advice (such as that given in advance of a transaction). Firms may deem it too risky to advise on matters where the law is unclear or uncertain in its application, particularly when the amounts at stake are, for the firm, significant so potentially exposing them to large penalties (see below).

2.25 All advice given by advisers and every entry in a tax return will have to be checked against the conduct definition before it is given to clients. Whilst the Tax Information and Impact Note indicates that HMRC believe that this measure will have no cost to firms, there will no doubt be cost implications to this which are likely to be passed on to clients in higher fees (as firms will need to review and alter policies and procedures to guard against being

sanctioned, e.g. in relation to documenting and reviewing work and file retention). This may cause some taxpayers to decide to file returns without recourse to professional advice, which may increase tax return errors, HMRC's workload and the tax gap.

2.26 We will be pressing for HMRC's guidance to contain practical examples of what is in and out of scope. However, the wording of the legislation is what matters first and foremost. The courts do not have to take guidance into account (or the wording of explanatory notes or other publications) when interpreting the law in future appeals. It is highly unsatisfactory that advisers will, as the legislation stands, be reliant on HMRC's guidance to interpret the scope of the legislation on such a crucial issue.

2.27 Penalties - HMRC have the power to charge penalties based on the potential loss of tax revenue that has arisen due to the adviser's action. Whilst there is a cap of £1m for the first penalty it is still likely in very many cases to be disproportionate compared to the level of the fee the adviser may have charged for the work. Multiple penalties can be charged (i.e. to a firm and any individuals involved in the sanctionable conduct) and their details can be published (under existing legislation). Indeed a firm can be penalised and their details may be published even if an individual acted alone and against the firm's procedures. Such penalties are uninsurable and could potentially put the firm out of business.

2.28 Being sanctioned under these rules will also impact the adviser's registration with HMRC as it is likely to result in the suspension of their registration under clause 229(2) (i.e the adviser has, in the course of interacting with HMRC, behaved in a manner which falls below the standards that might reasonably be expected of a tax adviser in their interactions with HMRC). If an adviser has their registration suspended, this is likely to be a business-ending event.

2.29 Finally it is not clear that the use of the words "by law" in para 3(4) Schedule 38 FA2012 will include HMRC's Extra Statutory Concessions. HMRC may allow relief on an extra-statutory basis when a strict application of the law would create a disadvantage or the effect would not be the one intended – for example, see [VAT Notice 48](#). This could lead to advisers being reluctant to rely on ESCs in the future. The same point also applies to HMRC's guidance.

2.30 **Suggested amendment:**

**Page 514, schedule 21, line 38, at end insert -**

**(aa) after sub-paragraph (6) insert -"(6A) A reference in this paragraph to something being done "by law" shall be taken to mean "by law or under an applicable HMRC concession, guidance or other HMRC publication."**

*Explanatory statement: This amendment makes clear that references to a client paying the tax required – or claiming the relief to which they are entitled – by law include HMRC guidance and extra-statutory concessions within their scope as well as legislation*

### **3 Power to Publish Information: Clauses 248 - 250**

3.1 These clauses introduce a new power for HMRC to publish information relating to misconduct by tax advisers. A tax adviser's details can be published in two specific circumstances – if an authorised HMRC officer has decided (1) to refuse to deal with the adviser (whether temporarily or permanently), or (2) to suspend their access to HMRC's online services, and the officer considers that publication would be in the public interest (clause 248(1)).

3.2 A firm's details may be published even if an individual employee acted alone and against the firm's procedures (clause 248(3)). If a firm's details are published then their reputation will be damaged and they will be less able to retain clients and engage new ones, despite having in place suitable procedures. The legislation should be amended to prevent a firm being named if a partner or employee has engaged in misconduct but this happened in spite of the firm having in place reasonable procedures for the prevention of misconduct by its staff.

3.3 **Suggested amendment**

**Page 226, clause 248, line 26, at end insert -**

**“unless that person can demonstrate that they had reasonable procedures in place to prevent the misconduct that led to HMRC’s decision in subsection (1)(a) and the tax adviser did not adhere to them.”**

*Explanatory statement: This amendment would prevent a firm’s details being published when one of their people misbehaves if the firm had in place reasonable procedures to prevent such misbehaviour taking place*

3.4 Before publishing information about the tax adviser (and the organisation they work for, if appropriate), HMRC must notify the adviser (and the organisation) and give each of them at least 30 days to make representations about whether the information should be published.

3.5 There is no independent right of appeal (i.e to the tax tribunal) against a decision by an authorised officer to publish information.

3.6 This provision gives the authorised officer wide powers with no external safeguards. It is essential, in the interests of fairness, accountability and transparency, that HMRC publish their internal governance processes around the use of this power, so that tax advisers, Parliament and the public can have confidence that the power will be used appropriately and not abused.

#### **4 The Chartered Institute of Taxation**

4.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. 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. 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.

4.2 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. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

4.3 The CIOT’s 20,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

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The Chartered Institute of Taxation  
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