Representation from the Chartered Institute of Taxation
for Finance Bill 2021-22 Committee Stage

Tackling Tax Avoidance
Clauses 84 to 90 and Schedule 12

Executive Summary

Clauses 84 to 90 and Schedule 12 deal with measures to tackle promoters of tax avoidance and were consulted on by HMRC earlier this year.

We support the government taking a robust approach to people who are still devising and promoting tax avoidance schemes and in general support the measures in the Finance Bill, albeit we have a few concerns which we set out below.

Clause 85, which introduces a new power allowing HMRC to publish information about schemes and promoters more quickly, will be helpful, but we do have some concerns about both the potential scope of the measure and how such information will be effectively communicated.

We recommend that a review of this avoidance legislation, and HMRC's powers in relation to it, should take place in about three to five years' time.

1. Tax avoidance – general comments

1.1. The government are right to be taking a robust approach to those who devise, promote or sell tax avoidance schemes. There should be no place for such people and their schemes in the tax services market. We are therefore broadly supportive of the measures in these clauses, subject to our comments below which focus on the need to ensure government action in this area is proportionate, carefully targeted and accompanied by appropriate safeguards.

1.2. The aim of legislation and other activity in this area should be to stamp out the activities of those who push and use avoidance schemes while at the same time not making life harder for ordinary taxpayers and the compliant majority of tax advisers who play a vital role in the proper administration of the tax system.

1.3. CIOT and the other tax and accountancy professional bodies strengthened our *Professional Conduct in Relation to Taxation* rules in 2017 to make explicit that creating, encouraging or promoting such arrangements is not compatible with membership of a professional body such as our institute[1].

[1] The wording of the relevant section of PCRT states: "Members must not create, encourage or promote tax planning arrangements or structures that: i) set out to achieve results that are contrary to the clear intention

1.4. However, as the government's July 2020 consultation document stated: "Promoters of tax avoidance schemes are rarely members of professional bodies. Indeed many – perhaps a majority – are not tax advisers or tax agents at all but rather operate in boutique firms focused mostly or entirely around such avoidance schemes."

1.5. So long as such schemes continue to exist the government are right to target them. But HMRC do deserve credit for their progress to date in this area. The most recent 'tax gap' estimates put tax lost due to avoidance in 2019-20 at £1.5 billion (0.2% of total theoretical liability). The first tax gap figures (2005-06) put the 'avoidance gap' at £4.7 billion (1.1% of total theoretical liability). The avoidance gap is therefore less than a third of what it was 15 years ago, and less than a fifth as a share of the total tax that should be collected.

1.6. Nevertheless, according to HMRC, there remain around 20 to 30 active promoters of tax avoidance still operating. They have proved remarkably impervious to a succession of pieces of legislation designed to put them out of business. We hope this latest set of measures will prove effective but we do wonder how successful more legislative measures will be in tackling this 'hard core' of promoters who clearly do not wish to play by the rules, and whether they will be able to find a way to just move the goalposts so that this game of 'cat and mouse' with HMRC will continue *ad infinitum*.

1.7. The avoidance market has changed in recent years, primarily because the 'hard core' promoters have focussed their activity on disguised remuneration (DR) schemes[2] involving significant numbers of people who are, or are close to being, employees whose tax affairs would normally be dealt with under PAYE rather than self-assessment, and many of whom are low paid and/or in weak labour market positions. 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. Most 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.

1.8. There is a particular problem at the moment with abuse of umbrella companies which use DR to pay workers.[3] While tough action against promoters of tax avoidance schemes is important, we do not believe it is the whole answer to the problem of non-compliant umbrella companies, as many umbrella arrangements these days are not backed by sophisticated promoter structures. Currently there is no real incentive for the umbrella companies to stop using these schemes to pay workers and the cycle continues, which has a significant impact on the well-being of the workers involved but also wider implications for the reputation of the tax system.

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of Parliament in enacting relevant legislation; and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation."

[2] 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). 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.

[3] A report published by CIOT's Low Incomes Tax Reform Group (LITRG) in March 2021 casts light on some of these abuses as well as providing broader context on the uses and abuses of umbrella companies - https://www.litrg.org.uk/latest-news/news/210324-press-release-litrg-report-puts-umbrella-companies-under-spotlight.

1.9. HMRC must recognise the changing nature of the avoidance market for the measures in the Finance Bill, particularly those in clause 85 (publication by HMRC of information about tax avoidance schemes), to have any chance of success.

1.10. We recommend that a review of this 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. 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.

1.11. More generally, many tax professionals feel that HMRC frequently ask for new powers while not making full use of those they already have. When proposing new or extended powers for HMRC, such as these, the government should take up the recommendation of the House of Lords Finance Bill Sub-Committee last year[4], that they specifically explain in each case why existing powers are insufficient to achieve the policy objective.

1.12. Other angles that should be explored by the Government to tackle recalcitrant promoters of tax avoidance include:

- continuing to focus on tackling misleading advertising of schemes in conjunction with the Advertising Standards Authority;
- consulting on whether and how regulatory or similar interventions could be imposed on the provision into the UK of services from abroad;
- working towards making it a legal requirement for anyone who wants to provide tax services on a commercial basis to belong to a recognised professional body or be similarly regulated. (This would need to apply more widely than simply to the giving of tax advice since, as noted above, most promoters go to strenuous efforts to avoid giving 'advice', instead simply selling a product to the taxpayer. Effectively this approach would extend the requirements of Professional Conduct in Relation to Taxation (PCRT) to those parts of the market not subject to it.)

2. Clause 84 - Winding up petitions by an officer of Revenue and Customs

2.1. Clause 84 introduces a new power allowing HMRC to present a winding up petition to the court for companies and partnerships involved in the promotion, management and facilitation of tax avoidance where they are operating against the public interest and to protect the public revenue.

2.2. The government are doing this because they want to disrupt the promoters' activities, remove them from the market and reduce the harm they are causing.

2.3. Currently HMRC can only take action against a promoter under insolvency legislation where there is a tax debt.

CIOT Comments

[4] New powers for HMRC: fair and proportionate, 4th report on House of Lords Finance Bill Sub-Committee, 19 December 2020, paragraph 198 - https://committees.parliament.uk/publications/4097/documents/40546/default/

2.4. This seems a reasonable proposal, although it is not an area which is normally dealt with by tax advisers so it is not one we would claim to be experts in.

3. Clause 85 – Publication by HMRC of information about tax avoidance schemes

3.1. This introduces a new power allowing HMRC to publish information about tax avoidance schemes, the promoters and the people connected with them at a much earlier stage than now.

3.2. The government is doing this to put more information in the public domain to help taxpayers identify and steer clear of schemes, or exit them, and to raise awareness of the risks of the schemes.

3.3. Currently, the law on taxpayer confidentiality[5] restricts disclosure of taxpayer information with limited exceptions. There is also specific legislation that allows for the naming of promoters and enablers of tax avoidance but at a much later stage in proceedings.

CIOT comments

3.4. We support this measure and agree it will be helpful for taxpayers to have more information about HMRC's view of schemes and the promoters and the people connected with them much earlier than now.

3.5. During the consultation process the government recognised that most tax advisers adhere to high professional standards[6] and that the Finance Bill measures are not aimed at them[7]. However, this measure sets a low bar because the definitions[8] of 'promoter', 'relevant proposal' and 'relevant arrangements' are quite wide. We would therefore welcome a statement from the Financial Secretary to the Treasury reconfirming what her predecessor said in the consultation document ('Clamping down on promoters of tax avoidance') that this measure (and the rest of the measures in this group of clauses) do not target legitimate tax advisers but are 'instead targeted at those promoters who profit by sidestepping the rules'.

3.6. Under the proposal HMRC is required to amend or withdraw information which they publish which is incorrect or misleading. This is welcome. However, in our view this may not go far enough to rectify any reputational damage which has been inflicted on innocent parties, particularly since versions of the story will inevitably remain in circulation on the internet. We

[5] Commissioners for Revenue and Customs Act 2005 s18.

[6] Professional Conduct in Relation to Taxation (PCRT) sets out the principles and standards of behaviour that all members, affiliates and students of the seven tax and accountancy professional bodies, including the CIOT, must follow in their tax work - https://www.tax.org.uk/sites/default/files/200601%20Professional_Conduct_in_Relation_to_Taxation_2019.pdf.

[7] Foreword by Jesse Norman, Financial Secretary to the Treasury on page 5 and also at para 1.12 of the introduction to the consultation document - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973478/Clamping_down_on_promoters_of_tax_avoidance_-_consultation.pdf

[8] Promoter, relevant proposal and relevant arrangements are defined in Finance Act 2014 s234 and s235.

think HMRC should also be required to publish a formal retraction (and in some cases an apology).

3.7. Requiring HMRC, when they get things wrong, to publish a formal retraction (and potentially an apology) would provide more balance to this measure. If HMRC may have to publish formal retractions and apologies, this will make it more likely that they think carefully from the outset and only use this power for the egregious schemes at which it is properly aimed.

3.8. We are concerned about how the information can be published so that it reaches its target audience and is therefore effective in helping taxpayers identify and steer clear of schemes, or exit them, and in raising awareness of the risks of the schemes.

3.9. We doubt that publication on GOV.UK will be sufficient – we already know that existing publications on GOV.UK such as HMRC's 'Spotlights' and the General Anti-Abuse Rule (GAAR) Panel decisions do not have a wide reach - so HMRC will need to publish and share the information more widely, including using social media and the mainstream press.

3.10. The information must be written in non-tax technical language so that it can be understood by the ordinary person.

3.11. The CIOT looks forward to engaging with HMRC about the best way to get the information about promoters and schemes out to our members and the public at large.

3.12. However, the avoidance market has changed in recent years, as noted in paragraphs 1.4 and 1.5 above, primarily because of the proliferation of disguised remuneration (DR) schemes. Whilst there are undoubtedly still people 'in the market' to use tax avoidance schemes for their own advantage, we do not believe this is the norm any longer.

3.13. As set out in paragraphs 1.7 and 1.8 above, the DR arrangements of today are no longer always, or mainly, an issue of traditional tax avoidance but often more about exploitation of the economics of supply chains and the nature and scale of the temporary worker labour market. Indeed, it would appear that workers are increasingly being paid via DR schemes for the non-compliant umbrella companies' own gains with no understanding at all of the set-up themselves. Naming promoters, the websites they use and the schemes they promote at the earliest possible stage, so that HMRC can share that information publicly to warn taxpayers of the risks, will do nothing to assist those who are being paid via DR unknowingly. They will also do nothing for those who may have little choice but to be paid by a non-compliant umbrella company if they want the work.

3.14. HMRC must recognise the changing nature of the avoidance market, and adapt their publicity accordingly, for these measures to have a chance of success.

3.15. Targeted sharing with businesses, agencies and employers known to HMRC as being involved in DR tax avoidance supply chains – whether knowingly or unknowingly - should 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 taxpayers' digital tax accounts.

4. Clause 86 – Freezing orders England and Wales

Clause 87 – Warrants for diligence on the dependence: Scotland
Clause 88 – Freezing injunctions: Northern Ireland
Clause 89 – interpretation

4.1 These four clauses introduce measures to allow HMRC to seek an order from the court to freeze the assets of a person HMRC have started or intend to start proceedings against to charge an 'avoidance' penalty (eg under Disclosure of Tax Avoidance Scheme (DOTAS), Disclosure of Tax Avoidance Schemes VAT and Other Indirect Taxes (DASVOIT), Promoters of Tax Avoidance Scheme (POTAS) and the enablers of tax avoidance rules), and the court considers HMRC have a good arguable case in relation to the penalty.

4.2 Currently, HMRC can only apply for a freezing order where there is an existing cause of action, such as an enforceable tax debt.

CIOT comments

4.3 We have no objections to this measure, though we note that freezing orders are normally dealt with by lawyers not tax advisers so there may be others better placed to make an assessment of the measure's legal merits.

4.4 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 has had 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, 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.

5. Clause 90 and Schedule 12 – Penalties for facilitating avoidance schemes involving non-resident promoters

5.1 This introduces a new penalty on UK based entities who facilitate tax avoidance schemes involving non-resident promoters. The penalty is up to 100% of the consideration received by related entities in promoting the scheme.

5.2 The penalty will apply where an 'avoidance penalty' (eg under DOTAS, POTAS etc) is payable on the UK entity in respect of their own activities equal to or more than £100,000. This threshold does not apply if the penalty is an enabling of tax avoidance penalty.

5.3 The government is doing this to try to tackle the problem of offshore promoters operating in the UK via a network of UK based associates and collaborators.

CIOT comments

5.4 We are aware of the problems being caused by promoters based offshore and support this measure.

5.5 Given the size of the possible penalties, HMRC must publicise the measure as widely as possible so UK entities potentially affected are aware of it and can take appropriate lawful action to minimise their risk of a penalty.

6. The Chartered Institute of Taxation

6.1. 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.

6.2. 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.

6.3. The CIOT's 19,000 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
23 November 2021