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Tackling Promoters of Tax Avoidance – HMRC Consultation

Response by the Chartered Institute of Taxation

1 Introduction

1.1 This consultation document[1] is seeking views on proposals to reduce the scope for promoters (and other enablers) to market tax avoidance schemes and to strengthen the sanctions against those who promote or enable tax avoidance schemes. It proposes making changes to the following anti-avoidance regimes:

- Disclosure of Tax Avoidance Schemes (DOTAS)
- Disclosure of Avoidance Schemes: VAT and other indirect taxes (DASVOIT)
- Promoters of Tax Avoidance Schemes (POTAS)
- Penalties for Enablers of Defeated Tax Avoidance
- General Anti Abuse Rule (GAAR)

Draft legislation[2] to implement the measures has been published alongside the consultation document.

1.2 The consultation document illustrates the situations HMRC encounters when it tries to tackle avoidance and recognises that specific solutions are needed for particular problems that are distinct from the broader tax advice market. It gives examples of situations where the anti-avoidance regimes fail to provide effective measures to counter abuses, along with the proposed solutions and illustrations of the intended effects. As the target is the promoters of tax avoidance, the measures mainly focus on the 'supply side' of abusive arrangements.

1.3 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT 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.

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1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902352/Tackling_Promoters_of_Tax_Avoidance_-_consultation.pdf

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902606/Tackling_promoters_of_tax_avoidance_schemes_Draft_Legislation.pdf

1.4 Our stated objectives for the tax system which are relevant to this consultation include:

- A legislative process which 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.

2 Executive summary

2.1 The Government are right to be taking a robust approach to those who continue to devise, promote or sell tax avoidance schemes. The examples in the consultation document highlight the challenges HMRC faces in dealing with uncooperative and unscrupulous promoters. There should be no place for such people and their schemes in the tax services market.

2.2 It is welcome to see the consultation document highlight the fact that the extensions being proposed to HMRC's powers are not aimed at advisers adhering to high professional standards (see the Foreword (page 5) and paras 1.4 and 2.9), and to see it recognise that the 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 a small number of boutique firms focused mostly or entirely around such avoidance schemes, many of which are known to HMRC.

2.3 Ideally we favour HMRC targeting their resources on the activities of this small number of promoters and boutiques, rather than introducing new rules which might place additional compliance obligations on tax advisers and tax agents (even if that obligation is limited to ensuring they are not caught by those rules). Where, as in this instance, changes are being proposed to existing anti-avoidance regimes, our focus 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.

2.4 There is also a particular danger of new measures focussing on tax advisers or tax agents rather than the intended culprits who may not pose as advisers at all. There is evidence of promoters enticing taxpayers to use their avoidance schemes on false pretences as to the risks and likely consequences of entering the scheme, and then failing to support the taxpayers when HMRC investigates and perhaps litigates. The possible interventions necessary to address this issue need to apply whether the promoters in question are giving, or purporting to give, advice or not.

2.5 Angles that should be explored in tackling the issue of recalcitrant promoters of tax avoidance also include dealing with the issue of generic Tax Counsels' opinions supporting packaged tax avoidance schemes; ensuring that regulatory or similar interventions bite on the provision into the UK of services from abroad; ensuring that the professional bodies enforce the provisions of Professional Conduct in Relation to Taxation[3]

[3] 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.

(PCRT) (entailing a still more active referral of people falling short of it into their disciplinary processes); effectively extending the requirements of PCRT to those parts of the market not subject to it; and focussing further on misleading advertising by promoters.

2.6 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 fit for purpose and operating effectively and as intended.

3 **Chapter 3**: proposes changes to the **Disclosure of Tax Avoidance Scheme (DOTAS)** rules in Part 7 Finance Act 2004 (including similar changes to the VAT and other indirect taxes disclosure schemes (DASVOIT)):

- to provide for a new two stage process to sit within the existing DOTAS regime to help HMRC act more promptly where promoters fail to disclose or provide information about their schemes:
  - The first stage creates a new information notice which can be issued more widely than currently possible.
  - The second stage is triggered if the information is not forthcoming or insufficient and enables HMRC to issue a scheme reference number (SRN).
- to allow HMRC to publish information from these notices and the SRN to ensure taxpayers are informed about HMRC's interest in the scheme.

3.1 **Q1. Would 30 days give a reasonable amount of time to furnish HMRC with information on the schemes that the promoters or enablers have been promoting or enabling?**

30 days may not be long enough for a detailed response to be prepared, particularly given that HMRC tends to post letters second class and it can often be 14 days or more before the post is actually received. We would suggest that it should be increased to 60 days This would provide an appropriate length of time for consideration and preparation of a reply as well as for the letter to arrive from HMRC and the response to be received by HMRC.

3.2 **Q2. Would the proposed approach prevent persons from obstructing enquiries by claiming not to be a promoter, or in other ways such as by restructuring or moving offshore? If not, why not?**

It is proposed that the notice could be issued to any party that HMRC believes to be in the supply chain, not just to the promoter. This widens the information power considerably, and we understand the reasons HMRC wants to introduce it if they are currently being frustrated by persons claiming not to be promoters. We accept that if an adviser is adhering to high professional standards HMRC would never need to use this information power on them. However we think there may need to be some safeguards (particularly around naming) for those with a limited role in the supply chain, particular those who are not promoters and who may not have any knowledge about the tax avoidance arrangements – eg a lawyer who may have drafted paperwork, such as a trust deed, but who has no knowledge of the aggressive tax planning or scope of the artificial arrangements that are going on behind that.

Legal privilege is not mentioned in the consultation document. There could be situations where an information notice sent to a lawyer is requesting information which is privileged and the client refuses to

allow it to be released, meaning that the lawyer is unable to comply with the notice. This general issue is addressed in the DOTAS rules themselves. Please can HMRC provide some guidance on how the new rules are intended to work when legal privilege is in point.

As a general point, we would anticipate that any person who is already behaving in an uncooperative and unscrupulous way with HMRC is likely to seek ways to continue to obstruct HMRC's efforts to obtain information from them regardless of these new measures. We have doubts about whether this new measure will change the behaviour of the people it is targeting.

3.3 **Q3. How useful would information on the scheme be, without the name of the promoter, to help potential purchasers of the scheme understand the risks of using it? How might this information be published in order to be most helpful?**

This sounds as if it would be very similar to HMRC's existing 'Spotlights' which we doubt are read by users and potential users of mass marketed avoidance schemes. In order to get the message out, HMRC really should be running a big media campaign on a regular basis (say once a year), whilst at the same time targeting its more technical communications at specialists.

Perhaps HMRC could consider highlighting the details about schemes in the self-assessment tax return instructions and incorporate prompts in order to warn people before returns are filed containing typical scheme entries.

Professional bodies can play their part in any communications strategy and HMRC should engage with us on this. We are very aware that poor behaviour by a minority of promoters (who, as we note above, are these days rarely tax advisers) is nonetheless against the public interest and the best interests of clients, and damaging to the tax profession.

3.4 **Q4. Are the grounds of appeal against the issue of a new SRN the right ones?**

The grounds of appeal sound reasonable.

3.5 **Q5. Are there any other grounds that should be considered?**

No comments.

3.6 **Q6. Would naming those in the supply chains for promoting tax avoidance schemes help make taxpayers aware that they risk falling into a scheme that HMRC suspects does not work?**

The measure is being introduced to enable HMRC to identify schemes earlier and try to reduce the time available for the promoter to market and sell the scheme, so naming those in the supply chain would seem key to making the measure work in the way intended. However, as mentioned above, there may be persons in the supply chain who did not have actual knowledge of the tax avoidance arrangements, and we think there should be some protections afforded to them to prevent them being named.

This measure is unlikely to work unless the taxpayer is aware of the naming and is encouraged to seek independent professional advice before filing their return. Otherwise the promoter may say to them – 'HMRC will name me but that just means they are aware of the scheme so there is no cause for concern, carry on and put it on your return'.

In this context 'independent professional advice' means advice directed at the customer's own facts and circumstances. Some taxpayers are over-impressed by generic opinions from Tax Counsel which typically include assumed general facts which gloss over risks and exposures. Attempting to tax plan on a generic basis is contrary to Professional Conduct in Relation to Taxation ('PCRT'), which applies to most tax professionals, but unfortunately not in the HMRC Standard for Agents - and of course neither are able to bite on tax advisers outside the scope of PCRT who are not agents or on promoters who may convey the generic Counsel's Opinion but are not presenting themselves as advisers at all.

We do not know how likely it might be for the potency of this new power to be diminished by promoters changing their names, phoenixing their businesses, moving offshore or simply disappearing.

3.7 **Q7. Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposed measure?**

We note that the government does not propose that there should be a right of appeal against the new information notice in new s310D FA 2004, We understand why HMRC is trying to limit appeal grounds to speed up the process, but there must be strong internal governance and review of these notices before they are issued.

It would be counter-productive for compliant advisers to be receiving unduly onerous information notices, placing unnecessary and potentially significant costs on their end clients. These notices should only be used in limited and prescribed circumstances, and provisions should ensure that these notices cannot be used in the course of a standard enquiry or intervention.

3.8 **Q8. To what extent do the safeguards proposed achieve a balance between ensuring that the new power would be used appropriately and ensuring that the new powers are not sidestepped by promoters and others, allowing them to continue to market their scheme to taxpayers?**

No further comments.

3.9 **Q9. Do you agree that the proposed new rules, as described above, should also apply to DASVOIT?**

Q10. Are there any modifications to the proposals for the new power in DOTAS that would be needed in order for it to work appropriately in the DASVOIT regime?

No comments.

4 Chapters 4 & 5: changing the **Promoter of Tax Avoidance Scheme (POTAS)** rules in Schedules 34-36 Finance Act 2014:

- to enable HMRC to issue 'stop notices' (see para 12 Sch 34) to promoters earlier than they can do currently.
- to prevent promotes from abusing corporate entity structures to avoid their obligations under the POTAS regime.
- to tighten the application of the 2 year period for 'conduct notices'.
- to update the threshold condition for DOTAS in para 5 Sch 34 to include disclosure failures of any nature.

- Other minor technical amendments, such as allowing HMRC to withdraw and reissue conduct notices.

4.1 **Q11. Do the conditions for issuing earlier stop notices achieve a sensible balance between ensuring appropriate safeguards are in place, whilst ensuring that HMRC is able to promptly tackle schemes that are destined to fail for the benefit of taxpayers? If not, how could they be better targeted to achieve this balance?**

We have several concerns about the proposal to issue stop notices at an earlier stage than at present. Whilst we understand the challenges HMRC is facing with uncooperative promoters who seek to avoid or delay the application of the existing stop notice legislation, we are concerned that the proposals could in theory impact on advisers who adhere to high professional standards and who are not the intended target of the measure.

The conditions in the draft legislation (new s236A FA 2014) are very wide, meaning that the threshold for issuing a stop notice under the new proposals is low. 'Promoter' is widely defined; 'arrangements' is widely defined and is capable of applying to many commercial arrangements which also deliver tax benefits; 'tax advantage' is very widely defined. Furthermore, the power to issue a stop notice is to be based merely on whether the authorised officer 'suspects' that a person promotes arrangements. This is a low bar, considering that the issue of a stop notice is a draconian power. There should be clear guidance and strong internal governance and review to support this process. Ideally, this should be made as transparent as possible to those outside HMRC. The notice should explain exactly why HMRC considers the particular arrangement to meet the threshold for a stop notice.

A description of arrangements or a proposal for arrangements may be specified in a stop notice only if the 'authorised officer considers' that Conditions A and B are met (new s236A (3) & (4)). This seems to be a very low threshold to meet. What if the authorised officer is wrong?

Our concerns are principally about Condition B, which we think is too widely constructed, but we also have a concern about Condition A.

Condition A appears to be more appropriately targeted than Condition B in that it is referring to conditions which are similar to those in existing anti-avoidance legislation targeting abusive cases. However, it does include a provision that the arrangements are similar to arrangements that have previously been notified under DOTAS (para 3(b)). It is concerning that this could potentially include any arrangements that have ever been the subject of a DOTAS disclosure since the regime was introduced in 2004. We understand that many advisers made protective disclosures when DOTAS was first enacted when it was purely a notification procedure rather than a trigger for other anti-avoidance measures, such as accelerated payment notices (APNs) and POTAS, and now potentially a POTAS stop notice. It was also drafted so as to bring into the disclosure requirements arrangements that were unusual and unforeseen, giving HMRC early notice of developments which might affect the tax take. It was not always felt appropriate to legislate or otherwise intervene to prevent this from happening – in other words, novelty might imply abuse, but might simply be a new, or newly identified, set of commercial circumstances.

Condition B is very broadly drafted and could potentially impact advisers who adhere to high professional standards and who are not the intended target of the measure. 'Marketed' in the first limb of the condition is not defined. It would help with targeting the measure if 'marketed' was narrowly defined so that it only covers the types of behaviour that HMRC is trying to address with this measure.

The second limb of the condition states that 'it is more likely than not that arrangements…. are not…..capable of enabling that advantage to be obtained'. The words 'more likely than not' are again a very low threshold when combined with requiring only that the authorised officer 'considers' the condition is met.

Because of the subjective nature of the criteria, a stop notice under these new proposals could apply to a reputable tax adviser operating within PCRT. The threshold for a stop notice needs to be higher than specified here and, in our view, should be limited to cases which the authorised officer reasonably suspects involve abusive tax avoidance.

4.2 **Q12. Are there any other conditions that should be considered?**

No comments.

4.3 **Q13. How can HMRC best ensure that the internal review and appeals process work appropriately for recipients of stop notices?**

We note that full guidance is to be published on how decisions to issue stop notices are made. This will be essential to understand how HMRC intends to operate the measure given the risk that it could have an impact on advisers who are not its intended target.

4.4 **Q14. To what extent would publishing stop notices help inform taxpayers of the risks of entering into that scheme?**

It would depend on how the information is communicated (see comments above in answer to Q3).

4.5 **Q15. If the notice is appealed (and not subsequently withdrawn) – when would publishing of the details of the promoter best provide taxpayers with the information they need? Should this be after the First-tier Tribunal has reached a decision or later?**

Publishing after the FTT has reached a decision would help raise awareness amongst taxpayers at an early stage of which promoters are high risk but if the FTT decision is overturned on appeal then a person may be named when the courts ultimately decide they should not be. A more balanced safeguard would be to name only after the final court decision, although we recognise this would add delay to the process which HMRC is trying to reduce overall with this measure.

4.6 **Q16. Would the proposal be a suitable way to achieve the government's objective (as set out in para 4.9)? Are there any modifications that would help deliver that objective more effectively?**

No further comments.

4.7 **Q17. Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposal?**

There should be suitable governance around decisions to issue stop notices under this proposal to ensure that they have been based on reasonable suspicions and only issued in circumstances which are consistent with the policy intention of the draft legislation. This would improve the transparency of the measure.

4.8 **Q18. Are the proposals to deal with promoters who hide behind other business structures/entities or individuals appropriately targeted?**

Q19. Does the opportunity to comment on the proposed terms of the conduct notice continue to provide an appropriate safeguard?

Q20. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraphs 5.7-5.9)?

No comments beyond noting that these proposals seem a sensible response to the behaviour by promoters as described in the consultation document.

4.9 **Q21. Do the proposed changes achieve an appropriate balance between providing a clear window for those in receipt of a conduct notice and the need to ensure that promoters cannot continue to manipulate the rules to prevent HMRC taking action against them?**

Q22. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraphs 5.11-5.13)?

No comments.

4.10 **Q23. Are the proposed updates to the POTAS threshold conditions to include further DOTAS failures proportionate?**

Q24. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals (paragraph 5.15)?

No comments.

4.11 **There is no specific question about the following amendment to the POTAS regime in the consultation document but we do wish to make some comments about it, as follows:**

Paragraph 24 of the draft legislation amends Schedule 34A FA 2014 ('defeated arrangements') to include International Tax Enforcement (Disclosure Arrangements) Regulations 2020 (DAC6) within the definition of a defeated arrangement (Para 13 Condition C). Three relevant defeats under the provisions in Sch 34A can lead to the issue of a conduct notice under POTAS (s237A (11) FA 2014). Paragraphs 26 and 27 add non-compliance with DAC6 to the POTAS threshold conditions in Schedule 34.

We were concerned to see that DAC6 is to be included within the definition of a defeated arrangement and added to the threshold conditions, despite previous assurances from HMRC that DAC6 compliance would not creep into other regimes. Under DAC6, persons are required to disclose certain cross-border tax arrangements. These are widely defined and will include many commercial arrangements. Whilst there are safeguards within the DAC6 regulations, the regime is nonetheless very broad, and the arrangements covered are much broader than the sort of tax avoidance arrangements at which POTAS is targeted. Indeed, some hallmarks in DAC6 don't require a tax avoidance motive or a tax advantage at all. Consequently DAC 6 should not be linked to POTAS. If there is a desire to link the two then all DAC6 hallmarks that do not require a tax avoidance motive and a tax advantage (eg those that lack a main benefit test) should be excluded from scope of these proposed new rules.

We expect the burden on reputable advisers is going to be extremely onerous in ensuring compliance with DAC6 regulations, and the risk of non-compliance with the DAC6 reporting regime leading to a defeat under the POTAS regime is only going to increase that burden.

It would be helpful if the DAC6 guidance in HMRC's International Exchange of Information manual could include reference to whatever provision is included in the final legislation so that there is a joined up approach between HMRC's DAC6 and POTAS policy teams.

5 Chapter 6: changing the **Enablers of Tax Avoidance Penalty** rules in Schedule 16 Finance (No 2) Act 2017, as follows:

- to enable HMRC to use their Schedule 36 information powers earlier than they can do currently, ie as soon as a scheme has been identified,
- to introduce a new tiered approach to multi-users schemes in determining when HMRC can issue an enabler penalty to enable penalties to be issued sooner when a scheme has been defeated at the tribunal.
- To publish the names and addresses of enablers where multi-users schemes are involved sooner than HMRC can do currently.

5.1 **Q25. Do you agree that this change would enable HMRC to engage with potential enablers and get the required information from them to determine whether an enablers penalty is appropriate?**

No comments beyond noting that the changes being proposed seem sensible in order that the legislation can work in the same way as Schedule 36 information powers, as originally intended.

5.2 **Q26. Where an enabler receives a notice from HMRC seeking information on other enablers in the avoidance chain how readily would the recipient have that information? Would it cause any problems for the recipient of the information notice?**

We have no knowledge of how enabler supply chains operate in practice so we are unable to comment.

5.3 **Q27. Do you agree that penalties should be raised in all cases once there is a final judicial ruling confirming that the scheme is abusive avoidance?**

Yes.

5.4 **Q28. To what extent do the proposed tiered threshold percentages provide a suitable balance between ensuring that penalties can be issued to enablers promptly while providing sufficient time for enough 'defeats' to confirm that the scheme is likely to fail?**

The proposal provides a suitable balance.

5.5 **Q29. To what extent do the conditions in 6.21 provide a suitable threshold for naming enablers of tax avoidance schemes who have received penalties if the additional threshold in 6.22 is removed (in order to ensure that HMRC can advise taxpayers of that enabler's penalty position)?**

The conditions provide a suitable threshold for naming enablers who have received penalties if the additional threshold for multi-user schemes is removed.

5.6 **Q30. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?**

Existing procedural safeguards should continue to provide an appropriate amount of internal scrutiny.

5.7 **Q31. What factors should the government consider in determining whether it would be appropriate to apply these measures from the introduction of the penalty regime in 2017?**

In general, we do not agree with retrospective legislation. Ensuring that the law operates prospectively will at least give the opportunity for affected enablers to consider changing their behaviours and practices which is a key purpose of the legislation. Therefore, we do not think that these changes should apply retrospectively from when the enablers regime was introduced in November 2017. We agree with the way that the legislation has been currently drafted, ie that these changes should only apply from the date of Royal Assent.

6 Chapter 7: changing the **General Anti Abuse Rule (GAAR)** rules in Part 5 Finance Act 2013, as follows:

- To provide for the GAAR procedures to be applied at partnership level to partners or partnerships who enter abusive arrangements.

6.1 **Q32.Do the proposed changes to the legislation make it sufficiently clear as to how the GAAR would apply to partnerships?**

Q33. To what extent are the existing safeguards within the GAAR suitable for cases involving a partnership, and for a responsible partner?

Q34. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?

Q35. Are there any additional amendments that are required to the draft legislation in respect of partnerships to ensure the changes are effective?

We have no comments on these proposals beyond noting that they appear to be a reasonable measure to ensure that the GAAR procedures can be applied at partnership level in appropriate circumstances.

7 Acknowledgement of submission

7.1 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.

8 The Chartered Institute of Taxation

8.1 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.

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.

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.

The Chartered Institute of Taxation

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