

## Tougher consequences for promoters of tax avoidance – HMRC consultation<sup>1</sup>

### 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 Before commenting on the specific proposals, we frame the following response by noting that the CIOT supports the Government in 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. Such behaviour directly contravenes the standards for tax advisers set by Professional Conduct in Relation to Taxation (PCRT)<sup>2</sup> which include the Standards for Tax Planning. If HMRC have concerns that a CIOT member is involved in tax avoidance in breach of the standards for tax planning, they should refer them to the Taxation Disciplinary Board in accordance with the Memorandum of Understanding that exists between HMRC and the professional bodies.
- 1.3 We also need to see this Consultation in the wider context of the Government's commitment to raise standards in the tax advice market generally. We therefore look forward to the promised publication of HMRC's wider consultation on '*options to improve the wider regulatory framework that supports standards in tax advice in consultation with stakeholders and in a way that fulfils the three criteria of clarity, transparency and enforcement*'.

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<sup>1</sup> Tougher consequences for promoters of tax avoidance - HMRC consultation

<https://www.gov.uk/government/consultations/consultation-tougher-consequences-for-promoters-of-tax-avoidance/tougher-consequences-for-promoters-of-tax-avoidance-3#:~:text=a%20criminal%20offence%20to%20apply,or%20exercise%20influence%20over%20such>

<sup>2</sup> Professional Conduct in Relation to Taxation

<https://assets-eu-01.kc-usercontent.com/220a4c02-94bf-019b-9bac-51cdc7bf0d99/d0836d40-5102-4ac1-89f3-efc9b7c75e8a/CIOT%20-%20PCRT%2003.01.23.pdf>

- 1.4 We now turn to the specific proposal in the consultation document. We have very serious concerns with the proposal to introduce a criminal offence for promoters who continue to promote tax avoidance schemes after being issued with a stop notice by HMRC. Any new criminal offence is a serious matter and needs particularly careful scrutiny. That is all the more so where the offence is, as here, a strict liability offence – where the prosecution is not required to prove dishonest intent and guilt is established by commission of an act (in this case, continuing to promote the scheme subject to the stop notice) – and particularly one where Government officials have the de facto power to decide what is and what is not a criminal act without any external scrutiny. This is clearly a matter that affects the rule of law and one which is of vital constitutional importance.
- 1.5 The decision to issue a stop notice rests entirely with HMRC, with no external oversight. In our view, this presents a risk that a stop notice could be incorrectly issued and / or inappropriately targeted with significant consequences. While unlikely, the possibility of ill-considered decision making (perhaps due to extreme time pressure, incompetence, unconscious / conscious bias or even unethical / rogue individuals) within HMRC needs to be catered for and protected against. The present proposal places too high a level of reliance on HMRC's internal governance process (which also need clearly setting out – see further below) working effectively that such an outcome could never happen in practice. We are strongly of the view that there needs to be a higher level of scrutiny before a stop notice that carries with it the risk of criminal charges is issued. Using the existing safeguards which were designed for a regime attracting civil financial penalties, rather than criminal sanctions, will not be adequate. We suggest that at the very least there should be two levels of stop notice – the existing civil one and a new criminal stop notice (the former being capable of later being upgraded to the latter). The latter should require an enhanced level of authorisation within HMRC and some form of external scrutiny before it can be issued. We discuss this further in section 8 below.
- 1.6 As currently proposed, the offence could mean that a person commits the offence even if the courts ultimately decide that the scheme covered by the stop notice did deliver the promised tax advantage. If this were to occur, it would be a perverse outcome of the legislation that someone could end up with a criminal record despite the arrangements they promoted being found to work by the tax tribunal. Enhancing the level of scrutiny required before a criminal stop notice is issued should help reduce the chance of this happening in practice, but clearly it would still remain a potential risk. We consider that legislation that could produce this kind of outcome would not be fit for purpose.
- 1.7 A criminal offence could also be committed by a promoter who continues to promote their scheme even where an appeal against the issue of the stop notice is successful, because, as proposed, an open appeal against a stop notice would not constitute a reasonable excuse. It is vital that the offence would be cancelled or charges dropped if the appeal against the stop notice was successful. We do not think this would necessarily dilute the deterrent effect and it would provide an additional safeguard that the prosecution would not proceed if the promoter won their appeal against the stop notice.
- 1.8 Whether focussing the proposed criminal offence on the continued promotion of a scheme covered by a stop notice will help to deter promoters will largely depend on how realistic promoters believe the prospect of a criminal conviction is. Promoters will need to understand what the consequences of a successful prosecution for the strict liability offence are. They will need to believe that there is a realistic prospect of this measure affecting them, particularly crucial since many of them are based offshore.
- 1.9 The consultation document, like previous consultation documents, recognises that promoters are rarely members of professional bodies and that most tax advisers adhere to high professional standards and provide

sound advice and support to taxpayers<sup>3</sup>. The Financial Secretary to the Treasury helpfully states in her foreword that these proposals do not target legitimate tax advisers but are aimed at promoters who seek to exploit every opportunity to profit by sidestepping the rules. Whilst these words provide some reassurance that it is the Government's intention that the proposed criminal offence will only be targeted at the 'hard core' of promoters (most of them not members of a professional tax or accountancy body, or even tax advisers at all), the fundamental problem remains that the offence itself will not be so narrowly drafted and there will be no external oversight before the stop notice is issued. While we do not doubt that HMRC will in fact be very sparing in the use of this power, simply relying on their goodwill and good sense is not a sufficient safeguard against a (potentially arbitrary) criminal charge.

- 1.10 We favour HMRC targeting their resources on the small number of active promoters still in operation, 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). We also favour HMRC using their existing criminal powers to tackle promoters wherever possible.
- 1.11 We would support HMRC publishing more information about how decisions to issue stop notice are made and how their internal governance process works. This would improve the transparency of the regime and help provide reassurance to external stakeholders that it is working as intended and being targeted appropriately.
- 1.12 The disqualification of directors is generally 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 the director disqualification measures proposed in Chapter 3 are therefore necessarily limited since only a minority of tax advisers are lawyers with expertise in this area.
- 1.13 The consultation document notes that often the promoter behind the scheme, or 'controlling mind', operates through limited companies, concealing their involvement in the promotion of their schemes, and often inserting stooge or intermediate shadow directors who distance the promoter from the company. These directors may be unaware of the role they are playing so may be equally unaware that these proposals may apply to them. It will therefore be important to publicise and raise awareness of the new power, if it is enacted, so that these people are aware of it and it has maximum deterrent effect. We make some suggestions below about how the measure could best be publicised.
- 1.14 We recommend that a formal and consultative review of all the promoter of tax avoidance (POTAS) legislation, HMRC's powers in relation to it, and ideally of related legislation should take place soon. The POTAS legislation has been introduced and added to over the past decade to tackle specific problems in the tax avoidance market that existed at the time, but the tax avoidance market has changed over the intervening period as the consultation document acknowledges. A review would enable all the measures to be examined to ensure that they are still fit for purpose and operating effectively and as intended.

## **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 –

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<sup>3</sup> See para 1.5 and 1.14 of the consultation document.

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 The Government is seeking views on two proposals:

1. A new strict liability criminal offence to apply to promoters who continue to promote tax avoidance schemes after being issued with a 'stop notice' by HMRC. Stop notices, which were introduced in Finance Act 2021, are a legally enforceable notice from HMRC telling a promoter that they must stop promoting a particular scheme and that they must comply with certain other obligations. Failure to comply with the obligations imposed by a stop notice can lead to substantial civil penalties. According to the consultation document, as of 17 February 2023, 10 promoters had received a stop notice from HMRC.
2. Expediting the disqualification of directors of companies who are involved in promoting tax avoidance including those who control or exercise influence over such a company.

3.2 The CIOT's stated objectives for the tax system, relevant to the measures being proposed in this consultation document, include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- 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 Question 1: Do you agree that focusing a criminal offence on the continued promotion of a scheme covered by a Stop Notice will help to deter promoters?**

- 4.1 Promoters can already face enormous financial civil penalties for continuing to promote schemes specified in a stop notice (see para 2.10 of the consultation document). Only a small number of stop notices have so far been issued, but it appears from what HMRC say that a handful of promoters continue to promote their schemes despite receiving a stop notice so the deterrent effect of the penalties is not working in all cases; hence the need for the Government to propose introducing even more draconian measures against promoters. Whether focussing the proposed criminal offence on the continued promotion of a scheme covered by a stop notice will help to deter that small number of promoters will largely depend on how realistic they believe the prospect of a criminal conviction is. We discuss this further in our response to Question 2.

**5 Question 2: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a comprehensive deterrent for promoters?**

- 5.1 We agree that the existing civil penalties should be retained. From what HMRC say, it appears that they are deterring some, but not all, promoters from continuing to market their schemes following the issue of a stop notice.
- 5.2 For the deterrent effect of the proposed criminal offence to work, HMRC will need to ensure they flag to all those involved in promoting the avoidance arrangement as early as possible the prospect of both the proposals in the consultation document being used - perhaps even by writing to them at both their home and businesses addresses, given HMRC's worries about stooge directors (see para 3.1 of the consultation document). It will be important to ensure the message gets through to all who could be affected.
- 5.3 At the same time HMRC should continue to make efforts to deter people from using schemes and raise awareness of what a scheme is and how to spot one in a way that is easy for people to understand. It is frustrating that avoidance arrangements that do not work, predominantly disguised remuneration (DR) schemes, continue to be marketed and that people continue to use them. But 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. 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 placed in schemes that they do not know, and cannot reasonably be expected to know, involve tax avoidance if they want to take up a particular job.
- 5.4 We know that existing publications on GOV.UK such as HMRC's 'Spotlights', the list of named promoters and the list of issued stop notices are not widely known about outside the tax profession - so we would encourage HMRC to continue 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 DR tax avoidance supply chains – whether knowingly or unknowingly - should also be increased, as should publicising the information through industry specific magazines, newsletters, webinars, professional websites etc. Issuing letters directly to known users of schemes is another option that we know HMRC are using. Messages could also be posted directly into people's personal tax accounts.
- 5.5 The consultation document does not set out the consequences of a successful prosecution for the proposed strict liability offence. Promoters will need to understand what they are. They will also need to believe that there is a realistic prospect of this measure affecting them. If HMRC proceed with the strict liability offence then when they issue the stop notice they should set out how the offence could affect the promoter and how

it will be enforced (particularly since some promoters are not UK based<sup>4</sup>) eg if it is extraditable (which we assume is very unlikely), how the individual could end up in prison (if that applies), how any criminal fine could be collected (eg will the authorities enforce against UK situs assets or can they get the money with help from the authorities in the country in which the person is based).

5.6 Where an offshore promoter uses entities based in the UK to facilitate the promotion and marketing of their schemes, perhaps the UK entities could also be made criminally liable (in a similar way that UK entities have been made liable to penalties for facilitating tax avoidance by offshore promoters by the provisions introduced in Finance Act 2022), albeit with suitable safeguards. This may increase the deterrent effect and make it more difficult for promoters based offshore to promote their products to the UK market.

**6 Question 3: In the circumstances set out in the example provided, as Mr A is significantly influencing the continued promotion activity, do you agree that Mr A is in scope of the criminal offence?**

6.1 Yes.

**7 Question 4: Do you agree that these other obligations, where they do not relate to continued promotion, should not be subject to the criminal offence?**

7.1 Yes.

**8 Question 5: Do you agree that these safeguards provide the right level of protection for those who may face potential criminal prosecution?**

8.1 No. Using existing safeguards which were designed for a regime attracting civil financial penalties, rather than criminal sanctions will not be adequate. This is because the decision to issue a stop notice rests entirely with HMRC, with no external oversight. There needs to be a higher level of scrutiny before a stop notice that carries with it the risk of criminal charges is issued .

8.2 We suggest that at the very least there should be two levels of stop notice – the existing civil one and a new criminal stop notice. The latter should require an enhanced level of authorisation within HMRC and some form of external scrutiny before it can be issued. The civil stop notice could be upgraded to a criminal stop notice subject to meeting the same enhanced scrutiny.

8.3 Decisions to issue a stop notice are currently made by HMRC at a senior (SCS) level. We suggest that, as a minimum, this should be increased for a criminal stop notice to Tax Assurance Commissioner and / or Tax Dispute Resolution Board level. This would provide an additional level of scrutiny within HMRC. But even this is not enough - because there will still be no external oversight of HMRC's decision. Where, as here, the Government is proposing to significantly increase HMRC's powers, it is essential that there are strong safeguards to protect the public from any potential misuse of those powers, however unlikely the

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<sup>4</sup> Para 1.3 of the consultation document states that *'there are currently around 20 to 30 active promoter organisations, some based offshore and hiding behind complex corporate structures'*.

Government or HMRC think that might be. We would therefore want to see some oversight by someone in a ‘judicial capacity’ before a criminal stop notice is issued.

- 8.4 There are various ways in which this could be achieved. Our suggestion is that HMRC should make an application to the Upper Tribunal (Tax and Chancery Chamber) for ‘judicial’ approval before a criminal stop notice can be issued. We appreciate that HMRC may want to issue a stop notice at short notice. HMRC should explore with the Tribunal Service how this could best be done, for example it may be possible to frame it as an emergency ex parte application. The question for the Upper Tribunal judge would simply be whether in his or her opinion the scheme was more likely than not to fail to work. Akin to summary judgement (and some interlocutory applications) this would not place a high burden on the Upper Tribunal and so should not significantly delay HMRC issuing a criminal stop notice. And, given that the likely number of such notices will remain limited, we do not think that this places an undue resource constraint on the Upper Tribunal. High Court Judges (to which the Upper Tribunal is equivalent) may, at present, be called upon at short notice – eg for emergency injunctions – in a range of situations and we do not consider that our proposal here places any different burden.
- 8.5 As proposed, a criminal offence could be committed even where an appeal against the issue of the stop notice is successful<sup>5</sup> ie despite the fact that the stop notice should not have been issued. This is because the offence will already have been committed when the promoter fails to comply with the stop notice, regardless of whether they appeal against the stop notice or not.
- 8.6 In our view it is vital that the offence would be cancelled or charges dropped if the appeal against the stop notice was successful. Someone may be charged with the offence but the Crown Prosecution Service would then not take the prosecution process forward (or any offence could be stayed) until the stop notice appeal is concluded in HMRC’s favour. If the promoter’s appeal against the stop notice succeeds, it would provide a reasonable excuse defence against the criminal charge. This would slow the process up, whereas HMRC seem to want to progress it quickly, but it would still leave conviction as a real prospect if the appeal against the stop notice goes in HMRC’s favour, so this safeguard may not dilute the deterrent effect of the proposal. If the promoter loses the stop notice appeal, they will know they have – subject to due process of the criminal courts - already committed a criminal offence if they did not stop promoting the scheme when they received the stop notice. It would provide an additional safeguard that the prosecution would not proceed if the promoter won their appeal against the stop notice and they would not end up with a criminal record.
- 8.7 It would be even better if the criminal offence only arose if the promoter fails to comply with the stop notice after the later of (a) the time to appeal that stop notice has passed (and perhaps HMRC have written to the promoter to inform them of this fact) and (b) once any stop notice appeal has been determined by the Tribunal and stop notice upheld. That would allow HMRC to target promoters only where there is a stop notice that has ‘stuck’. This is a strict liability criminal offence and for the government to set the bar any lower, strikes us as unacceptable given the theoretical ease with which HMRC could issue a stop notice and do so improperly. There appears to be no in-built protection here for over-use of this power by HMRC. Relying on HMRC governance is simply not enough.
- 8.8 The fundamental issues we have identified with this proposal stem from the stop notice regime itself. Prior to 2021, the POTAS regime had a higher threshold. But the 2021 stop notice changes now simply require a DOTAS reference number to have been issued and for HMRC to take the view that it is more likely than not that the arrangements do not work. Given that DOTAS itself has very wide definitions of ‘promoter’, ‘tax

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<sup>5</sup> See para 17 of the consultation document.

advantage’ and ‘one of the main benefits’, this creates a low threshold for POTAS...and if the current proposal proceeds a low threshold for criminal sanctions. When we commented on the stop notice proposals in 2021, we could not have envisaged they would be used only a few years later as the trigger for potential criminal sanctions.

8.9 It will be essential that HMRC continue to publish details about the stop notices<sup>6</sup> they have issued to improve transparency on the use of the power and the schemes it has been used to stop. Currently decisions to issue stop notices are made at a senior (SCS) level, but it is not clear how the internal governance operates in practice and who is involved in the decision making process. We would therefore support HMRC publishing more information about how decisions to issue stop notice are made and how their internal governance process works. This would further improve the transparency of the regime and help provide reassurance to external stakeholders that it is working as intended and being targeted appropriately.

**9 Question 6: Do you agree that allowing HMRC to consider and bring disqualification proceedings against directors and those who control or exercise influence over a company involved in promoting tax avoidance will help deter and tackle tax avoidance?**

**Question 7: What other factors should HMRC take into account when considering a director disqualification?**

**Question 8: Do you have any suggestions for ensuring these proposals deal effectively with those who directly or indirectly control or exercise influence over a company, for example shadow directors?**

**Question 9: Should undertakings form part of HMRC’s approach to director disqualification?**

**Question 10: Do you consider the current sanctions for breaching a disqualification or undertaking are sufficient for tax avoidance-related disqualifications?**

**Question 11: Do you consider the current safeguards outlined above are sufficient and provide adequate protections for directors? If not, what additional safeguards could be introduced?**

9.1 A general comment about the director disqualification measures proposed in Chapter 3 is that they are 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 with expertise in this area.

9.2 The consultation document notes that often the promoter behind the scheme, or ‘controlling mind’, operates through limited companies, concealing their involvement in the promotion of their schemes, and often inserting stooge or intermediate shadow directors who distance the promoter from the company. They might not always have full understanding of the company’s activities but they still play an important role in the promoter’s activities. The problem, as we see it, is that these ‘stooge’ directors may be unaware of the role they are playing so may be equally unaware that these proposals may apply to them, meaning that they

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<sup>6</sup> See <https://www.gov.uk/government/publications/named-tax-avoidance-schemes-promoters-enablers-and-suppliers/list-of-tax-avoidance-schemes-subject-to-a-stop-notice#:~:text=Stop%20notices%20are%20one%20of,get%20caught%20up%20in%20them.>



continue to act as directors rather than resigning their directorships and severing their links with the promoter companies. It will therefore be important to publicise and raise awareness of the new power, if it is enacted, so that these people are aware of it and it has maximum deterrent effect.

- 9.3 We suggest that HMRC explore how the Department for Business and Trade and Companies House can be involved in publicising the measure and educating directors about the risks and responsibilities. Perhaps this could be in the information Companies House provides to newly appointed directors. The Government could consider generating media interest, in conjunction with HMRC and Companies House, via press releases and social media posts. It would need to be done on a regular basis not just when the new measure is announced, in order to reach people who are asked to be stooge directors in the future. Awareness for accountants, tax agents and legal advisers can be raised through webinars, Agent Update and the professional tax and accountancy bodies.

## **10 Acknowledgement of submission**

- 10.1 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

20 June 2023