



Part 3 Miscellaneous and Final

Evasion, avoidance etc

Clauses 31-34 & Schedule 13

Executive Summary

Clause 31 doubles the maximum term of imprisonment for the most egregious tax offences. We are dubious that the measure will achieve its objective of deterring people from committing tax fraud unless it is prominently publicised and lengthier sentences are actually imposed on those who commit such offences.

Clause 32 & Schedule 13 introduce a new power enabling HMRC to bring disqualification action against directors of companies involved in promoting tax avoidance. Whilst we support this measure and the need to protect taxpayers from promoters it is essential that it is appropriately targeted and prominently publicised. The problem is that in many cases the 'controlling minds' behind avoidance schemes are not directors of the companies themselves and instead recruit 'stooge directors' in order to conceal their own involvement. We want to avoid a situation where stooge directors who may lack culpability take the fall for those actually promoting the tax avoidance. It is important to understand what impact the government believe this measure will have on these controlling minds.

Clause 33 introduces a new criminal offence for a person who, without reasonable excuse, fails to comply with a stop notice issued by HMRC requiring them to stop promoting a tax avoidance scheme. While we are generally supportive of measures to crack down on avoidance schemes and protect taxpayers, we are concerned that this measure crosses an important constitutional line, namely that something can potentially become a crime on HMRC's say-so alone. This is because the decision to issue a stop notice rests entirely with HMRC with no external oversight. To add a higher level of scrutiny into the process, we suggest that HMRC should have to make an application to the Upper Tribunal for 'judicial' approval before a notice that carries with it the risk of criminal charges is issued by HMRC.

Clause 34 and associated regulations expand the grounds for immediate removal of Gross Payment Status (GPS) for sub-contractors in the Construction Industry Scheme (CIS) in relation to cases of fraud in some areas. We believe that this measure will achieve its objective, but it is important that minor VAT errors or delays do not exclude a business from GPS.

Clause 31: Increase in maximum terms of imprisonment for tax offences

- 1.1. Clause 31 doubles the maximum term of imprisonment for tax fraud from 7 to 14 years. Sub-clause 1 lists the offences that are affected by this change.
- 1.2. It is difficult to assess whether the measure will meet the government's policy objective¹ (that is, to crack down on tax fraud and deter criminal actions), but it will clearly be important to publicise the measure and to raise awareness of such consequences. If people do not know about it, then it will not deter them from committing tax fraud. Likewise, if people who commit serious tax fraud do not believe that they will be caught, or that if they are caught that they could be prosecuted and receive a long prison sentence, the fact that longer sentences can be imposed will not be a deterrent.
- 1.3. It appears from HMRC's published figures² that the average sentences for tax fraud tend to be in the 2-3 year range, with many of them suspended. Presumably sentencing is determined in accordance with Sentencing Council Guidelines. It is not obvious to us how doubling the maximum sentence will affect this position considering that the majority of sentences currently appear to be nowhere near the existing 7 year maximum. The issue does not appear to be that the Courts cannot impose the sentences they want under the current law.
- 1.4. It will be important to monitor whether the number of prosecutions and potentially the number of convictions attracting longer sentences increase following the introduction of this measure. If not, it is hard to see what the measure will have achieved.

Clause 32 and Schedule 13: Disqualification for promoting tax avoidance

- 2.1. This measure introduces a new power enabling HMRC to bring disqualification action against directors of companies involved in promoting tax avoidance. Whilst we support this measure it will be essential that it is appropriately targeted and prominently publicised.
- 2.2. In many cases the actual promoters, or 'controlling minds' behind the avoidance schemes, may not be directors of such companies themselves and instead will have recruited so-called 'stooges' to act as directors in order to conceal their own involvement in the company. We understand that HMRC are alive to this issue. Many stooges are young, inexperienced, or otherwise naïve individuals often recruited on social media for a fee. This is usually done to disguise the real ownership of umbrella companies that facilitate avoidance through disguised remuneration schemes. Evidence as to the nature and extent of this issue can be found in the submission of the CIOT's Low Incomes Tax Reform Group's

¹ <https://www.gov.uk/government/publications/increasing-the-maximum-prison-term-for-tax-fraud/doubling-the-maximum-prison-term-for-the-most-egregious-examples-of-tax-fraud#policy-objective>

² <https://www.gov.uk/government/publications/hmrc-annual-report-and-accounts-2022-to-2023/customer-compliance-our-approach-to-tax-compliance-and-serious-fraud-for-hmrCs-fraud-investigation-service>

to HMRC's consultation on 'Tougher consequences for the promoters of tax avoidance' in June³.

2.3. The measure therefore needs to be considered from two perspectives:

2.3.1. To be an effective deterrent to the **actual promoters of the schemes**, whether they are directors or not, the legislation must capture the 'controlling minds' behind the schemes. The Bill's explanatory note⁴ states that the measure does seek to tackle "*other persons who control or exercise influence*" over such a company and the legislation, as drafted, states that "'director' includes a shadow director"⁵. The Companies Act 2006 section 251⁶ defines a shadow director as "*a person in accordance with whose directions or instructions the directors of the company are accustomed to act*". Extending this legislation to 'shadow directors' could therefore capture the controlling minds behind the company and enable HMRC to take action against them (assuming they can be identified). It will be important to understand how and to what extent the government believe this measure will have a practical impact on the controlling minds behind these companies.

2.3.2. Whether and the extent to which the measure should apply to **stooge directors**. It would be appropriate for HMRC to assess a person's level of culpability when deciding whether to apply for a disqualification order, particularly since disqualification can have ramifications that could impact on their future lives. Presumably there will be varying levels of culpability so each case will be dependent on its own facts. Some stooge directors may be unaware of the role they are playing and so similarly unaware that these proposals may apply to them, others may be less naïve. We note that the legislation does provide HMRC with some discretion over whether to make an application for disqualification (referring to whether it appears that it is "*expedient in the public interest for such an order to be made*"⁷). The key therefore is that there is a strong internal governance structure in place so HMRC can weed out stooge directors where appropriate (ie where they lack culpability and there is evidence they had little or no understanding or involvement in day-to-day operations) and before disqualification action is initiated. Without this safeguarding, the consequences for individuals who have unwittingly got involved are harsh.

2.4. Ultimately we want to avoid a situation where stooge directors take the fall for those actually promoting the tax avoidance, with the consequences that the actual promoters are not deterred and further avoidance is created through the recruitment of new stooge directors – otherwise the policy objective of deterring others from being directors of companies promoting avoidance will not be met.

2.5. The effectiveness of the measure will also depend on directors' awareness of the risks of disqualification. We suggest that HMRC explore how the Department for Business and

³ <https://www.litrg.org.uk/latest-news/submissions/230623-tougher-consequences-promoters-tax-avoidance>

⁴ <https://www.gov.uk/government/publications/dealing-with-promoters-of-tax-avoidance>

⁵ Clause 8ZF (6) and clause 8ZG (7) CDDA 1986

⁶ <https://www.legislation.gov.uk/ukpga/2006/46/section/251>

⁷ clause 8ZF (2) and clause 8ZG (4) CDDA 1986

Trade and Companies House can help publicise the measure and educate existing and newly appointed directors about the risks and responsibilities. The Government could consider generating media interest 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, to reach people who are asked to be stooge directors in the future.

- 2.6. There will undoubtedly be a challenge for HMRC in reaching promoters and stooge directors who are located outside of the UK (increasingly likely where recruitment is so easy over social media), both to raise awareness and to enforce the measure.

Clause 33: Promoters of tax avoidance: failure to comply with stop notices etc

- 3.1. Clause 33 introduces a new strict liability criminal offence for a person who, without reasonable excuse, fails to comply with a stop notice issued by HMRC requiring them to stop promoting a tax avoidance scheme.
- 3.2. Under current law, when HMRC issue a stop notice to a promoter, the promoter must stop selling the specified tax avoidance scheme and inform all clients that they are subject to the stop notice or face penalties of up to £100,000 which can increase to up to £1 million in certain circumstances. HMRC can also publish the name of the promoter and the scheme details. To date HMRC have issued 16 stop notices⁸.
- 3.3. The effect of clause 33 is that in future a promoter will automatically commit a criminal offence if they fail to comply with a stop notice unless they have a reasonable excuse.
- 3.4. We support HMRC taking a robust approach to those who continue to promote tax avoidance schemes. Such behaviour directly contravenes the standards for tax advisers set out in Professional Conduct in Relation to Taxation (PCRT)⁹, a set of regulations which the CIOT and six other tax and accountancy bodies require our members to follow. However, whilst we strongly support the raising of standards in the tax advice market and protecting the general public and the Exchequer from the damage that promoters of tax avoidance can cause, this needs to be done in a way that has due process with adequate safeguards. In our view the proposed new criminal offence fails this test.
- 3.5. At the heart of our concerns is that the decision to issue a stop notice (and hence determine that the criminal act has been committed) rests entirely with HMRC with no external oversight. The offence is also a “strict liability” offence - i.e. no guilty state of

⁸ List of tax avoidance schemes subject to a stop notice

<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=3.-,Information%20about%20stop%20notices,get%20caught%20up%20in%20them.>

⁹ Professional Conduct in Relation to Taxation (PCRT) sets out the fundamental principles and standards of behaviours that all CIOT members, affiliates and students must follow:

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

mind has to be proved.). In our view, this crosses an important constitutional line, namely that (in principle at least) something can potentially be a crime on HMRC's say-so alone¹⁰. While we have no sympathy for promoters of tax avoidance, the law must still be applied fairly, ensure a balance between the power of the authorities and the rights of citizens, and provide sufficient protection for the possibility that a 'promoter' is innocent (that is, that a tribunal determines that HMRC have made an error and the stop notice should not have been issued – for instance because the planning in question does not constitute tax avoidance).

- 3.6. We set out our concerns in more detail in our response to HMRC's consultation document¹¹ and in a recent exchange of correspondence with HMRC¹². We note that the interval between the closure of the consultation (22 June) and draft legislation being published (18 July) was less than four weeks, which does not seem a very long period to give careful consideration to the serious concerns about this measure raised by ourselves and others during the consultation.
- 3.7. To add a higher level of scrutiny into the process, we have suggested that HMRC should have to make an *ex-parte* application to the Upper Tribunal for 'judicial' approval before a notice that carries with it the risk of criminal sanction is issued¹³. This additional step would provide an extra level of assurance for all the parties involved, including HMRC, that a stop notice that carries with it serious consequences if ignored has been appropriately issued.
- 3.8. HMRC take the view that the existing right of appeal against a stop notice provides sufficient external oversight. However this right will be exercised after a stop notice has already been issued and a criminal offence potentially committed, not before. As mentioned below, it is unclear that even a successful appeal would rescind the criminal offence already committed.
- 3.9. As it stands, the proposal places a high level of reliance on HMRC's internal governance working effectively. HMRC have indicated that they will be sharing a clear picture of their governance process in due course – at the very least this needs to include scrutiny by suitably qualified, senior staff within HMRC, who operate independently from the personnel issuing the stop notice. However, the risk still exists that a notice could be incorrectly issued and / or inappropriately targeted.

¹⁰ A prosecution would, of course, have to go through the criminal courts in the normal way, but as the offence is strict liability and the issue of the stop notice (and the failure to comply with it) will be obvious, it is difficult to see what role there is left for the criminal courts other than to pronounce sentence.

¹¹ Tougher consequences for promoters of tax avoidance – CIOT response 20 June 2023

<https://assets-eu-01.kc-usercontent.com/220a4c02-94bf-019b-9bac-51cdc7bf0d99/634300e0-55f4-4050-93e1-c6c1a9aab2ef/230620%20Tougher%20consequences%20for%20promoters%20of%20tax%20avoidance%20-%20CIOT%20response.pdf>

¹² Our letter and HMRC's response can be found on the CIOT website – see <https://www.tax.org.uk/ref1198>.

¹³ Or, alternatively, if a stop notice has already been issued (because HMRC need to act quickly) that the Upper Tribunal later confirm that failure to comply with it now carries criminal and not just civil sanctions.

- 3.10. However, even if such scrutiny is in place, the risk still exists that a notice could be incorrectly issued and / or inappropriately targeted.
- 3.11. Our concerns are exacerbated by the fact that:
- If a stop notice is successfully appealed by the promoter, it is currently unclear whether that automatically rescinds the criminal offence (which will have already been committed if the promoter had failed to comply with the notice). HMRC seem to think it does, but HMRC accept that this is only if the Tribunal judge directs that the notice ceases to have effect from the date it was issued¹⁴.
- 3.12. If the courts rule that the tax planning in question does not constitute tax avoidance (that is, that HMRC were wrong to issue a stop notice in respect of it), a criminal offence will still have been committed. In our view this is an inherent shortcoming in the proposal which was highlighted during the consultation process.¹⁵ An amendment to Clause 33 along the following lines could be proposed which would provide for external oversight prior to the issue of a notice:

Clause 33, page 25, line 26, at end insert—

(6) An offence under section 277A(1) or 277A(2) of FA 2014 (as inserted by subsection (1)) cannot be committed unless judicial approval of the issue of the stop notice has first been obtained prior to the issue of the notice. Judicial approval in this context means that a judge of the Upper Tribunal (Tax and Chancery Chamber) confirms the issue of a stop notice.

- 3.13. The effect of this amendment should be that failure to comply with a stop notice will only be an offence if judicial approval for the issue of the notice has been obtained first. Otherwise, a failure to comply would result in civil sanctions only (as now).

Effectiveness of measure

- 3.14. How effective the criminal offence will be will largely depend on how realistic promoters believe the prospect of a criminal conviction is.
- 3.15. There may be a higher deterrent effect on promoters based in the UK than on those overseas, as the measure will be harder to enforce where a promoter is located outside the UK. HMRC should explain how this measure will affect promoters situated outside the UK, particularly those with no UK presence or assets, for example by accessing mutual assistance legal treaties to help enforce the measure, which we would welcome as a

¹⁴ Even on HMRC's interpretation of the law, with which we do not agree, this puts intolerable pressure on Tribunal judges who will rarely be trained in criminal law.

¹⁵ <https://www.gov.uk/government/consultations/consultation-tougher-consequences-for-promoters-of-tax-avoidance/tougher-consequences-for-promoters-of-tax-avoidance--3> - see para 2.13.

positive step. Additional publicity setting this out would help those non-UK based promoters understand how this new offence could realistically affect them.

- 3.16. We agree with HMRC that prosecution should be reserved for the most serious cases where HMRC need to send a strong deterrent message or where civil investigations are ineffective.

The future

- 3.17. We would like to see a formal and consultative review of all the promoter of tax avoidance legislation, HMRC's powers in relation to it, and ideally of related legislation, in line with stage 5 of the government's tax policy-making framework. This 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 and is now predominantly centred around Disguised Remuneration schemes. A review would enable all the measures to be examined and evaluated to ensure that they are still fit for purpose and operating effectively and as intended.
- 3.18. If permitted under the resolutions for the Bill, the following new clause could be proposed –

To move the following Clause—

“Review of legislation relating to promoters of tax avoidance

The Chancellor of the Exchequer must review the impact of sections 32-33 and schedule 13 of this Act and lay a report of that review before the House of Commons within two years of the passing of this Act.

A review under this section must estimate the expected impact of the provisions of sections 32-33 and schedule 13 on -
(a) levels of tax avoidance, and
(b) tax revenues.

A review under this section must consider how sections 32-33 and schedule 13 interact with other legislation relating to promoters of tax avoidance, and make recommendations for the consolidation and improvement of legislation in this area.

Member's explanatory statement

This new clause would require the Government to review the impact of clauses 32-33 and schedule 13 on tax avoidance and tax revenues, and review legislation relating to promoters of tax avoidance more broadly.

Clause 34: Construction industry scheme: gross payment status

- 4.1. Under the construction industry scheme (CIS), contractors are, broadly, required to deduct 20 per cent of a registered sub-contractor's payments (or 30% for unregistered sub-

contractors) and pass it to HMRC. The deductions count as advance payments towards the sub-contractor's income tax and NICs, or corporation tax (if a company). If a sub-contractor does not want deductions to be made in advance by contractors, they can apply for 'Gross Payment Status' (GPS).

- 4.2. Clause 34 amends the CIS rules in Chapter 3 of Part 3, and Schedule 11 to, Finance Act 2004 (FA 2004). The amendments expand the grounds for immediate removal of GPS for cases of fraud involving Value Added Tax (VAT), Corporation Tax Self-Assessment, Income Tax Self-Assessment and Pay-As-You-Earn. The changes also add compliance with VAT obligations to the GPS compliance test, which must be passed by sub-contractors to obtain and keep GPS. The amendments only apply to GPS applications and compliance checks made on or after 6 April 2024. For existing GPS holders, VAT obligations before 6 April 2024 will not be checked as part of the compliance test.

Effectiveness of measure

- 4.3. The GPS test will be strengthened by including VAT. We are, however, concerned that including VAT in the GPS test should not result in genuine and minor VAT errors or delays excluding an applicant from GPS or removing existing GPS status. We believe that existing safeguards for direct taxes in the current compliance test should also apply for VAT. The loss of GPS has significant cash flow implications for businesses, particularly for smaller businesses operating on small profit margins who do not have the benefit of access to an HMRC Customer Compliance Manager or to professional advice. The loss of GPS might also damage a sub-contractor's credibility with clients and could place the sub-contractor at a commercial disadvantage or may well lead to the loss of contracts on the basis that contractors may prefer to engage only sub-contractors that hold GPS.

Associated draft regulations

- 4.4. Draft CIS regulations were published on 12 December 2023 aimed at ensuring that minor VAT compliance failures will not result in GPS refusal or removal. The CIOT will be responding directly to HMRC regarding these. While we welcome these easements to the compliance test they are framed quite tightly and are likely to be of limited application.
- 4.5. The draft regulations also provide that a payment from a landlord to a tenant, where the tenant engages a sub-contractor to complete construction work on the property occupied by the tenant, is not a contract payment for CIS purposes and so will be outside the scope of the CIS. We welcome this change, which will reduce administrative burdens, time, waste, and costs.

The future

- 4.6. A third suggestion contained in the CIS consultation from last summer – the introduction of a CIS grouping arrangement for certain groups – is not being taken forward. This is disappointing. We believe that the CIS scheme should not apply to intra-group transactions and that the government should continue to explore ways to introduce a CIS grouping arrangement in order to ameliorate the administrative impact of the CIS scheme on groups.

The Chartered Institute of Taxation

- 5.1. The 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.
- 5.2. 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.
- 5.3. 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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