

LAW SOCIETY OF SCOTLAND - WRITTEN EVIDENCE (DFE0025)

Draft Finance Bill 2020-2021 inquiry

Introduction

We welcome the opportunity to provide written evidence to the House of Lords Finance Bill Sub-committee on the draft Finance Bill 2020-21¹. We have responded separately to the related consultations and calls for evidence from HMRC including: *raising standards in the tax advice market*², *tackling promoters of tax avoidance*³, *tackling disguised remuneration tax avoidance*⁴ and *Amending HMRC's Civil Information Powers*⁵.

Questions

New proposals for tackling promoters and enablers of tax avoidance schemes

1. How effective are the existing powers of HMRC in tackling promoters and enablers of tax avoidance schemes?

We consider existing powers are somewhat effective in tackling promoters and enablers of tax avoidance schemes.

We support strong action against the promoters of aggressive tax avoidance schemes. We note that HMRC acknowledges that the difficulties are driven by a small number of individuals who repeatedly promote such arrangements. These promoters are unlikely to belong to professional bodies.

There is likely be a small number of promoters selling aggressive tax avoidance schemes who simply cannot be stopped other than by way of direct action against them. It is clear that HMRC consider that some promoters do not always comply with disclosure of tax avoidance schemes (DOTAS) rules and have found ways around the promoters of tax avoidance schemes (POTAS) and the enablers of defeated tax avoidance rules, hence the need for greater measures in these areas.

We broadly consider that the changes proposed in relation to these regimes are desirable, however, it is important that recognise that some of the proposed measures are broad in scope and we would hope they will not be used by HMRC in an effort to

¹ <https://committees.parliament.uk/work/559/draft-finance-bill-202021/>

² <https://www.lawscot.org.uk/media/369382/20-08-28-tax-reg-aml-raising-standards-in-the-tax-advice-market.pdf>

³ <https://www.lawscot.org.uk/media/369462/20-09-15-tax-consultation-tackling-promoters-of-tax-avoidance.pdf>

⁴ <https://www.lawscot.org.uk/media/369563/20-09-30-tax-consultation-tackling-disguised-remuneration-tax-avoidance.pdf>

⁵ <https://www.lawscot.org.uk/media/361117/18-10-02-tax-consultation-amending-hmrCs-civil-information-powers.pdf>

target reputable advisers and others who may be tangentially (and perhaps inadvertently) involved in the supply chain as being 'softer' targets than the promoters. In addition, we consider that any changes should not cause extra compliance costs (in terms of time and financial costs in complying with further legislation) for the majority of tax advisers who do adhere to appropriate standards.

2. What has been your experience of the Promoters of Tax Avoidance Schemes (POTAS) rules and the enablers rules in practice?

No comments.

3. Are HMRC's communications likely to be effective in informing potential scheme users about schemes, and so deter them from participating?

We do not consider that HMRC's communications to date have generally been effective in informing potential scheme users about schemes and so deterring them from participating.

We consider it would be beneficial for there to be greater promotion of information about schemes at an early stage to help taxpayers understand the risks and in this regard, we support the proposed legislative changes.

In order for communication to be of most benefit, this has to be done in a timely, accessible and comprehensible manner. For example, HMRC currently use the *Spotlight* publication which is likely to reach some agents but not many taxpayers. In addition, it is common for there to be a delay in having schemes published in *Spotlight* which is likely to reduce the value of publishing the information while taxpayers continue to use schemes.

The tax system and associated legislation is very complex and is unlikely to be well understood by many taxpayers and some agents who are not undertaking tax advice work. Taxpayers may not be aware that they are being sold an aggressive tax avoidance scheme and are unlikely to be able to easily identify if there is a problem with a scheme. We consider that using the name of a promoter in anti-scheme publicity to be important as that is what a taxpayer will likely use in searching for information when they are considering entering a scheme.

In addition, there may be intermediaries who are not aware that they are part of a promoter's supply chain. For example, an adviser may have performed an "execution only" type service (for example, a conveyancer registering the transfer and filing an SDLT return) without having any meaningful details of the tax planning that lies behind that. In addition, we are aware of a number of examples of SDLT/LBTT relief claim schemes promoted by unregulated tax advisors. Another example of a scheme promoted by unregulated tax advisers involves the purchase of bare land with planning permission with an attempt to claim Multiple Dwellings Relief. In these examples,

conveyancers are likely to be involved in implementing the transactions for the clients, however, they are usually not tax advisers and be not be aware that the transactions form part of a tax avoidance scheme.

We have previously suggested that consideration be given to the following:

- mainstream and social media for mass campaigns, as well as other HMRC communication channels. COVID-19 schemes (such as the Job Retention Scheme and Self Employment Income Support Scheme) were widely promoted to taxpayers which demonstrates that this is achievable. As well as 'paid for' advertising, it may be possible to have coverage on money advice shows and other current affairs television programs;
- providing feedback to professional bodies about schemes that are being used is of assistance so that they promote details of the known issues with the schemes to their members;
- in the context of SDLT and LBTT in Scotland, it is common for claims businesses to obtain details of recent purchases from the Land Registry or Registers of Scotland and to write to taxpayers stating that they have paid too much tax. Commonly, the correspondence is misconceived. It would be of benefit if there was greater promotion by HMRC of these schemes;
- where feasible, we support a direct approach being made to taxpayers to make them aware of concerns about a scheme. Where it is not possible to make a direct approach, public communications require to be sufficiently clear and simple in order for taxpayers and advisers to be able to identify if they are being sold/promoted such a scheme and to understand the risks involved;
- there are opportunities for HMRC to improve its processes for accepting intelligence reports about poor practice and schemes which are being promoted, and there is a need for HMRC to respond timeously and robustly to such reports. While HMRC understandably will not comment on individual cases, it could publicise (for example, at monthly intervals) that it has received intelligence in certain areas/sectors and that it is acting on these reports in certain ways;
- an increase in avoidance staff at grass-roots guidance level which would be helpful in investigating schemes and showing HMRC is able to act on intelligence reports;
- HMRC could consider offering or requiring 'product rulings' as, for example, offered by the New Zealand Revenue⁶ - the absence of a ruling would then act as a warning to a taxpayer that HMRC had not approved a scheme (despite what a promoter may say on that point); and
- HMRC could consider hosting a web page with a colour coded system or similar to indicate the degree of concern it has with different schemes.

⁶ <http://taxpolicy.ird.govt.nz/publications/2009-ip-binding-rulings/chapter-2-binding-rulings-system>, see para 2.6

4. How effective will the proposed measures be against those who promote aggressive tax avoidance schemes, and in informing and deterring potential scheme users? What else could HMRC be doing in this area?

As referred to above, we broadly support the proposed measures. However, there is likely to be a small number of promoters selling aggressive tax avoidance schemes who simply cannot be stopped other than by direct action, and who may continue to attempt to sidestep the existing regimes.

In relation to the enablers penalty measures, there is a potential that HMRC could spend a lot of time and resources investigating penalties for possible enablers only to find the scheme itself is not defeated at tribunal.

While the proposed measures are likely to go some way to resolving the difficulties, we are not aware of a concerted effort by HMRC to prosecute promoters or those individuals who are repeatedly involved in selling aggressive tax avoidance schemes behind any particular entities used. We suggest that the proposed legislative changes are accompanied by strong efforts by HMRC in that direction.

As referred to above in our response to question 3, we consider that greater promotion around schemes would be of benefit in raising awareness among taxpayers and agents, and making them aware of potential risks. This will help to deter taxpayers from entering schemes. We suggest that this should include use of more targeted approaches by HMRC, for example, direct to taxpayers.

We also suggest that action could be taken to prevent some employees being encouraged into disguised remuneration schemes, particularly in Government and public sector bodies. For example, where public funds are being used, we suggest that it could be a condition that workers are processed through an official payroll or that checks are carried out to ensure that no disguised remuneration scheme is being used.

5. Are the safeguards being proposed sufficient to ensure an appropriate balance is struck between HMRC and taxpayer?

We generally consider the safeguards are sufficient given the nature of the behaviour which they are seeking to stop. As well as internal processes, the measures provide for the right of appeal against the issuing of a Scheme Reference Number (SRN) under DOTAS and against the refusal of a request for a stop notice to cease under POTAS.

However, internal processes need to be strong and we suggest should involve a high-level specialist HMRC team that takes a reasonable approach. We consider that this should involve the review being carried out by an officer or panel not involved in the initial decision, with written submissions from the promoter and the initial HMRC officer (rather than undocumented personal contact between HMRC officers) and a written

report with reasons being produced and sent to both the initial officer/s involved and the promoter.

In relation to DOTAS, we consider that identifying the promoter seems sensible, as long as it is clear that the status is only 'under investigation' or similar so it is clear that HMRC is not definitively stating there has been any improper behaviour. Using the name of a promoter in anti-scheme publicity to be important as that is what a taxpayer will likely use in searching for information when they are considering entering a scheme. We consider that naming only of promoters, or those who have acted akin to a promoter, should be appropriate at this stage – naming those who have minor roles (and who may have not known what they were involved in) would not be appropriate.

In relation to the POTAS regime, we note that the draft legislation seeks to amend schedule 34A to the Finance Act 2014 in relation to relevant defeats, so as to include DAC6 arrangements. We consider that caution is required in this regard. While we appreciate that HMRC will need to meet existing POTAS conditions in order for behaviour to be able to be caught by the provisions, the provisions of DAC6 are wide in scope and include normal commercial transactions. There could be a risk that an amendment made to DAC6 arrangements which may have nothing to do with tax avoidance could be at risk of being caught by the relevant defeat provisions.

In relation to the proposed stop notices, it should be necessary for HMRC to have **reasonable grounds** to consider the (i) person is promoting (or likely to promote) a scheme and (ii) that scheme does not work to achieve the tax advantage promised. The draft legislation, section 236A, says the officer has to only "suspect" or "consider" this.

A person could, as worded in 4.12 of the consultation document and draft legislation, be subject to a stop notice simply because they have had a DOTAS SRN issued for another matter in the past. While we agree past conduct could be relevant here (especially to establishing the person is a promoter), it should not be enough in itself for a notice to be issued. We consider that HMRC should still have to show grounds for both points (i) and (ii) above.

Naming a promoter at the time the stop notice is issued would seem the most effective way of ensuring the public were aware the scheme may be one to avoid, but with the publication noting that the stop notice can still be appealed. Alternatively, this could be done at the time of the conclusion of any appeal process or when the appeal period is up. If any appeal process against the notice would be public in any event, then HMRC notifying that a notice exists could not be said to go any further than saying what was already public. We suggest that this may come down to how it is phrased by HMRC i.e. as being "subject to/under an appeal process".

In relation to the proposed changes to enablers legislation, the changes are intended to address difficulties that HMRC has encountered with suspected enablers who claimed

“client confidentiality prevented them from voluntarily providing client information without an information notice”⁷. We consider it crucial that HMRC appreciates the importance of client confidentiality. Legislation and guidance require to be carefully drafted so as to protect client confidentiality and legal professional privilege.

New tax checks on licence renewal applications

We have no comments in relation to the detail of these proposals.

On conditionality generally in the tax system, this can be useful in a system which relies on voluntary compliance. There are already examples in the tax system, for example, a property purchaser cannot have title registered with Registers of Scotland until Land and Buildings Transaction Tax is paid. While it may help HMRC to identify those who have been operating in the hidden economy, the measures could be circumvented by individuals choosing not to renew their licences in order to avoid the tax check and therefore may not be fully effective in compelling compliance.

In relation to the possible extension of the proposals to Scotland and Northern Ireland, we note the importance of the Government working with the devolved administrations in relation to an extension. This is of particular importance given the interaction between reserved and devolved matters – corporation tax is a reserved matter and Scottish income tax receipts are devolved but administered by HMRC, and the renewal of a private hire licence is devolved.

Amendments to HMRC’s civil information powers

10. What is your view of the removal of the requirement to obtain tax tribunal approval before issuing a Financial Institution Notice? Are the safeguards promised instead adequate and, if not, what more should be done?

We recognise the need for HMRC to have appropriate powers to obtain information in order to check tax compliance and to comply with international obligations. However, we do not consider that the length of time referred to in obtaining approval from the Tribunal is a sufficient reason to remove this safeguard.

We do not support a blanket removal of the requirement to obtain tribunal approval before issuing a FIN. We previously noted that Tribunal approval is an important safeguard as it may protect a taxpayer from requests from HMRC for information which is not ‘reasonably required’. Tribunal approval can help to ensure that the information

⁷ Tackling Promoters of Tax Avoidance consultation, paragraph 6.8.

requested is necessary and so can provide an important safeguard for financial institutions which may require to undertake significant work to adhere to the information request. Internal HMRC processes do not provide an adequate replacement for independent oversight by the Tribunal.

We note that it is intended that an authorised officer trained in the application of civil information powers must approve all notices. While the notice may only be issued where the information is 'reasonably required' to check a known person's tax position and for international requests it has to be shown that the information is 'foreseeably relevant' to the administration or collection of tax, these matters would rely on the view of the HMRC officer which is not subject to independent scrutiny. This does not achieve the same level of independent decision making as the Tribunal. An alternative to an individual officer would be to have an internal review panel.

We are supportive of the other restrictions on the use of information notices in Part 4 of Schedule 36 FA 2008, including the rule preventing notices being used to obtain documents covered by legal professional privilege.

The earlier consultation on the measures suggested that if the requirement for Tribunal approval was to be removed, the third party would have a right of appeal against the notice "on the grounds that it is too onerous". The draft legislation does provide a condition that "the information is, in the reasonable opinion of the officer giving the notice, of a kind that it would not be onerous for the institution to provide", however, provides a right of appeal for a financial institution against any penalties levied only.

Where HMRC has not applied to the Tribunal for consent to waive the requirement to notify the taxpayer, the taxpayer will receive a copy of the notice, but will have no right to appeal. The taxpayer's only right of challenge will be by way of judicial review. In the UK, judicial review alone may not amount to an effective safeguard for taxpayers due to the time constraints and cost of raising such proceedings when compared to an appeal to the Tribunal. We do not consider that this is a viable alternative.

We consider that there should be additional safeguards put in place if the need for Tribunal approval is removed. Obtaining information about a taxpayer via their bank may be an intrusive process and could affect their access to banking facilities. A possible safeguard would be to require HMRC to issue a formal taxpayer notice, requesting the banking information from the taxpayer before a third party notice could be issued to the bank. This would ensure that a taxpayer was made aware that if they do not provide the relevant information, information would be requested from their bank.

If the information is to be obtained without the taxpayer's knowledge, we consider that prior Tribunal consent to the whole notice is an important safeguard for the taxpayer.

11. Is the scope of the new power in terms of the information to be reported to HMRC appropriate and sufficiently clear?

No comment.

12. How can the need for adequate taxpayer safeguards and timely international exchange of information be balanced? What steps should be taken to ensure that taxpayer safeguards are not treated as dispensable when they make it more difficult to meet other obligations?

As referred to above, we recognise the need for HMRC to have appropriate powers to enable proper and efficient administration of the UK tax system by obtaining information and to enforce compliance in order to ensure compliance. However, it is crucial that there is a balance between HMRC's information powers and taxpayers' rights to certainty and privacy. It is important that powers are exercised proportionately and that appropriate safeguards are in place.

It is our view that independent oversight by the Tribunal of FINs should be retained so as to ensure taxpayers can have confidence in the system. We previously suggested that, if necessary, the requirement for Tribunal approval for FINs should only be removed for such notices arising from requests from overseas tax authorities. We note that the response to the 2018 HMRC consultation states that it is not possible to treat overseas requests differently.

The challenges around timing for responding to overseas information requests should be addressed by ensuring sufficient resources for both HMRC and the Tribunal to enable matters to be dealt with timeously and by ensuring that information requests received are appropriately detailed and specific in relation to the information sought.

Other measures of interest

Proposed introduction of new requirements for certain businesses to notify uncertain tax treatments, where the business considers that HMRC may have a different view of the tax treatment to its own

We do not consider that the definition of 'uncertain tax treatment' is sufficiently clear and would merit improvement if the requirements are to be introduced.

As a result of the proposed definition, we consider that there is a potential for businesses to inadvertently fail to notify HMRC of tax treatments which could result in a penalty, even where the tax treatment may ultimately be upheld by the courts.

The majority of large businesses are thought to be compliant and these proposals are likely to have the greatest impact on those businesses who are already compliant,

resulting in additional costs and administrative burden, while non-compliant businesses are less likely to provide notification. We expect that this will demand significant HMRC resource to work through notifications received from compliant businesses and confirming that sufficient information has been provided. As such, we suggest that proposals might be better targeted at those businesses that do not generally comply or engage with HMRC.

It is currently proposed that one individual, for example the Senior Accounting Officer or someone else, would be responsible for making the notification and be subject to any penalties for a failure to notify. We do not consider that this is appropriate as determining the appropriate tax treatment is the responsibility of the business. It is therefore appropriate for the notification requirement to be placed on the business.

Impact and appropriateness of proposed retrospective measures in the Finance Bill, in relation to uncertainty within the tax system.

We do not generally support retrospective measures in relation to taxation. This can cause uncertainty for taxpayers.

There are two proposed amendments which are technical in nature. The amendments will:

- clarify the way special provisions in the Corporate Interest Restriction rules apply in the context of a Real Estate Investment Trust, to take into account that UK property businesses of non-resident companies are now within the charge to Corporation Tax rather than Income Tax (section 452) – this will apply from 21 July 2020; and
- make sure that no penalties arise for the late filing of an Interest Restriction Return if there is a reasonable excuse for the failure, bringing the administrative rules in line with those for Corporation Tax Self-Assessment (Schedule 7A) – this is a retrospective measure which is treated as having effect from 1 April 2017 when the Corporate Interest Restriction commenced.

The second of these measures is technical in nature and intended to provide a 'reasonable excuse' provision which was omitted from the original legislation. This could be to the benefit of the taxpayer. While we do not generally agree with retrospective measures, we are supportive of this amendment in the circumstances.