ANONYMOUS - WRITTEN EVIDENCE (DFE0032)

Draft Finance Bill 2020-2021 inquiry

My day-to-day work involves dealing with taxpayers under enquiry, including those who have been involved in tax avoidance schemes. In all cases my role is to assist taxpayers to reach resolution with HMRC.

I set out below responses to the questions posed in relation to 2 of the areas which the committee is scrutinising. I do not have any experience of the third area.

A) 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?

   1.1. HMRC's current powers are not particularly effective due to a number of issues:

   - the inherent delays in being able to issue follower notices;
   - promoters shape shifting to new versions of schemes or new entities;
   - the prevalence of promoters being situated (or moving to) outside the UK tax jurisdiction, which makes the imposition of penalties/sanctions more difficult and HMRC powers less effective.

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

   2.1. We have not seen POTAS rules in practice very often – presumably due to the inherent delays in the system, and the fact that some of the promoters have "disappeared" or changed their identities by the time there is any attempt to impose the rules.

3. How effective will the proposed measures be against those who promote aggressive tax avoidance schemes, and in informing and deterring potential scheme users?

   3.1. Broadly the changes to the DOTAS rules enabling HMRC to issue a Scheme Reference Number (SRN) are a sensible idea and are appropriately accompanied by a right of appeal to the Tribunal against the SRN. This ensures a measure of objectivity in operation of the law and thus provides a degree of safeguard for taxpayers.

   3.2. It is perhaps surprising that there is no equivalent right of appeal against the information notice. Measures should be implemented to ensure that these notices cannot be used in the course of a standard enquiry. In addition, the "reasonable grounds" for issue of notices should be assessed and tested through something like a closed hearing.

   3.3. Whilst the proposals will strengthen HMRC's ability to deal with promoters, it is questionable whether these measures will actually change the behaviours of the people involved, since in many situations the arrangements appear to be fraudulent and some of the taxpayers involved innocent victims. For that reason, the proposals to enable HMRC to publish details of schemes may be more effective than the issue of an SRN.

   3.4. However, HMRC's communications are highly ineffective in informing potential scheme users. They have an extremely limited audience restricted primarily to tax professionals and those who are represented by such professionals. They also appear to have a blinkered approach to engaging with the wider public in terms of being reluctant to change their views on communication channels – despite their stated intentions.

   3.5. Most of the general public wouldn't even know of the existence of HMRC measures to inform and deter users of avoidance schemes. Indeed, the majority of prospective scheme users find it difficult to differentiate aggressive tax avoidance from legal tax efficient complex technical advice provided by their long-term accountant (who is often the one that suggests a promoter's scheme anyway). These taxpayers wouldn't even think of searching for bulletins on tax avoidance; and have never heard the term "spotlight" in the context of HMRC communications. Moreover, the HMRC website is so difficult to search adequately and so much less user friendly than its predecessor, it would be difficult to find the bulletins for anyone not experienced in navigating the site.

3.6. HMRC should have a publicly assessable register of scheme names and descriptions that they are challenging or with which they think they are likely to disagree so that they can be easily located using google or similar search engines. The register should include the names of the relevant promoters so that taxpayers are able to work out which promoters are high risk. In addition, prompts on tax returns to guide people as to where to find the published information would be helpful.

3.7. The proposed measures for earlier stop notices are a good idea – anything that allows HMRC to accelerate the process of stopping promoters is positive, although there is a concern over the potential for subjectiveness in the application of the rules, in view of the low threshold and the absence of statutory safeguards. There needs to be appropriate governance around the decisions to issue stop notices to ensure that they are only used in circumstances which are consistent with the policy intention of the draft legislation and that the legislation is not interpreted much more widely. It is also sensible, in view of the way in which some promoters operate that in certain circumstances a person can be treated as having met a POTAS threshold condition that was met by another person since this will help to stop promoters escaping measures by transferring business to a separate entity.

3.8. There may still be difficulties in imposing the sanctions and providing the general public with the information necessary to deter them from using such schemes.

3.9. It would therefore be sensible to try and deter the promoters in the first place rather than merely sanctioning them after the damage is done. For example, tax firms could have to nominate a professionally qualified member (ICAEW, CTA etc…) to stand as the Senior Tax Officer (like a SAO role), where they are personally responsible for the firm's actions and who could be struck off or face a personal fine (like an SAO) if the firm is found to be carrying on certain types of activity which are "inappropriate". Promoter shapeshifting firms would perhaps find it difficult to persuade someone to fulfil that role if they were going to be held personally liable for the firm's actions. There may also be some possibility of making it illegal for firms without a Senior Tax Officer to promote any kind of scheme.

3.10. HMRC need to have appropriate safeguards for tax firms to challenge their judgement that something is aggressive avoidance i.e. a panel to which the advisor can appeal. This needs to be a senior officer in HMRC outside the counter-avoidance team taking the action. If HMRC's judgement is bona fide, then this shouldn't

cause too many issues; however, if HMRC are the ones behaving aggressively, then taxpayers and their advisors should have a route for appeal before matters become more public or reputationally damaging.

B) Amending HMRC’ s civil information powers

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

1.1. It seems very strange that justification for FINs is the delays in responding to requests from foreign jurisdictions but that the scope of FINs is far wider (without any justification why this is needed above and beyond the existing third party notice powers that HMRC have).

1.2. A key question is how many third-party notices do the Tribunal decide should be withdrawn or amended and on what basis? If this is a large number, then it is clear that HMRC is not exercising the appropriate judgement internally for this to be a safeguard that can be removed. If the number is very low, then it is clear that the Tribunal is aligned with HMRC’s judgement as to what is reasonably required.

1.3. In my experience, the third party notice process itself acts as a check and balance even before notices get to Tribunal – for example: it is frequently the case that HMRC ask for the taxpayer’s permission to issue the notice, the taxpayer objects and says why he would want to appeal it, HMRC amend the notice and the taxpayer approves it.

1.4. The concern is that the taxpayer will have no visibility over the FIN process and no opportunity to appeal or disagree. There should be a clear notification and a right to request an internal review as well as judicial review (although that is a more costly way for taxpayers to check HMRC powers and it disadvantages some taxpayers without access to specialist advice). As the proposed new power is included in the draft legislation, HMRC have the choice to issue a FIN without the taxpayer knowing, and to restrict the Financial Institution from telling the taxpayer. There is no safeguard for the taxpayer, and it could lead to HMRC having detailed historical financial information that the taxpayer doesn’t even have access to themselves.

1.5. Not all third-party notices are contested – in some circumstances, it is useful to the taxpayer if they are struggling to obtain their

historic information from a financial institution – HMRC have more persuasive powers to get compliance.

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

    2.1. The proposals are clear. However, the conditions for issue are similar to other legislation which provides powers to HMRC in circumstances where:

    - the information or document 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 or produce; and
    - the information or document is reasonably required by the officer for the purpose of checking the tax position of a taxpayer.

    Therefore, again there is a concern over the potential for subjectiveness in the application of the rules and the lack of safeguards for the taxpayer. It is not unknown for HMRC to contend that information is "reasonably required" when actually much of the information they are requesting is "fishing".

    Expanding schedule 36 notices (both taxpayer and third-party notices) to include information required for the purposes of tax debt collection (and presumably this is intended to come under the remit of FINs too) is potentially intrusive and misleading. HMRC have powers for debt collection and individuals must already provide detailed financial information if they wish to request a time to pay or make a substandard offer – there does not appear to be any need for further powers in this regard.

Date: Tuesday 29th September 2020