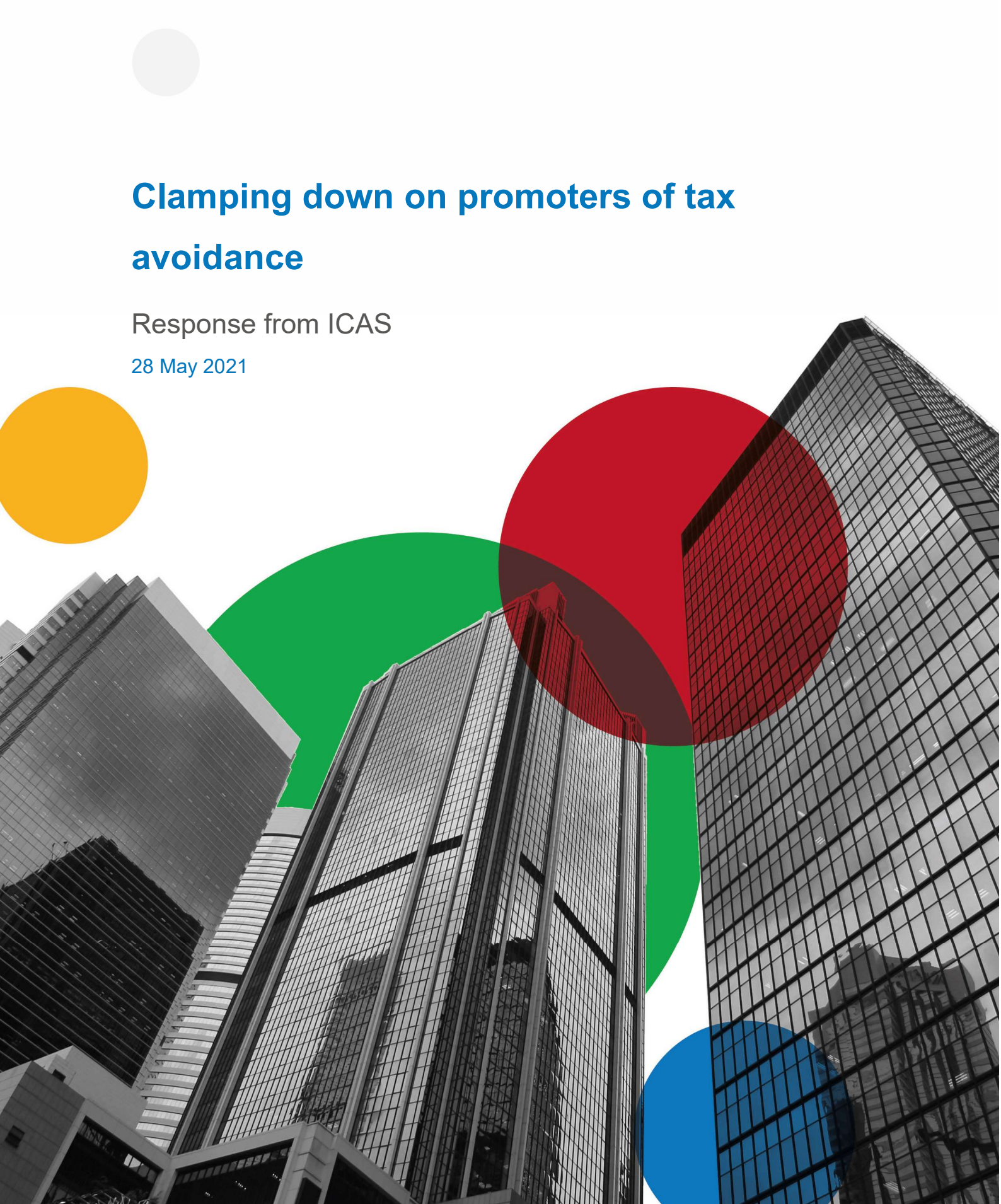




Clamping down on promoters of tax avoidance

Response from ICAS

28 May 2021

About ICAS

1. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants. We represent over 22,000 members working across the UK and internationally. Our members work in the public and not for profit sectors, business and private practice. Approximately 10,000 of our members are based in Scotland and 10,000 in England. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good.
2. The following submission has been prepared by the ICAS Tax Board. The Tax Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community; it does this with the active input and support of over 60 committee members.

General comments

3. ICAS welcomes the opportunity to respond to the consultation, Clamping down on promoters of tax avoidance, issued by HMRC on 23 March 2021.
4. We welcome the recognition in paragraph 1.12 of the consultation that most tax advisers adhere to high professional standards and are an important source of support for taxpayers – and that these legitimate advisers are not the target of the proposals.
5. Subject to appropriate safeguards being put in place, we broadly support targeted and proportionate attempts to prevent taxpayers who are not in full possession of the facts from being drawn into mass-marketed abusive avoidance schemes.
6. Whilst previous legislation has persuaded some promoters to withdraw from the market, it has not been successful against the remaining 'small but determined population' referred to in paragraph 1.4 of the consultation. Due to the tactics of these promoters, it is by no means clear that the additional legislation consulted on in 2020 and included in the current Finance Bill – and the further legislation proposed in this consultation – will succeed where previous attempts have failed. Other action is likely to be necessary, particularly in the case of disguised remuneration schemes.
7. ICAS does not have any detailed comments on the proposals in chapters 2 to 4 of the consultation. We broadly support the intention to disrupt the business model of the remaining small number of promoters of mass-marketed abusive tax avoidance schemes, including those based offshore. Our main concern is that there should be adequate safeguards to prevent the additional powers being used more widely than intended, and to ensure that legitimate advisers do not need to worry that they might inadvertently be affected.
8. The proposals in chapters 2 and 4 both include fairly strong safeguards through independent oversight by a senior court or upper tribunal (chapter 2) or the existing safeguards around winding up of companies and disqualification of directors (chapter 4).
9. For the proposals in chapter 3 it will be important to ensure that they do not catch legitimate advisers with a limited role, for example, advisers consulted on a specific point (who may be unaware that an avoidance scheme is involved, as noted in paragraph 3.15 of the consultation). In view of the proposed threshold conditions for being treated as 'connected' to an overseas promoter (which include being subject to a penalty in their own right under POTAS, DOTAS, DASVOIT or Enablers), and the right of appeal against the additional penalty proposed in chapter 3, we consider that the safeguards probably strike the right balance.
10. We support additional efforts to raise taxpayer awareness of the risks of using avoidance schemes, as set out in chapter 5, subject to appropriate safeguards being in place. Increasing awareness is particularly important in the field of disguised remuneration schemes where feedback from our members indicates that higher earning employees no longer tend to enter into these schemes.

11. However, lower earning employees, who might be tempted or pushed into disguised remuneration schemes, are unlikely to have an independent tax adviser, so it is very difficult to ensure they obtain accurate information. In some cases, where they are pushed into schemes (for example, where the job is dependent on being 'employed' in a particular way), being made aware of the risks may be of limited use – additional action from HMRC and the Government to tackle those behind the employment arrangements is likely to be required.
12. More generally, whilst agents and advisers belonging to the main professional bodies will usually be aware of HMRC's Spotlights, our concern is that awareness amongst taxpayers in general is currently very low. The proposals that HMRC should be able to share more information about tax avoidance schemes, at an earlier stage, and publicly challenge misleading information from promoters, are therefore welcome. Direct communication to taxpayers, in addition to publication online, will be important.
13. We have responded in detail below to the questions in chapter 5 of the consultation.

Specific questions in Chapter 5

Question 32: How helpful would this information be to taxpayers?

14. It would be helpful for HMRC to make available the information suggested in paragraph 5.27 of the consultation, ie (i) the name of the scheme (ii) the names of those believed to be the promoters and (iii) the fact that HMRC was enquiring into them. It is suggested that these details would be published on GOV.UK but also provided by HMRC directly to taxpayers 'in relevant circumstances'. It is likely that publishing this information would be more useful than the more generic information in Spotlights because if a scheme appeared on the list there would be no doubt that HMRC enquiries were in progress. We assume, however, that Spotlights will continue to be issued, where appropriate – we discuss this further in our response to question 33.
15. Paragraph 5.28 suggests that publication would occur quickly – for example, when HMRC first became aware of the scheme and initiated enquiries. It is essential that publication happens as soon as possible. We anticipate that advisers belonging to professional bodies (and subject to Professional Conduct in Relation to Taxation) will wish to consult the proposed list when new or existing clients seek their advice, having been approached by a promoter trying to sell a scheme. PCRT requires professional body members to advise clients on material uncertainty in the law (including where HMRC take a different view); information that HMRC was making enquiries into a scheme would be relevant.
16. Feedback from our members indicates that it would be helpful for advisers to know, as soon as possible, that HMRC is actively enquiring into particular schemes and promoters – so that they can explain the possible consequences to clients who have been approached by promoters. The client may not have been given accurate information by the promoter – and may have been led to believe that HMRC has 'approved' the scheme in some way.
17. Some promoters have targeted taxpayers, particularly with SDLT (and LBTT) avoidance schemes, and suggested that they should not have paid the tax and should sue any existing adviser. Again, it would be helpful for legitimate advisers to be able to point to a published statement that HMRC has concerns about a particular scheme and is enquiring into it.
18. HMRC should make it as easy as possible for agents and taxpayers to locate the proposed list - and also the information about promoters and schemes formally named under the other tax avoidance naming powers (including those listed in Box 5.1 of the consultation). A 'landing page' which could be linked to from other sites (and therefore publicised) would be helpful in view of the poor navigation and search functionality available in GOV.UK.
19. Unrepresented taxpayers are unlikely to find information published on GOV.UK without being pointed to it. We are aware (as noted in paragraph 5.7 of the consultation) that HMRC is already writing to some taxpayers it believes are potentially involved in a tax avoidance scheme to make them aware of the risks and to explain how to contact HMRC if they have any questions or want to get out of the scheme. We understand that these letters are currently primarily being sent to

taxpayers potentially involved in disguised remuneration schemes – and we discuss these schemes in more detail in our response to question 34 below.

20. It would be helpful if HMRC could extend the direct communication approach to other types of avoidance scheme, where possible. Being able to point to a published list in any direct communications, making clear that HMRC is enquiring into the scheme, should be helpful.

Question 33: How can HMRC ensure that taxpayers do not incorrectly assume that if a promoter or scheme was not on the list then they cannot be involved in tax avoidance?

21. There is a risk that taxpayers could incorrectly assume that if a promoter or scheme is not on the list then they cannot be involved in tax avoidance. We agree that suitable caveats would need to appear alongside the list. These should be very prominent and should stress that the list cannot be comprehensive, for the reasons outlined in paragraph 5.33 of the consultation.
22. We assume that HMRC intends to continue to publish generic information about schemes in its Spotlights. This could be helpful where a particular promoter or specific scheme has not yet been identified by HMRC (or enquiries have not yet commenced) but HMRC is already aware of similar schemes. The caveats alongside the list of named promoters and schemes should include signposting to the Spotlights, with a suggestion that these should also be reviewed.
23. As set out in our response to question 32 it would be useful for HMRC to provide a 'landing page' with links to the proposed chapter 3 list, other lists of promoters formally named under other tax avoidance naming powers, Spotlights and other useful avoidance-linked material (for example, the 'Tax avoidance - don't get caught out' frontpage).

Question 34: To what extent would information of the sort described here help taxpayers understand the risk of entering into tax avoidance?

24. It is important that as far as possible this information is published and available to agents and advisers, as well as made available through direct communication to taxpayers. Feedback received from members suggests that the more factual information HMRC can share and the sooner it can share it, the more helpful it will be when clients ask an adviser about a scheme which has been suggested to them.
25. We agree with the suggestions in paragraphs 5.38 and 5.39 that HMRC should be flexible in the way that it shares information and that methods should range from writing letters to posting information on social media platforms. If HMRC responded directly via the same channel a promoter has used, it would have a greater impact on taxpayers and potential users of the schemes in countering unrealistic claims.
26. From the perspective of agents and advisers, it would be helpful if HMRC ensured that in addition to any social media posts and direct letters to taxpayers, details were also published in one place on GOV.UK – with a link to the data appearing on an avoidance 'landing page' (as set out in our responses to questions 32 and 33); advisers could then be certain that checking there would give them access to any information HMRC had shared about particular schemes or promoters.
27. Whilst we support these proposals to increase taxpayer awareness of the risks of entering into tax avoidance, we do not believe that taxpayer education will be enough, particularly in the case of disguised remuneration schemes. As noted above some lower paid employees may have little choice about arrangements imposed upon them as a condition of obtaining work, so being made aware that they are involved in tax avoidance will be of no assistance.
28. We consider that both the Scottish and UK Governments could take action to prevent some employees (particularly lower paid ones) being pushed into disguised remuneration schemes. Government departments and public sector bodies taking on workers could be required either to employ them through the official payroll or, where employment agencies are used, to ensure that those agencies are not using any type of disguised remuneration scheme. For instance, as part of procurement procedures all government departments and public sector bodies could insist on a

written confirmation from employment agencies providing staff that they will not use any disguised remuneration scheme.

29. Consideration also needs to be given to how other employers could be deterred from using workers who are being placed into disguised remuneration arrangements.

Question 35: What other information would be helpful for HMRC to share with taxpayers to clarify claims made by promoters?

30. See our response to question 34. It will be important for HMRC to publish as much factual information as possible, as soon as possible, about promoters and schemes but it is also essential that it is made as easy as possible for agents, advisers and taxpayers to locate the information.

Question 36: Do you agree that a 30 day period strikes the right balance between giving promoters sufficient time to make representations and ensuring that taxpayers can be informed quickly?

31. Whilst we appreciate the need to prevent promoters creating unnecessary delays, we have some concerns about the proposed 30 day period for representations, particularly in cases where the person approached by HMRC wants to make a representation that they are not connected to the scheme. There would be no right of appeal if HMRC rejects the representations, so it is important that those affected are given adequate time to prepare and make their submissions.
32. We assume that the 30 day period would run from the date of the letter from HMRC inviting representations. Paragraph 5.43 notes problems HMRC has experienced in the past where promoters claim that they are not promoters, so we understand HMRC's concerns about delaying tactics. However, we regularly receive feedback that HMRC's postal arrangements mean that it can take weeks from the date of a letter for it to arrive.
33. 30 days to make representations might be reasonable if the letter from HMRC is received within 2 or 3 days of the date of the letter – but not if it only arrives when half or more of the 30 day period has elapsed (given that it will also take time for the response to be received and processed by HMRC). A 60 day period for representations would be more realistic.

Question 37: Do these proposals strike the right balance between safeguarding promoters and acting swiftly?

34. As the information published by HMRC should be factual and related to HMRC's actions, we consider that the proposals in paragraphs 5.46 and 5.47 for a right of appeal after publication strike the right balance. Our concerns relate to the earlier pre-publication representation stage, as set out in our response to question 36.

Question 38: To what extent do the safeguards described above, provide adequate protection for those on whom information is shared?

35. In the circumstances outlined in paragraphs 5.51 to 5.53 it would be important that HMRC took action to share information to correct the position as quickly as possible.

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