



Response from ICAS

Strengthening tax avoidance sanctions and deterrents: discussion document

14 October 2016

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About ICAS

1. The following submission has been prepared by the ICAS Tax Committee. The ICAS Tax Committee, with its five technical sub-Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.
2. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to share insights from ICAS members in the many complex issues and decisions involved in tax and financial system design, and to point out operational practicalities.

General comments

3. ICAS is grateful for the opportunity to contribute its views on 'Strengthening tax avoidance sanctions and deterrents: discussion document', published by HMRC on 17 August 2016.
4. ICAS members are bound by a Code of Ethics (<https://www.icas.com/ethics/icas-code-of-ethics>), based on IFAC's code of ethics for professional accountants and last updated on 1 January 2014. ICAS members are also expected to comply with the guidelines on Professional Conduct in Relation to Tax (PCRT) agreed jointly by ICAS and other professional bodies.
5. As noted in paragraph 2.2 of the discussion document, the professional bodies have been further developing PCRT in response to the challenge set by the government in March 2015. PCRT expands on the fundamental principles contained in the Code of Ethics, and the further development sets out standards expected around tax planning.
6. During the previous parliament there were over 40 anti-avoidance measures. These need to be given time to operate and, if necessary, to be tested in the tribunals, before legislators and other interested parties evaluate their overall effectiveness. ICAS calls for a review of the main anti-avoidance measures before introducing yet more.
7. We also call for any further penalty proposals (apart from the Failure to Correct penalty linked to the Requirement to Correct, covered in another consultation) to be postponed until HMRC has concluded its work developing its approach to all penalty regimes, following on from the 2015 discussion document, on which ICAS contributed its views.
8. However, if the government does decide to proceed with penalties for 'enablers of tax avoidance which is defeated', the measure needs to dovetail into, and support, existing anti-avoidance legislation. It is also essential that it is only applicable to any arrangements that are put in place after this new legislation is enacted. ICAS is against retrospective tax legislation; taxpayers should be able to achieve certainty in their tax affairs.
9. We do not agree with the inclusion in the definition of "defeated tax avoidance" of arrangements which have been the subject of a TAAR or an unallowable purpose test contained within a specific piece of legislation or regime. Legislation which includes TAARs or unallowable purpose tests is usually complex and involves an element of subjectivity; due to being broadly drafted it may also affect genuine commercial transactions. Taxpayers will want advice on these areas to ensure that they do not inadvertently fall within a TAAR; it will not be helpful to taxpayers or HMRC if advisers refuse to provide that advice because of concerns about a possible penalty.
10. If the key test for the imposition of penalties is that the tax arrangements have been "defeated", ie either the taxpayer has agreed to a settlement or there is a final determination of a tribunal or court against the arrangements, then there will be an

incentive for the enabler to hold out for a tribunal hearing. The prospect of being charged an expensive penalty will deter early settlement and may encourage promoters of schemes to require users to agree not to settle without the agreement of the promoter.

11. We also have concerns that there may be issues for advisers where a taxpayer wishes to settle an issue (particularly around a TAAR or unallowable purpose test), not because they agree with HMRC on the technical argument, but because they do not want to incur legal costs (particularly where the amount of tax at stake is relatively small), or do not want a long drawn out process through the tribunal and courts. The adviser could apparently be subject to an enabler's penalty (and possible reputational damage) without the opportunity to challenge HMRC's interpretation of the legislation. This would be unfair and undesirable. Excluding TAARs and unallowable purpose tests from the definition of "defeated tax avoidance" would go some way to addressing this concern.
12. It is essential that our members remain able to advise their clients when an external promoter has approached a client with a scheme. They must also be able to advise on disentangling a client from a scheme. 'Enabler' and 'defeated tax avoidance' should not be drawn so widely that our members feel unable to give tax advice in these situations. There is also a concern that the accountant who has followed the PCRT and referred a client on to someone who is able to provide specialist advisory work, taking no fee in the process, would be eventually penalised.
13. We also agree with the comment in paragraph 2.8 that the government will need to define an 'avoidance enabler' clearly and to provide safeguards for those who are within that definition but were unaware that the services they provided were connected to wider tax avoidance arrangements. As currently proposed there are concerns that legitimate, genuine advice may be brought within this penalty regime; there are also concerns that this could impact on professional indemnity insurance.

Specific Questions

Definition models (Q1 and 2)

Q1 – How far do the descriptions of enablers of offshore tax evasion also represent those who enable tax avoidance? What changes to these definitions would be needed to tailor them to tax avoidance?

Q2 – Are there other classes or groups of person who should be included in, or specifically excluded from, the definition of enabler?

14. We agree that it would not be appropriate to use definitions from POTAS or DOTAS to define 'enabler'. The definition of 'enabler' in Schedule 20 Finance Act 2016 (relating to offshore evasion) looks like a reasonable starting point but tailored for avoidance rather than offshore evasion.
15. As set out in paragraph 2.14 of the consultation it is essential that appropriate safeguards are included to exclude those who are unwittingly party to enabling the avoidance in question.

Penalties for those who enable tax avoidance that HMRC defeats (Q3-6)

Q3 – The government welcomes views on whether this approach is the right scope for a penalty on those who enable tax avoidance which HMRC defeats.

Q4 – The government welcomes views on whether a tax-geared penalty is an appropriate approach.

16. We note that the government's preferred approach is to tie the penalty to a percentage of the tax at stake. Whilst this clearly targets the offence, avoiding tax, those who are 'enabling' will be motivated in large part by the fees they earn from the activity. It may therefore be better to link the penalty to the fee earned, although we note the comment in paragraph 2.23 that this might be hard to determine in some cases.

Q5 – How should the penalty regime apply where a scheme has been widely marketed? What safeguards might apply in these circumstances?

17. We agree that there needs to be a mechanism for capping the penalty if there have been a number of users of the scheme. It does not fit with the 5 principles detailed in paragraph 1.5 and, in particular, with being proportionate and providing a credible threat, if an enabler could end up with, say, a tax geared penalty based on 10 users of the scheme. This would result in a penalty of 10 times the amount of tax avoided. Likewise, if there are a number of enablers in a chain, and considerably more was to be charged in penalties than the tax avoided, it is questionable whether this is proportionate.

Q6 – Views are welcome on whether Schedule 36 would provide an appropriate mechanism to identify enablers of tax avoidance or whether a stand-alone information power would be more appropriate.

18. The schedule 36 powers are sufficient.

Safeguards (Q7-9)

Q7 – Would safeguards similar to those in Schedule 24 to the Finance Act 2007 be appropriate?

19. The same range of safeguards that apply to all other penalties should be available in relation to enabler penalties. The penalty regime should be consistent across penalties and so should the safeguards.

Q8 – To what extent would the approach taken in DOTAS be appropriate to exclude those who unwittingly enable tax avoidance from this new penalty? And, what steps should an agent take to show that they had advised their client appropriately?

20. Legislation that gives a wide definition but then provides for exceptions is always more complicated and is likely to lead to more disputes. In principle, a tighter definition would be preferable.
21. If a wide definition is considered to be essential, we agree that the persons identified in the categories listed in paragraph 2.29 should not be liable to any enabler penalty.
22. We agree with the exclusion outlined at paragraph 2.30. This is essential so that clients may continue to obtain proper, full advice. In order to support this safeguard, there would need to be an audit trail that had been made on a timely basis.

Q9 – We welcome views on whether these safeguards are appropriate, and what, if any, other safeguards might be needed.

23. We have no comment on this question.

Penalties for those who use tax avoidance which is defeated (Q10-11)

Q10 – To what extent would defining what does not constitute reasonable care enable HMRC to more effectively ensure that those engaging in tax avoidance schemes that it defeats, face appropriate financial penalties?

24. We do not consider that there should be a different definition of 'reasonable care' in cases of 'defeated tax avoidance'. Deciding whether 'reasonable care' has been taken will depend on the particular circumstances of the taxpayer and will always include an element of subjectivity. The meaning of 'reasonable care' has been considered in a number of cases. Ultimately if HMRC and a taxpayer cannot agree whether reasonable care has been taken in a particular case the question should be determined by the tribunal in the normal way.
25. The consultation states that adjustments have already been made to 'reasonable care' in the POTAS regime. However, users of schemes provided by a monitored promoter would have been informed by the promoter that they are being monitored. This should

put users on notice to take care and to consider obtaining further advice when considering entering into a scheme. The same is not true outside POTAS; many potential users would be unable to determine whether the scheme being presented to them fell within the categories listed in paragraph 3.22 and without a warning about the promoter would not be aware that there was a risk. This is potentially unfair and also means that the proposed approach would not act as a deterrent in many cases.

Q11 – We welcome views on the extent to which placing the burden on the taxpayer to demonstrate they have taken reasonable care would ensure that appropriate penalties are charged in cases of avoidance which is defeated by HMRC?

26. We do not consider that the burden of demonstrating that they have taken reasonable care should be placed on the taxpayer. The reforms to the penalty regimes undertaken as part of the “Modernising powers, deterrents and safeguards” programme were intended to align penalty regimes as far as possible.
27. The same range of safeguards that apply to all other penalties should be available in relation to user penalties in cases of ‘defeated tax avoidance’. The penalty regime should be consistent across penalties and so should the safeguards.

Q12 – To what extent will these changes better ensure that those engaging in tax avoidance which is defeated by HMRC face financial penalties?

28. As noted in our response to Q 10 and 11 above, we do not agree with these proposed changes; and placing such changes on the taxpayer in order to change the behaviours of those in the ‘enabler’ supply chain is inappropriate.

What is defeated tax avoidance?

Q13 – Do you agree that this approach to identifying defeats of arrangements to which this measure should apply is appropriate?

29. See our comments in paragraphs 10 and 11 above. We consider that the approach may be counter-productive.
30. As noted in paragraph 9 above we do not agree with the proposed inclusion of arrangements which have been the subject of a TAAR or unallowable purpose test contained within a specific piece of legislation or regime. This makes the scope of the penalty too wide. Legislation which includes TAARs or unallowable purpose tests is usually complex and involves an element of subjectivity; due to being broadly drafted it may also affect genuine commercial transactions. Taxpayers will want advice on these areas to ensure that they do not inadvertently fall within a TAAR; it will not be helpful to taxpayers or HMRC if advisers refuse to provide that advice because of concerns about a possible penalty

Q14 – Do you agree that more ‘real-time’ interventions, targeted at particular decision points, could sharpen enablers’ and users’ perceptions of the consequences of offering/entering into tax avoidance arrangements?

Q15 – Could any of the options above create effective, proportionate incentives for users and enablers to change behaviour? Are there other, better ways to achieve the behavioural change government is looking for?

31. One of our key concerns about the proposals to strengthen the penalty regime in cases of ‘defeated tax avoidance’ is that many potential users may not understand or be aware of the possible consequences of using a tax avoidance scheme, so strengthening the penalty regime is unlikely to act as a deterrent. As noted above it might help some potential users if HMRC imposed monitoring notices on promoters under POTAS. Some of the measures set out in the table in paragraph 5.8 might also assist users to understand the risks and could influence their behaviour.
32. However, it is hard to assess how far any of these proposed additional measures are really necessary. We are of the view that far less tax avoidance is being undertaken,

following the introduction of DOTAS which has subsequently been reinforced by the introduction of the GAAR, Follower Notices and APNs. Those who have taken part in avoidance schemes in the past (enablers or users) are also likely to have been deterred by HMRC's well publicised successes in the courts and the reputational consequences of the publicity surrounding these, against a background of public and media disapproval of tax avoidance. HMRC has not yet used the GAAR, or imposed any monitoring notices under the POTAS regime. We have been told by HMRC that they see the existence of GAAR and the POTAS regime as changing behaviour – so using the powers would represent a 'failure'. If this is so we assume that behaviour is changing so it is hard to assess whether there is a real need for these additional measures.

33. As noted in our general comments above we believe there is a case for allowing the many anti-avoidance measures already introduced to be used, tested and reviewed for effectiveness before introducing further measures.