Response from ICAS to the HMRC Consultations

Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders

Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion

Tackling offshore tax evasion: A new corporate criminal offence of failure to prevent the facilitation of evasion

Tackling offshore tax evasion: A new criminal offence for offshore evaders

9 October 2015
Tackling offshore tax evasion: Four consultation documents

About ICAS

1. The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants. We represent over 20,000 members who advise and lead businesses. Around half our members are based in Scotland, the other half work in the rest of the UK and in almost 100 countries around the world. Nearly two thirds of our members work in business, whilst a third work in accountancy practices. ICAS members play leading roles in around 80% of FTSE 100 companies. ICAS is also a public interest body.

General comments

2. ICAS welcomes the opportunity to comment on the four consultations issued by HMRC on 16 July 2015:
   - Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders
   - Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion
   - Tackling offshore tax evasion: A new corporate criminal offence of failure to prevent the facilitation of evasion
   - Tackling offshore tax evasion: A new criminal offence for offshore evaders

3. ICAS representatives are also grateful to HMRC for meeting with them to discuss the detail of these four consultations. This response is restricted to general comments across all the consultation documents along with remarks on each particular document.

4. We note that a number of the points raised by ICAS in relation to the earlier consultation in 2014 have been taken into account in these proposals.

5. The proposed regime to tackle offshore evasion does not include any incentive for an individual or an enabler to disclose their position and co-operate with HMRC. ICAS supports HMRC taking a strong stance against tax evaders and enablers of tax evasion, but we believe that a system of incentives would complement the proposed approach. The possibility of reduced penalties, immunity from prosecution, or the removal of the sanction of naming and shaming would be positive incentives for co-operation.

6. A concern expressed by ICAS members is the need to ensure that additional powers and sanctions are properly targeted at those involved with evasion, but do not affect taxpayers and their advisers who do not intend to evade tax. This latter category can encompass those unaware of the complexity of international tax and the taxing rights of the UK, the badly advised, and those who have not reviewed their tax affairs for many years and believe they are compliant (but do not realise that changes to legislation or their circumstances mean this is not the case).

7. HMRC does not have a point of contact for internationally mobile workers. There are some sectors where successful itinerant workers may come from a background unused to dealing with the complexities of the tax system. The oil and gas sector is an example of the type of industry that attracts this type of worker and an HMRC contact point would assist these individuals (many of whom will have complex tax affairs encompassing such issues as residence, share options and bonuses) to comply with their obligations.

8. HMRC should undertake an information campaign over the remainder of 2015 to highlight the disclosure opportunity available under the Liechtenstein Disclosure Facility until 31 December 2015. Anecdotal evidence suggests that there are some individuals, particularly internationally mobile workers, who do not realise that they come within HMRC’s definition of offshore evaders. This group, and other individuals who may be affected by the proposed changes, should be given the opportunity to regularise their tax affairs before any new rules and penalties are introduced.
9. ICAS members have raised concerns that the approach outlined in all four of the consultation documents is disproportionate and provides powers to HMRC that are already available to it under other legislation, including the anti-money laundering regulations. Taxpayers who do not intend to pay their contribution to society, and the advisers who assist them with this, are unlikely to change their behaviour as a result of the introduction of new penalties and sanctions and they may have strategies to avoid detection. These individuals and enablers may also be involved in other criminal activities, with the tax issues being peripheral. Effective working alongside other government agencies, such as the Serious Crime Agency, may be a more appropriate method to tackle this rather than the introduction of new powers for HMRC.

10. It is difficult to gauge the scope of the problem without publically available information on the number of offshore evaders and enablers. ICAS would welcome additional information being made available, which may help to explain the approach that has been adopted. It may also allow more considered suggestions on targeting the new powers and sanctions once the scope and nature of the issues is known.

11. The proposal to issue draft guidance alongside the draft legislation would be helpful.

12. The consultation documents confirm that the proposed sanctions and penalties will apply to offshore evasion, and paragraph 2.7 of the document on civil sanctions for enablers of offshore evasion confirms that tax evasion is separate and distinct from tax avoidance. It is vital that this distinction is recognised and that the definition of tax evasion is clear to, and agreed by, both HMRC and taxpayers.

**Individual consultation documents**

**Strengthening civil deterrents for offshore evaders**

13. The proposal to increase the minimum level of penalties for offshore disclosure should strengthen the deterrent effect on potential offshore evaders. However, there should be scope to offer a reduced penalty to taxpayers who are willing to provide information on those facilitating their tax evasion. This would provide an incentive to taxpayers to co-operate and provide HMRC with information to identify enablers who are “centres of infection”.

14. The proposal for an asset based penalty to be imposed on offshore evaders is welcomed. Anecdotal evidence suggests this will have a greater impact on evaders than naming and shaming as it involves adjustments to their lifestyle. For example, the campaign on road tax evaders, involving the power to remove and crush cars, was successful in its message to potential evaders and reducing non-compliance.

15. There are concerns about option 5 “Amending naming provisions for offshore evaders so that only full unprompted disclosures are out of scope”. The definition of full unprompted disclosures can be complex and in practice can rule out those disclosures made at the beginning of a first meeting with HMRC to discuss a taxpayer’s affairs.

**Civil sanctions for enablers of offshore evasion**

16. HMRC has powers under section 99 TMA 1970 to impose a civil penalty on any person who assists in or induces an incorrect tax return or other document. Our members have asked whether these powers are being used to tackle enablers of offshore evasion and, if so, whether it is necessary to propose further legislation.

17. The proposals do not include a guarantee of immunity from prosecution if an enabler makes a full disclosure of its activities and clients to HMRC, although this can often be a key factor in persuading taxpayers to co-operate. Without such a guarantee there is a minimal incentive to assist HMRC. This may be particularly marked for enablers who will have concerns about their own reputation along with concerns about legal action from their clients.
18. It is likely that there will be operational difficulties in applying civil sanctions for enablers of offshore evasion who are based outside the UK. It is vital that there is a level playing field with civil sanctions applying to enablers no matter where they are based. Sanctions which in practice only apply to enablers based in certain jurisdictions are likely to have the effect of incentivising enablers who operate in this area to relocate to avoid the reach of those sanctions.

19. ICAS members have provided anecdotal evidence that “naming and shaming” has a deterrent effect on both taxpayers and advisers.

20. Paragraph 5.6 of the consultation document states that HMRC does not propose to charge a penalty to enablers whose behaviour is careless and can be dealt with under the Money Laundering Regulations. However, the consultation then notes that HMRC may extend the sanction to include careless behaviour if this is deemed appropriate. Our members have expressed concerns about such a proposed extension, not least because there are occasions when declared mistakes, which are simply errors, may then be categorised by HMRC as ‘careless’.

21. The proposed penalty regime will overlap with the anti-money laundering regulations and this may lead to situations where an enabler has been assessed for a penalty under the AML legislation and may then be liable under the proposed new penalties. There will be enablers who do not have HMRC as their anti-money laundering supervisory authority where this position may occur. What will happen in these circumstances, and how will the penalties for civil sanctions for enablers interact with the anti-money laundering penalties? If an anti-money laundering penalty is imposed by another of the supervisory bodies will HMRC consider a further penalty under these rules? These issues should be considered before any changes are made.

A new corporate criminal offence of failure to prevent facilitation of evasion

22. The proposed powers are modelled on the provisions of the Bribery Act 2010 and are intended to level the playing field between compliant businesses and those that operate beyond the margins of what is acceptable. Businesses will already have processes and structures in place to deal with the requirements of the existing legislation, which can be adapted to include the proposed tax changes.

23. One of the challenges in designing a system of compliance and regulation to show that a business has taken reasonable steps to prevent the facilitation of evasion is that this can have the effect of increasing the burden on the compliant while not identifying those that operate outside the system. Care should be taken to ensure that the system does not create a “tick box” approach.

24. As with the civil sanctions for enablers, there are likely to be operational difficulties in applying the new criminal offence to enablers based overseas, particularly to those based in countries that do not apply the Common Reporting Standard (CRS).

25. The proposals include the facilitation of actions which are tax offences in overseas jurisdictions. However, there may be some jurisdictions where accusations of tax evasion can be a ploy to extract money from multi-national businesses or achieve political aims. Therefore, there should be safeguards around this power.

26. The consultation document refers at paragraph 2.10 to English law and does not recognise the Scottish legal system or that there may be differences between the two.

A new criminal offence for offshore evaders

27. The de-minimis limit outlined in the consultation is £5,000 which seems a low threshold for such an offence, although this figure may have been used to highlight HMRC’s determination to act to tackle offshore evasion. We question whether it is effective to use HMRC resources to pursue offshore liabilities at such a low level. As noted in paragraph
10 above, information on the scale of the problem would be helpful to give context to this figure.