ICAS response to the HMRC consultation document ‘Strengthening Sanctions for Tax Avoidance’

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About ICAS

The Institute of Chartered Accountants of Scotland ("ICAS") is the oldest professional body of accountants. We represent around 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

ICAS welcomes the opportunity to comment on the HMRC consultation document ‘Strengthening Sanctions for Tax Avoidance’. Our members remain to be convinced that further anti-avoidance legislation on this issue is justified or necessary. HMRC already has significant powers at its disposal to deal with taxpayers who do not comply with their legal obligations as indicated by the detail of the consultation document itself. The foreword to the consultation document notes that there have been 42 changes to tax law since 2010 to make strategic changes and deter and prevent tax avoidance. We would like to see these measures evaluated post implementation before a decision to introduce new legislation is taken.

ICAS members are concerned that certain proposals, such as "naming and shaming" those who are not guilty of criminal actions is suggestive of a media witch hunt mentality rather than upholding the rule of law. The solutions are better anti-avoidance legislation, and/or better drafted legislation overall. Alternatively if HMRC believes that transparency of taxpayers affairs is the key to better tax compliance, does it not lead to consideration of whether all taxpayers affairs should be made public? A separate consultation on overcoming the fundamental principle of confidentiality would be required.

ICAS is in principle against retrospective legislation; no taxpayer should now be penalised for activities undertaken in years when the legislation was different, or for activities that would now be countered by the General Anti-Abuse Rule but are not because they were entered into before Parliament determined it should apply. It is not wholly clear what implementation period is being considered but it should only be prospective, rather than retrospective, in the behaviours affected.

The consultative document does not attempt to define “tax avoidance” or “tax evasion” further and these two concepts should not be confused. We have concerns with some of the wording used in the document to describe tax avoidance - on page 7 it is described as actions to "side step the rules". Tax avoidance is legal and HMRC should do more to contribute to better understanding of the core taxing legislation and improve it. There are many tax cases that support the right of a taxpayer to structure their affairs in the most tax efficient way for them. That is why it can be confusing to use the phrase “the right amount of tax” payable by taxpayers. Tax law has become so complicated that it is frequently down to interpretations of what the law actually means to establish the final tax payable. There is only the amount of tax that is required to be collected by law and it would be helpful to both inform the current public discussion if HMRC could outline this more clearly and in a more balanced way.

There are a number of consultations at the moment covering overlapping areas of the UK’s taxation system – this particular consultation; the current consultation "Tax Enquiries: Closure Rules"; and the Discussion Document on HMRC penalties. The HMRC review of the DOTAS regime remains unpublished. We would like to see a coherent approach in these areas rather than piecemeal reviews of particular issues. A roadmap approach to addressing taxpayer compliance would be preferable and bring all these strands together to look at the bigger picture and design a coherent framework.

Our members’ experience suggests that the introduction of the DOTAS regime, the General Anti-Abuse Rule and Accelerated Payment Notice measures have significantly affected the market for tax avoidance schemes, and that both clients and advisers are much more circumspect about using such marketed schemes. The lack of referrals to the GAAR panel since it came into existence would suggest that this is a real change in taxpayer behaviour.

HMRC describes the individuals they are seeking to target as “hardened” tax avoiders and it is questionable whether these individuals will be deterred by additional new legislation.
Specific questions

Q1: What should be the starting point for identifying those who should be the subject of new legislative measures? Should it, for example, be based on the number of schemes used over a certain period or in any one period or are there other criteria that could be used?

We do not consider that new powers are required. HMRC has significant powers to deal with non-compliant taxpayers and we would recommend that these are actually used rather than seek the introduction of new powers. In particular we would direct attention to the powers under schedule 24 FA 2007 and the discovery powers under section 29 TMA 1970. As noted above, we are also against retrospective legislation on principal.

Q2: To what extent would a surcharge be a deterrent to taxpayers who repeatedly use tax avoidance schemes that are shown not to work?

We believe that there are sufficient existing powers to deal with this issue. In our members’ experience it is highly unlikely that taxpayers would repeatedly use ineffective schemes in the hope that one would work. The economic impact of the fees for this approach is likely to be prohibitive.

Q3: Use of how many tax avoidance schemes, over what period, should trigger the surcharge?

ICAS does not support the introduction of new measures in this area. We would like to see the 42 measures to tackle tax avoidance introduced since 2010 given time to be evaluated before a decision to introduce new legislation is taken.

Q4: What level of financial sanction would best deter the sorts of negative behaviour described here?

See our response to question 3

Q5. Could subjecting a serial avoider to special measures, such as additional reporting requirements, conduct notices, or restricting access to reliefs be an effective and proportionate approach to encouraging less risky behaviour?

The DOTAS regime has changed the behaviour of both tax advisers and taxpayers and the approach taken by those rules should be followed to encourage positive taxpayer behaviour.

Q6. What sort of special measures would best positively influence the behaviour of serial avoiders?

See our response to question 5. We would reiterate our comments that individuals who continue to adopt tax avoidance strategies and are not deterred by adverse publicity on this issue are unlikely to be discouraged by further new legislation.

Q7. What threshold conditions should trigger entry into special measures?

ICAS does not support the introduction of new measures in this area. We would like to see the 42 measures to tackle tax avoidance introduced since 2010 given time to be evaluated before a decision to introduce new legislation is taken.

Q8. What consequences should follow from failure to comply with special measures?

See our response to question 7

Q9. In particular, would the prospect of publicly naming serial avoiders be an effective and proportionate approach to encouraging behaviour change?

No evidence so far has been provided to convince us to support the naming and shaming of taxpayers, whether tax evaders, introduced in the UK a few years ago or from anywhere else for those who have acted within the law.
The confidentiality of a taxpayer is one of the fundamental blocks of the UK tax system but, as noted above, if HMRC believes that transparency of taxpayers affairs is the key to better tax compliance, does it not lead to consideration of whether all taxpayers affairs should be made public?

Q10. Should special measures be imposed for a set period of time or lifted only when the avoider has demonstrated objectively a change in behaviour?

ICAS does not support the introduction of special measures for the reasons above.

Q11. What safeguards do you think would be necessary and proportionate to ensure the fair application of each of the proposed measures?

ICAS does not support the introduction of special measures for the reasons above.

Q12. The Government would welcome views on whether and how such a threshold condition might work, and in particular what proportion and/or how many adverse decisions should trigger the threshold condition.

ICAS does not support the introduction of special measures for the reasons above.

Q13. To what extent would a GAAR penalty act as an effective deterrent?

Since the introduction of the GAAR there have been no referrals to the GAAR panel or the First-tier Tax Tribunal so the introduction of penalties would appear to be academic. HMRC already has significant powers at its disposal to deal with taxpayers who do not comply with their legal obligations and we believe that these existing powers should be used rather than be introduced to a new untested regime.

As noted above, the introduction of DOTAS, along with other measures, has had a profound impact on the behaviour of taxpayers and their advisers and there is evidence of a real change in the number of type of tax planning schemes marketed and implemented. There does not appear to be any need to introduce penalties at this point, and we would welcome a review of the full raft of powers and sanctions available to HMRC as outlined above.

Q14. Do you think an alternative sanction such as a surcharge might act as a more appropriate deterrent? What form might such a sanction take?

See our response to question 13.

Q15. Do you agree that it would not be appropriate to charge a penalty when a taxpayer has correctly included a GAAR adjustment on their return?

See our response to question 13. It would be wholly inappropriate, not to say utterly bizarre, to charge a penalty for compliant behaviour in providing correct tax information on a tax return. It could act as a disincentive to including a GAAR adjustment on a return; it would be difficult to enforce given the alternative is that taxpayers would enter the adjusted, correct information on the return, except that might also then have to be seen as a penalty error for not disclosing using a scheme caught by the GAAR for which no benefit was claimed.

Q16. Should a GAAR-specific penalty apply when the GAAR applies, without exception?

See our response to question 13.

Q17. Do you agree that submission of the taxpayer’s return ought to be the trigger point for a specific GAAR penalty to become chargeable?

See our response to question 13.

Q18. Are there any other points at which you think a GAAR penalty or other sanction could become chargeable?

See our response to question 13.
Q19. Should a GAAR-specific penalty be tax-geared? If so, what do you consider would be an appropriate rate of penalty?

See our response to question 13.

Q20. If you consider that a fixed penalty would be more appropriate, why do you think this is? How much would you consider to be an appropriate fixed penalty?

See our response to question 13.

Q21. Should the normal penalty mitigation rules apply? Should it be possible to levy higher penalties according to taxpayer behaviour?

See our response to question 13.

Q22. Should it be possible to charge a GAAR penalty in addition to a penalty under Schedule 24 to the Finance Act 2007?

See our response to question 13.

Q23. Do you agree that existing rights of appeal would be appropriate for a GAAR penalty?

See our response to question 13.

Q24. Do you think either of these measures would impact disproportionately on those with protected characteristics (as defined under the Equality Act 2010)?

We have no comment on this matter.