‘Response from ICAS to HMRC review of UK disclosure regimes’

5 September 2013
About ICAS

The Institute of Chartered Accountants of Scotland (“ICAS”) is the oldest professional body of accountants. We represent around 19,000 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.

Introductory comments

ICAS welcomes the initiative taken to review the UK’s tax disclosure regimes and responses to the questions issued are set out below using the questionnaire numbering.

As might be expected members responding to ICAS, and whose comments are reflected, were mainly “mainstream” tax advisers, rather than boutique members of highly egregious schemes.

Question 1

The objectives of the tax avoidance disclosure regimes are broadly as follows:

a. To provide early information about tax avoidance schemes, allowing the Government, where appropriate, to introduce legislation closing them down before significant tax is lost;
b. To identify users of disclosed schemes so as to challenge them operationally through HMRC’s compliance work; and, ultimately
c. To deter the promotion and use of avoidance by changing the economics of avoidance.

Thinking about these objectives, to what extent do you think the DOTAS regime has met them to date?

Objectives a and b have been met in the main; firstly in targeted legislative amendments to close particular arrangements, and the requirement to make timely disclosures has been crucial to this. Secondly, operational challenge by targeting enquiries on avoidance arrangements is discouraging taxpayers from entering such arrangements; the existence of several open enquiries is off-putting to those have been actively participating in such schemes; those who wish a lower risk profile and to avoid HMRC enquiry will not enter such schemes because of the enquiry consequence.

Question 2

And to what extent would you say the VAT Disclosure Regime has met these objectives to date?

The response is probably similar to that for Question 1, but it is harder to comment here as the obligation is on the taxpayer. The VAT disclosure regime is also for specific listed schemes, so the focus needs to be on regular review and update of the list to keep up to date with legislative and case law developments, which would benefit both advisers and HMRC in terms of time spent.

Question 3

Do you think any elements of (a) DOTAS, or (b) the VAT Disclosure Regime, could be changed to enable them to better meet their objectives? If so, what would you change and why?

1. Wider communication and taxpayer education around the purpose of the regime is necessary, particularly to individuals. Points to be addressed include explaining that because something is disclosable does not mean that it is necessarily tax avoidance that will be taken through the courts (depending on the hallmark) and that ‘a scheme has been disclosed’ does not mean HMRC has ‘approved’ the scheme.
Much of HMRC’s communication focus has, until recently, been to the specialist tax professional community (the ‘Spotlight’ page on HMRC’s website for example) rather than to taxpayers who might be purchasers of the more aggressive, mass marketed schemes. Accordingly, it was not well positioned to counter some promoters’ stronger selling messages. The recent publication of ‘Tempted by Tax Avoidance’ goes some way to address this but circulation needs to be direct to high net worth taxpayers and SMEs.

2. More cancellation of scheme reference numbers would improve the administrative process. Currently it is up to HMRC to decide when a scheme number should be cancelled; it is suggested that HMRC can be slow to cancel where a number is issued but the scheme is not one which they wish to challenge or where a taxpayer has won in court. This will keep the scheme focussed.

Questions 4 and 5

In your view, has the avoidance market changed since 2004? If so, how and why has the market changed?

If there has been a change in the market, would you say that the disclosure regimes have played a role in that change? If so, please describe how the regimes have influenced that change

The avoidance marked is considered to have changed significantly since 2004, with a reduction in the number of mass marketed schemes and more bespoke commercial planning; the larger firms appear much less involved in mass marketed schemes. It is extremely difficult to isolate cause and effects, but the reduction is probably not purely due to the DOTAS or VAT disclosure regimes; these have a role but recent media and non-governmental organisations attention on wealthy individuals and larger corporates have also had impact on tax behaviours recently. Interestingly, the comments in the latter are often focussed on transfer pricing, which is not covered by the disclosure regimes. The prominence of the discussion around the statutory General Anti-Abuse Rule, ie changing the law, as well as various targeted anti-avoidance measures passed recently, have also had an impact.

Question 6

In your experience, what are levels of compliance with the regimes like among the promoter population? Has this changed since they were introduced in 2004? If so, why might this be?

Compliance is reported as being taken very seriously, in member’s commenting, particularly among the larger firms, due to reputational risk. For the compliant this is probably unchanged since 2004.

Question 7

In your experience, has the increased penalty limit for non-disclosure of £1 million had an impact on compliance?

Following on from question 6, the deterrent of reputational damage has been reported as sufficient for the compliant to comply. It is understood that the penalty has never been assessed, but would seem sufficiently large to command closer attention from those inclined to pay less heed to disclosures.

Question 8

In your experience, are users who have to disclose complying in the case of:

a. in-house schemes
b. offshore promoters
c. where Legal Professional Privilege is claimed by promoters?

We have no evidence on compliance by these users.

Consistent with our view that there should be a 'level playing field' for tax advisory services in the UK, our view is that the disclosure arrangements should apply to law firms on the same basis as accountancy firms. Whilst the obligation may be on the user rather than the legal adviser, this assumes the user understands their obligations and that understanding might vary considerably between taxpayers.

**Question 9**

What do you think about the way HMRC polices the disclosure regimes, both in terms of promoters and users? And what effect does this have on compliance?

The right approach for promoters is adopted, with policing and ad-hoc specific enquiries from HMRC. For users, those commenting had always disclosed DOTAS numbers, so were compliant without a need for policing.

**Question 10**

In your view, are there any particular elements of the regimes that are open to abuse by those who might deliberately seek not to comply? If so, how could the rules be strengthened?

One concern was raised around whether there were grey areas about the application of DOTAS, and the use of Counsel’s opinion that it did not apply. The difficulty with this is that a responsible taxpayer undertaking commercial transactions might wish, for completeness, Counsel to confirm that the DOTAS regime did not apply, so it is not the seeking of the opinion that should be a separate risk indicator.

**Question 11**

In general, have your members made any changes in their organisational structures/governance arrangements since the introduction of the disclosure regimes? If so, what changes have they made and why?

All commenting had made changes, sometimes significant, to their governance and internal reporting arrangements to ensure compliance. These have broadly been around centralised reporting and monitoring, capturing disclosure numbers etc. across office networks. Given the potential reputational concerns, some have firm wide processes to monitor compliance, and permit centralised decision making to ensure consistency of disclosure decisions.

As might be expected, the larger the number of tax practitioners in a firm undertaking planning arrangements, the more formalised the business changes that would have been implemented.

**Question 12**

Have your members experienced any effects from the disclosure regimes? If so, what are they?

The level of enquiries into tax returns containing a DOTAS scheme number is reported as 100% for one firm - consistent with stated HMRC policy. Enquiries into tax returns not containing a DOTAS scheme number are generally much lower, even where tax planning has taken place with non-DOTAS disclosure.

**Question 13**

Do members have any experience of similar disclosure arrangements operating in foreign tax jurisdictions? If so, how do they feel they compare in practice to the UK regimes?
No comment.

**Question 14**

*Please feel free to make any further comments on members’ experiences with DOTAS or the VAT Disclosure Regime.*

There have been many changes to the regimes since their introduction, which are burdensome for practitioners to keep up to date with. Whilst it is helpful to have HMRC’s guidance on the regime, for DOTAS alone this is well over 100 pages and that is before further hallmarks are proposed, including one for disguised remuneration.

Extending the regime, without simplification and focus, risks that there will be too many disclosures for HMRC to evaluate effectively without additional resources, and a disproportionate burden will be placed particularly on those with a high focus on compliance.

The disclosure regimes will now operate alongside the GAAR; the impact of the GAAR on DOTAS disclosures should be carefully monitored over the rest of 2013 as part of this review.