ICAS response to the HMRC consultation document ‘Strengthening the Tax Avoidance Disclosure Regimes’

23 October 2014
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 the Tax Avoidance Disclosure Regimes’. The introduction of Accelerated Payment Notices (“APNs”) to taxpayers using disclosable schemes means that it is essential that the regimes are closely targeted on the greatest mischiefs. ICAS members continue to express deep concerns about the retrospective nature of the accelerated payments regime and its application to disclosed arrangements without judicial process. To extend the disclosable schemes provisions widely – for example to IHT as proposed – may serve the narrow purpose of providing HMRC with more information but have unintended consequences far beyond. Without greater taxpayer protection from the accelerated payments regime, these developments go strongly against the principle that tax assessments should be based on the clear will of parliament as set out in law, or with the oversight of the courts. HMRC now has legislation in the form of the General Anti-Abuse Rule (“GAAR”) to protect the public purse and the argument is not clearly made that widespread changes to the disclosable schemes are appropriate or necessary.

It is however also timely and appropriate to review the provisions to see how these have affected taxpayer behaviour. A missing element appears to be the output of the HMRC review into its review of the disclosure regimes which started late in 2013. In addition, the introduction of the GAAR and its impact on the use of tax avoidance schemes is likely to have affected the marketing and implementation of schemes that might fall within the disclosure regimes. A clear evidence basis for legislative developments is likely to achieve the optimum outcome, without which more piecemeal patching up provisions are likely to emerge, which are more likely to burden the compliant whilst not necessarily stopping the small number of promoters who regard a new set of provisions as something else to circumvent.

ICAS would also repeat concerns expressed in earlier submissions on tax avoidance preventative measures; that there is still work to be done by HMRC on the definition of “tax avoidance” and its relationship to “tax planning”. These concerns were set out in detail in our response to the HMRC consultation document on the General Anti-Abuse Rule (“GAAR”), a copy of which can be found at http://icas.org.uk/home/technical-and-research/technical-information-and-guidance/tax/tax-submissions/. Whilst HMRC states its intention is to challenge and counteract tax avoidance, it has failed to define in practice what that tax avoidance is, and changes almost monthly what it considers it will challenge and what it will not. This leaves unwelcome uncertainty for taxpayers and, by definition, complicates the design of the disclosure regime. Since the disclosable schemes provisions started to be introduced in 2004 the landscape for tax avoidance has changed substantially. It is extremely difficult to isolate cause and effects, so whether this is as the result of the introduction of the disclosure rules, media scrutiny of the tax planning of multi-national enterprises and wealthy individuals, lack of success of planning approaches in the Courts, the discussions around and introduction of the GAAR, or other factors. We note that the statistics published by HMRC show that direct tax disclosures have fallen from 503 for the year to 31 March 2005 to around 15 for the year to 31 March 2014, whilst indirect tax disclosures have fallen from 680 for 2005 to around 10 for the 2014. There are two conclusions that can be drawn:

- Taxpayer and promoter behaviour has changed; and/or
- Promoters of tax planning schemes are working to ensure that new opportunities for tax planning are structured to fall outside the disclosable schemes rules

The experience of ICAS members contributing to this response suggests that the first conclusion is the correct one for taxpayers who are members of the tax professional bodies.
The consultation document appears to address both of these. The problem with taking a prescriptive approach – and trying to define ever more tightly where boundaries should be drawn on tax planning – is that the unscrupulous promoters of such schemes will always try to find ways to fall outside the boundaries drawn by legislation. The work on the legislation by the draftsman to try and anticipate all the possible interpretations supported by the wording of the legislation can give rise to law which is complex, long and riddled with exceptions to exceptions.

This issue of the unscrupulous – and ICAS supports targeted measures to address the “those who have chosen to work outside the professional standards HMRC expects of mainstream advisers” as they have previously been described - is clearly complicated. It is exacerbated by the introduction of APNs so that if a scheme is outside DOTAS the promoter is able to highlight the cashflow benefits as well as the “tax savings” that can be enjoyed. HMRC has acknowledged this issue within the consultation document.

**Consultation questions**

**Q1:** Will removing grandfathering in this way deliver greater consistency in the application of this hallmark?

The grandfathering date of 1 August 2006 removed the need to re-examine prior advisory projects and the administrative effort associated with that. It avoided the provision being retrospective and assisted with the taxpayer certainty as to what would and would not be caught by these provisions. The administrative burden of removing the grandfathering rule described in paragraph 2.15 is probably no lower now than it would have been back in 2006, although the change to various legislative provisions since then would most likely reduce the number of issues that would have to be disclosed. If HMRC considers that there are arrangements promoted and effected before 2006 – a full 8 years ago - that it has not successfully closed by legislation or through defeat in the courts it does beg the question as to why not? With the consequence of a disclosure being the exposure to an APN on such established planning arrangements, the impact of such a change would be to assess tax without legislation or court authority to tax. ICAS does not support such an extension of powers. Targeted anti-avoidance provisions or a GAAR challenge are the appropriate responses to achieve this objective.

**Q2:** Do you foresee any issues with removing grandfathering prospectively for schemes made available or implemented from a certain date?

As above under Q1.

**Q3:** Will recasting the hallmark to consider the overall product being offered rather than the underlying documentation and scheme structure ensure greater consistency in the application of this hallmark?

ICAS support this change as it is a move towards a principles based approach rather than a rules based approach. A statement outlining the principles to interpret would be helpful in moving to a more principles based approach and in line with the GAAR.

**Q4:** Do you agree that widening the main purpose test to “the, or one of the, main purposes” will help ensure the policy is met?

This would widen significantly the net of potential schemes caught to probably include more bespoke planning that had not been designed to circumvent the hallmark. This does nothing for the principle of certainty and focus for this provision but is probably not the key issue that would make a difference to the promoters concerned anyway. A more closely targeted rule for the circumventers is needed.

**Q5:** Would including additional characteristics such as the existence of a fighting fund in this hallmark ensure disclosure of all schemes which include such elements or would a separate hallmark be a better way to achieve this?

ICAS believes that the existence of a fighting fund should be included as part of the hallmark, but as mentioned in our October 2012 submission in response to the HMRC Consultation
‘Lifting the Lid on Tax Avoidance Schemes’ we are concerned that the definition of fighting fund should not be so broad as to catch taxpayers who routinely take out regular professional fee insurance policies to bear the cost of enquiries.

Q6: Do you think that a combination of the new draft Financial Products hallmark and the revisions proposed to the loss hallmark will result in more tax avoidance schemes being disclosable without adversely impacting on normal business activity?

The concerns in our submission on ‘Lifting the Lid on Tax Avoidance Schemes’, about ensuring the provisions do not catch bona fide commercial plans and only abusive tax arrangements remain. Conditions 2 and 3 in Annex A still appear to allow the potential for a taxpayer making the more efficient choice between, say, share capital and a loan funding of a genuine business to be caught as the drafting around the abusiveness only comes in in condition 4 as an alternative to condition 3.

Q7: To what extent do the proposals strike the right balance between ensuring that IHT avoidance is brought within DOTAS but that legitimate estate planning is not disclosable? If not, how might this balance be best achieved?

As noted above, the distinction between tax planning and tax avoidance is unclear. ICAS members have concerns about the uncertainties caused by HMRC taking, without necessarily legislative approval or oversight, a more aggressive line on the definition of tax avoidance and this could move strategies which have previously been treated as acceptable planning into unacceptable tax avoidance. If behavioural change from taxpayers is sought, then rather than revise the disclosure regime, a broader based communication process around the ‘line in the sand’ on planning steps HMRC will challenge would be a more appropriate way to proceed, as suggested in paragraph 2.55. In seeking a wholesale introduction of a very broad IHT disclosure regime, HMRC should also consider the administrative burden on taxpayers, their advisers and HMRC resources itself. A much more targeted approach than that currently proposed is desirable.

Q8: Does the proposed approach ensure so far as possible that legitimate claiming of reliefs and exemptions does not have to be disclosed? If not, what alternative proposals would achieve that aim?

See comments on Q7 above.

Q9: To what extent will these change help ensure that HMRC is able to identify those responsible for making a disclosure where people are seeking to sidestep their obligations?

ICAS supports the proposal to include promoters and introducers of schemes within the rules.

Q10: Do you think this will help ensure there is consistent treatment of users of avoidance schemes and their promoters irrespective of where the scheme was designed?

This proposal should go some way to ensuring consistent treatment but it is an area where vigilance is required to monitor the activity of offshore promoters.

Q11: To what extent would requiring persons working with the offshore promoter ensure the proposed special rule applies appropriately?

No comment.

Q12: Are there any other steps which could be taken to strengthen DOTAS in this area to ensure that those required to disclose comply with their obligations?

Penalties for failure to comply with a DOTAS obligation without reasonable excuse for promoters are provided for in section 98C Taxes Management Act 1970, as amended by FA 2010. The failure to notify a scheme attracts a penalty of £600 per day under these rules with a higher penalty of up to £1,000,000. There are increases if the order from the Tribunal is not complied with – up to £5,000 per day. These are substantial powers and HMRC should use these to challenge promoters who operate without due regard to the legislation. It may be
worth considering publicising penalties imposed for this type of behaviour without identifying the promoters to draw attention to the rules.

The penalties for taxpayers who do not disclose a SRN are between £100 and £1,000. The penalties for failing to comply with DOTAS apply to promoters only.

These substantial penalties for promoters are supported by our members, as this category of promoter are sophisticated tax planners who are well aware of the rules around DOTAS and the GAAR.

Q13: Do you agree that aligning penalties in this way is proportionate given the significant financial gains users can obtain through failing to correctly report their use of a disclosed tax avoidance scheme?

We agree with this proposal

Q14: To what extent will this help ensure employees are fully aware of the fact that they are becoming involved in tax avoidance?

It is important that employees are aware of the actions taken by their employers in respect of employment schemes. This will be the case for very senior employees as well as those at a much lower level who are required to participate in umbrella schemes or similar arrangements that might be caught by the DOTAS hallmarks.

Q15: Do you think that the Government’s preferred option is the more effective and least burdensome way to achieve this objective?

The proposal puts the onus on the employer to provide the details and it seems reasonable to require the employer to provide the details as it has entered into the planning scheme.

Q16: Are there other ways in which this information could be cost effectively obtained from employers or employees?

We have not identified any alternative way to obtain this information. It is the employer who will have the full details of the employees involved.

Q17: To what extent would a provision of this nature provide a suitable safeguard to those wishing to provide information about avoidance to HMRC?

Care needs to be taken with the whistle-blowing provisions to ensure that an employee is not faced with claims for breaches of confidentiality. As an intermediary could be an individual member or member firm of a professional body, each or both of whom might be covered by any confidentiality provision, the scoping of such a provision would have to clearly specify who is to be protected by this.

Q18: To what extent would a threshold conditions in the High Risk Promoters rules ensure promoters do not seek to use DOTAS as a test-bed or clearance regime when devising new schemes and what other steps might the Government take to prevent abuse of this sort?

The suggestion is that certain promoters are now attempting to engineer tax planning schemes which fall outside the DOTAS regime as a result of the introduction of APNs. It seems illogical that such promoters would use DOTAS as a test bed or clearance regime when the intention is to stay outside the regime, however if having such a rule provides the safeguard sought so that HMRC can publish much earlier a list of SRNs withdrawn then it should go ahead.

Q19: To what extent would the preferred option deliver a balance between providing greater certainty for the taxpayers while ensuring HMRC can give due consideration to the need to issue a SRN?

The key certainty sought by taxpayers and agents in light of the introduction of the APN regime is when HMRC will issue a payment notice, in circumstances where if it does not consider the disclosed arrangement offensive or ineffective. The delivery of certainty in tax
aligns to Government policy as much as tackling tax avoidance does. Much greater efforts should be put into timely assessment of disclosed arrangements and a decision on whether APNs will be issued and a timescale of 30 days should be the target for this.

Q20: Are there other ways in which this could be achieved?

No other comment

Q21: To what extent does the draft hallmark deliver the policy objective of bringing arrangements involving financial products into the view of DOTAS?

No comment

Q22: Does the approach deliver the safeguards requested by respondents to the previous consultation?

No comment

Q23: Which form of VADR (user-based/promoter-based/include in DOTAS) is likely to be most effective in achieving the policy objectives?

A promoter based VADR would appear to be best placed to achieve the policy objective.

Q24: Which form of VADR would best contribute to achieving consistency and fairness for users and promoters of avoidance schemes across all regimes?

The promoter based VADR would be consistent with the approach for other taxes and as a result is likely to be the simplest to introduce and explain.

Q25: Which form of VADR would minimise the administrative burden on businesses, other than those who design and promote avoidance and their clients?

The promoter based VADR would be more consistent with the approach for other taxes and as a result is likely to be the simplest to introduce and explain.

Q26: What more could be done to ensure that HMRC receives the information it needs to effectively detect and tackle marketed avoidance

HMRC should allocate sufficient resources to tackle this issue and ensure that staff dealing with marketed avoidance are adequately trained and experienced to deal with the types of issues that are encountered. It is in the interests of all taxpayers and professional advisers to ensure that aggressive tax avoidance is effectively dealt with by HMRC. It is also vital that HMRC are able to accept that they should pursue the right amount of tax from taxpayers and not the maximum amount of tax. Taxpayers are entitled to arrange their affairs so that they can take advantage of reliefs and exemptions offered by the tax legislation.