Response from ICAS to HMRC Consultations on “Raising the stakes on tax avoidance” and “Tackling marketed 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 consultation documents continuing the programme of “Raising the stakes on tax avoidance” and on “Tackling marketed tax avoidance”. These are taken together given the common principle of “follower notices”. ICAS members and interested parties met with HMRC Counter Avoidance Policy representatives on 18 February 2014 to discuss the responses of ICAS members and this submission formalise our response.

A number of major issues and concerns on principles have been raised in relation to the proposals, and we make general comments on these before addressing the detailed questions below.

1. There is a widely and strongly held belief that the fundamental premise, that taxpayers delay case hearings solely for cash flow advantage is overstated. Whilst the policy intention in the current proposals for accelerated payment may be only to address a very small percentage of disputes, members reported that, across all areas, delays experienced in resolving tax disputes were not a direct result of taxpayers seeking to defer tax payments by prolonging legal processes, but delays from the HMRC side. Giving HMRC the right to collect tax pending a hearing without an obligation on it to resolve matters faster or within a committed time frame gives rise to considerable concerns around even greater litigation delays in HMRC’s hands; HMRC could then have little incentive to conclude matters through the courts.

The vast majority of taxpayers and their agents seek certainty in their tax affairs and do not want to become entangled in the court process because of the uncertainty and cost this involves. Introducing a scheme for ‘follower cases’, if badly considered or applied, could divert significant HMRC resources which could be more effectively utilised to resolve the backlog of cases on matters well beyond avoidance; close monitoring of its use and public reporting of the effectiveness of the provisions at clearing the case backlog will be essential performance measures.

2. The proposed powers on “follower cases”, without right of appeal, for HMRC alone to pass judgement on and without commitment for resolution of the specific issue, causes major concerns about lack of fairness and balance. Greater safeguards and certainty for all taxpayers is required, and a right of appeal against a failure notice is essential. Members continue to express concerns about the human rights involved in an authority having a right to collect tax in a system where there is no appeal to the courts. Alternative approaches are suggested below.

3. As noted in the consultation document, HMRC already has the powers to require taxpayers to make payments where there is tax litigation, and ICAS supports using these powers effectively, after only minor amendments should legislation be introduced, to ‘follower cases’. This should have the benefit of providing additional safeguards without the need for significant new legislative complexity. For example, the Tribunals regulations SI 273/2009 include at rule 18 the ability of the Tribunal to link cases. The independence of the Tribunals body linking the cases is regarded as providing a greater safeguard than a linking by HMRC which is subjective as a party to the case. The argument against using this power is that the case has to have been investigated and argued to litigation standard, which is resource intensive, but without such investigation and consideration it is difficult to see how HMRC would know which particular cases were sufficiently close on fact and principle to any decided case for it to be binding precedent. It might then be the unfortunate result that ‘follower notices’ might be issued in more wide ranging circumstances than appropriate.
HMRC also has powers under Para 3 (2) Schedule 24 FA 2007 where a figure has been used to complete a tax return and tax litigation means that the return is inaccurate; under that schedule HMRC may also impose penalties.

Finally, HMRC has powers under Sec 55 TMA 1970 which allow it to refuse an application to postpone tax. Using these powers would allow HMRC to require the payment of tax on issues which are being litigated which would have the same effect as the proposed legislation. An amendment to deal with the lack of assessment in such circumstances, in order to bring enquiry cases into this provision, would appear to give a simpler solution, and would then bring in the taxpayer safeguards of a right of appeal to the Tribunal, again using a process which is well-understood by taxpayers, agents and HMRC.

4. The proposal to extend the arrangements to the DOTAS regime to require taxpayers using disclosed schemes to advance the payment of tax on disputed issues is ill-conceived and may be counter-productive. The DOTAS scheme was brought in so that HMRC were made aware of schemes with certain hallmarks and promoters have to provide details of clients who are using the schemes. Not all tax planning disclosed under DOTAS is challenged by HMRC and it has been accepted that DOTAS applies to arrangements that do not fall within the General Anti-Abuse Rule or existing anti-avoidance legislation, so quite a number may not be countered. To require payment of tax on such provision is ill-conceived – there is often no tax issue at stake. In addition, there are still avoidance schemes that are undertaken outside the DOTAS regime by unscrupulous scheme promoters. Introducing the requirement to pay tax on disclosed DOTAS arrangements until the arrangements are confirmed as effective or ineffective would be a disincentive to promoters who work within the requirements of DOTAS. Their clients would have to pay upfront all the tax that they believe would be due if the scheme failed. A client who used a promoter who did not satisfy the requirements under DOTAS would not have to pay until the planning was identified and challenged by HMRC. This is not a consistent approach and HMRC should consider if they want to promulgate the message that taxpayers can defer tax by using high risk promoters. In addition, where an adviser has in the past taken a prudent approach to disclosure, taxpayer clients of that adviser (who may not even have been the originator of the scheme) will now be penalised in comparison to those who took a more aggressive approach.

5. ICAS opposes in principle the use of retrospective legislation, which is the effect of these provisions in relation to payment notices. Introducing the provisions for schemes entered into after the proposals were published would send the deterrent message for the future, or as a second and poorer choice, cases decided after the clauses are passed into law. A poor approach to the management of past litigation by HMRC should not be remedied by poor legislative principle now.

6. The time given by HMRC for responses to this consultative document was not sufficient given the nature and scope of the changes envisaged. The issue of the document on 24 January 2014, just before the self-assessment deadline, and with such a short response time is at the busiest time of year for many of our members. The timescale was also disappointing as it falls short of policy commitments on consultation; the result may be that the legislation will be poorer and less effective that might have been the case with a greater timescale.

Comments on draft legislation
The review of the draft legislation has identified issues which should be addressed, as follows:

1. As noted above, it is proposed in Schedule 1 on “relevant judicial rulings” that HMRC should have the power to issue a follower notice to a taxpayer to notify them that their circumstances are the same as a decided case. The taxpayer has the opportunity to request reconsideration of this notice and indicate why a follower notice is not appropriate but this “appeal” is only to HMRC. In these circumstances HMRC has the power to judge and review their own judgement and ICAS does not believe that this is a sufficient
safeguard for taxpayers. An independent, perhaps Tribunal or other review option in necessary as a legislative safeguard.

2. The definition in the legislation of "judicial ruling" and "final ruling" need to exclude cases where the appellant taxpayer chooses not to pursue a further appeal for reasons other than the technical strength of the arguments. Legal costs, commercial pressures and a wider perspective on a taxpayer’s overall tax position are possible examples, but in such cases it is likely that leave to appeal will have been given, even if not taken up. Test cases are also likely to be, by definition, at the weakest end of a taxpayer argument; there should be an opportunity in this definition to permit a genuine appeal to continue without such designation being widely used.

3. At various points in the Promoters provisions, for example at paragraph 22(9) and paragraph 30(2) provide a timescale of 10 days for information to be provided; this is simply unrealistic given HMRC outgoing mail issues, never mind commercial and practical difficulties in complying. The time limit should be no shorter than 30 days.

4. In proposed Schedule 1, “Threshold conditions”, we are surprised at the approach taken at paragraph 8 under the heading “Disciplinary action by a professional body”. Whilst accepting that an attempt is being made to seek wider evidence of behaviours of concern, there is no linkage requirement between any misconduct finding and being a high risk tax promoter, meaning such a provision is poorly drafted and might result in time wasting at HMRC in considering irrelevant issues. The naming of ICAS as one of only four professional bodies of particular concern to HMRC needs further explanation and justification; was it laziness only to mention these four despite there being other major accounting and tax professional bodies with significantly more members involved in tax, or inappropriate and unjustified singling out of ICAS members for greater monitoring? ICAS has always engaged constructively with HMRC on anti-avoidance measures and believes in a level playing field for qualified professional advisers, whatever the membership body involved. Such an approach is contrary to that spirit of cooperation, and indeed could encourage the potentially unscrupulous to stay away from the named bodies, which is hardly an approach designed to support better tax compliance. It would be preferable for all such bodies, or none, to be highlighted here.

Consultation questions on “Tackling marketed tax avoidance”

Specific points on the questions raised are included below.

**Question 1: Do you agree with the proposals for the timing and issue of payment notices?**

We have no comment on the time scale for the timing and issue of payment notices. An additional requirement should be placed on HMRC to respond to requests under paragraph 7 of the draft legislation within a certain time frame, no more than 30 days given it should already have considered the fact pattern and arguments before the payment notice was issued. HMRC’s internal review process would presumably also apply to such decisions but this should be confirmed.

As noted above, there also needs to be an appeal process against “follower notices” and related payment notices, as a matter of good administration and justice. There should also be a mechanism for taxpayers to challenge delays by HMRC in dealing with related litigation once tax is paid under such a notice. Including these types of safeguard would make changes to the current system more palatable to taxpayers and ensure a balance of rights and responsibilities.

**Question 2: Do you agree with this proposed method for establishing the payment amount?**

No comments.
Question 3: Do you agree with these grounds for objection to an accelerated payment notice?
As noted above and under question 1, there are serious concerns about a system where HMRC uses its subjective judgement to decide the position and there is no right of appeal to an independent body.

Question 4: Should there be any additional grounds for objection to an accelerated payment notice?
We believe that there should be hardship grounds included, with a model perhaps being that applied in the VAT Tribunal system. A taxpayer’s circumstances may have changed substantially in the period between the planning taking place and the follower notice being issued by HMRC and we feel that this is a necessary safeguard. Significant hardship could arise for actions taken in the past, and where no final court outcome is available for the particular taxpayer’s specific circumstances.

Question 5: Do you agree that accelerated payments for cases under appeal should be handled by way of adapting the existing rules for postponed tax in TMA 1970?
As noted above, we believe that using these powers would be an alternative to the draft legislation. These give HMRC the power to require payment in appeal cases, but there should be a right of appeal to the Tribunal, as currently in section 55.

Question 6: Do you agree with this proposed approach to interest and repaid amounts in relation to accelerated payments?
A system mirroring on the existing under and over payment interest regime is preferable on the grounds of simplicity.

Question 7: Do you agree that the accelerated payment should be subject to a late payment penalty and that the proposed amounts are reasonable and proportionate?
The penalty regime should not become harsher in cases where Time to Pay is agreed after the penalty day, on the grounds of hardship and fairness; the closure of litigation should be required before penalties increase.

Question 8: Do you agree to this treatment for payment of tax for cases in litigation?
We believe that this approach is generally acceptable. It is the current system amended to take into account payments made under the proposed legislation, however as with all HMRC powers and in view of considerable delays in legislative proceedings, there should be a right of appeal to the Tribunal system in relation to any retention of tax after a successful ruling in favour of the taxpayer around the “reasonable ground” of HMRC’s view. Taxpayers’ views on what are “reasonable grounds” may differ.

Question 9: Do you have any further comments on the principles or application of the proposal to issue accelerated payment notices in cases where a “follower notice” is issued?
One comment raised by a member was whether lessons could be learned from overseas tax jurisdictions, such as Canada, where it is understood that in litigation cases a taxpayer is required to pay 50% of the tax at stake at an early stage. This is intended to give both parties an interest in settling the issue. This may give a better balance in achieving the stated aims of the draft legislation and provide an opportunity to consider more carefully the safeguards needed to allow the system to work effectively for all parties.

Question 10: Do you have any comments about how information may be provided in such a way as to provide a reasonable balance between providing early certainty for taxpayers and not opening up a route to assist the development of future avoidance schemes?
Major concerns on this proposal are covered above. It is not appropriate to extend this approach to include DOTAS planning until such time as the DOTAS scheme is successfully litigated by HMRC.
Question 11: Do you agree that the proposed time limit for payment of an accelerated payment as a result of a DOTAS scheme should be the same as for accelerated payments linked to a “follower” notice?
As noted above, we do not believe that it is appropriate to extend the accelerated payment to DOTAS planning until such time as the DOTAS scheme is successfully litigated by HMRC. There will be schemes that are required to be disclosed to HMRC under DOTAS which are legitimate and where the technical analysis is that the planning is effective for tax. It is then for the Government to change the legislation. We also have concerns that if the accelerated payment scheme is extended to all DOTAS planning this will mean that unscrupulous advisers are in an advantaged position. They will be able to market schemes as requiring no upfront payment to HMRC and contrast this with schemes from promoters who do comply with the DOTAS rules.

In addition, such payments would be expected to result in many applications under the ‘Time to Pay’ system as a minimum, and could give rise to significant and unfortunate cash flow consequences. This is substantially due to historic planning, often by businesses, where insolvency concerns may arise.

Question 12: Do you have any further comments about the proposed extension of this measure to cases involving schemes disclosed under DOTAS?
This is discussed above. This was an area where the strongest representations were raised by our members and we would urge HMRC to reconsider these provisions. The outcome of the HMRC’s review of DOTAS should also be awaited before a whole scale review of its structure is implemented. The compliance cost to HMRC of chasing schemes not disclosed under DOTAS will be significant and this measure could, counter productively, increase this type of planning. HMRC will be well aware of the type of promoter who will be involved. We would draw attention to our comment above about retrospective legislation.

Question 13: Do you agree that the scheme being challenged under the GAAR should be a criterion for issuing an accelerated payment notice?
We consider that this is analogous to the proposal to introduce accelerated payments for DOTAS planning. Whilst at least there will have been an independent consideration of the merits of an arrangement by the GAAR panel, so that it is less offensive than the DOTAS provision, the concerns above around payment before litigation outcome remain.

Question 14: Do you agree with the timing proposal for the issue of an accelerated payment notice in a case being challenged by the GAAR?
As noted above, we do not believe that it is appropriate to extend the accelerated payment to a case being challenged under the GAAR.

Question 15: Do you have any further comments about the application of the policy to schemes that are challenged under the GAAR?
Comments are outlined above.