Response from ICAS to the HMRC Consultation
‘Lifting the Lid on Tax Avoidance Schemes’

9 October 2012
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.

Introduction

ICAS welcomes the opportunity to contribute to the consultation on the matter of improving information available to HMRC and taxpayers about tax avoidance schemes and the risks of using them. In this document we will be using “DOTAS” to mean all or any of the Disclosure of Tax Avoidance Schemes regimes.

ICAS considers there is still work to be done by HMRC on the definition of “tax avoidance” and its relationship to “tax planning” and these views were set out in detail in our response to the recent HMRC consultation document on the General Anti-Abuse Rule, 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, hence leaving unwelcome uncertainty for taxpayers.

Our responses to the current consultation questions are set out below.

Question 1

ICAS supports HMRC’s aims of improving the effectiveness of the DOTAS regime, but in order for this to be efficiently focussed, rather than just administratively cumbersome, calls firstly for publication of a review of its usefulness at present and identification of the key factors that have contributed most to the policy objective of countering tax avoidance. Alternatively, where, despite various amendments to the provisions over the years, it still fails to deliver the information which is a necessary foundation to the policy’s effectiveness, undertake an open and comprehensive review. To undertake this consultation without that disclosure and openness risks the next step decisions being based on impressions and partial information, rather than evidence and informed analysis.

Whilst there have been a number of comments in support of the aims of DOTAS, the only information made public on the effectiveness of the DOTAS regime, is that as few as 2% of schemes disclosed have been counteracted by legislation (around 60 out of 3,202 up to 31 March 2012, although as details are not disclosed it is not possible to know how many of the 3,202 are duplicate notification of the same issue). It is not surprising then that misperceptions appear to have arisen around HMRC’s approach in practice to disclosures. For example, where a scheme has been disclosed to HMRC and has not been counteracted by legislation, perceptions form that it is open to use, for a while at least. For non-specialist taxpayers, as suggested recently in the press, “disclosed to HMRC” if not counteracted, is perceived as “approved by HMRC”, and therefore acceptable. This is the opposite effect to that intended, where the expectation of counteraction and challenge, following disclosure, might have deterred some from entering into such schemes at the outset.

Whilst HMRC may analyse disclosure submissions and then form the view that the exchequer risk is low, such that some schemes will not be the focus of immediate counteraction, alternative outcomes include the one where HMRC considers that these schemes just do not work on technical grounds.
However, following on from the figures above, it is simply not credible to tax experts that up to 98% of disclosed schemes just do not work, given the complexity of the UK legislation and the range of commercial environments and situations in which they may be applied. Better information would be one way of improving the credibility of the regime as a deterrent.

A further project should be undertaken to look at ways in which dispute resolution mechanisms, including tribunal or court processes related to key anti-avoidance principles, may be accelerated in order that courts decisions may be arrived at more quickly.

In overall terms, HMRC’s aims of this exercise should not just be to ensure it is provided with more timely and relevant information on tax avoidance, but that it should act, and be seen to act, promptly and effectively in counteraction and be more open about the DOTAS regimes’ performance and effectiveness measures.

Our comments on possible communication solutions to this are given below in response to Question 2.

**Question 2**

In addressing the communication theme of the questions, better communication channels to both general taxpayers and tax agents could be employed. In relation to taxpayers, more tailored correspondence with particular taxpayer segments, such as high income taxpayers on the consequences of entering into tax planning schemes and disclosed arrangements, could be considered. Some will have Customer Relationship Managers, however a conversation and direct engagement, or provision of a copy of material such as the HMRC Issue Briefing “Tackling Tax Avoidance", might be a start. It is extremely unlikely that this category of taxpayers will be regular readers of the deeper recesses of HMRC’s website, nor will they necessarily respond to simplistic generalisations in media sound-bites. Those with more complex tax affairs are likely to have appointed agents, and may enter into tax planning arrangements with, or contrary to, their agent’s advice. If the agent relationship is to be regarded as one that has the potential to deliver views on tax risks and offer more effective communication lines to and from HMRC, the communication lines with such taxpayers should always include the agent.

We know that tax agents who are ICAS members are asked by clients for their assessments of proposed arrangements and those views are generally well listened to; whether or not the client follows all advice given is another matter, but it is a key communication channel for HMRC. For tax agents, HMRC could provide more, and more relevant, feedback on what is happening to disclosed arrangements. Details of the HMRC’s response to “market trends” would be useful and relevant. The publication of “Spotlights” may form part of this but a more visible and accessible communication channel of this information is needed to support the judgements which the agent community need to make in addressing the balance of their duties to their clients and their public interest obligations (where members of professional bodies such as ICAS).

The publication by HMRC of the number of schemes notified under DOTAS says very little to taxpayers or agents, but a qualitative analysis covering planning themes (recognising that there may be duplication in notifications), with HMRC decisions in general headings, such as “challenge through courts – test case pending”, “HMRC considers technically ineffective based on HMRC Counsel’s opinion”, “to be counteracted by legislation immediately” or “anomalous but not currently considered capable of widespread use” might be a start, as might comments on which primary areas of challenge against more common schemes are likely. The information power of these is likely to translate into an obligation for agents to discuss these specifics with clients, and so have a greater behavioural consequence on agents and introducers as well as on their clients. ICAS believes this information should not be a matter to be shared only with professional bodies but to all involved parties, whether agents or introducers.
Simple communication channels should not be overlooked. HMRC’s website at present contains no clear message of the policy position, arguments or expectations on tax avoidance, yet it is an obvious place to put a message that would be seen by all those filing tax returns online.

Any tax agents or other recipients who wish to share third party marketing messages with HMRC could be provided with a postal and/or email address to which information could be forwarded, and this could be made much more accessible through messages with tax returns, on the website etc. Simple solutions might be much more efficient and effective than additional, complex legal powers.

As regards confidentiality agreements, even if there were to be a statutory override to conditions of confidentiality between a promoter and customer/intermediary, the question would be around how that would be enforced in practice? Would HMRC have to know both of the arrangement, and that it was subject to this provision, before any notice to deliver information could be served? There are existing powers in relation to tax enquiries; would these be the basis of a notice? Perhaps then to be effective it would have to operate automatically, as do certain money laundering provisions for finance professionals. But this would be yet another bureaucratic burden on agents to provide HMRC items that could include unsolicited mail, or their client’s unsolicited mail, particularly if the obligation arose before any alleged arrangement had been entered into. Alternatively, if a simple provision overrode a duty of confidentiality in terms of breach of contract, it would then be for a taxpayer to volunteer information to HMRC, after signing such a letter. The practical likelihood of this behaviour is likely to be limited, given it would be somewhat irrational. Overall, with the other anti-avoidance tools at HMRC’s disposal, and the arrangements under discussion being legal rather than in the tax evasion sphere, this confidentiality override would appear to add bureaucracy to no evident benefit.

The disclosure of additional information about promoters is different from information on arrangements, involving as it does a variety of individuals and businesses with the right to go about lawful business in the UK, without harassment. ICAS sees little benefit in publishing information about promoters that might simply serve either as free advertising, or which runs the risk of damaging professional reputations should it be misdirected or unbalanced. Who would decide which promoters and what information was publicised, and what rights of hearing or appeal would a promoter have to challenge any allegations? Is there any evidence that the small numbers of promoters of concern to HMRC would change their behaviour as a result? Until these are points are addressed, the necessity of this step is unproven and it should not be taken further.

ICAS considers the mis-selling issue, in terms of consumer protection, or financial services to be one which merits detailed further consideration, in particular if they may be used without further legislative process. HMRC should undertake a full evaluation of the applicability and likely effectiveness of such provisions to the promotion of tax avoidance schemes of concern.

**Questions 3 and 4**

It appears a fundamental requirement that a DOTAS scheme that it should provide relevant and necessary details, sufficient to be useful to HMRC in understanding the technical operation of the scheme disclosed. There would be a danger in being swamped by the unnecessary and the simplest step forward in pursuit of the minimum necessary details for HMRC to evaluate a proposal would also protect the administrative burden. This would favour the additional powers route to obtain additional information.

It is difficult to see why HMRC would have more difficulty in matching names and addresses, in mass-marketed schemes, to customer records, when compared to other schemes, other than as a result of a failure by HMRC to resource adequately for volume. Regardless, inclusion of the taxpayer Unique Taxpayer Reference or National Insurance number could be considered. Information may be delayed, but as the main details of the scheme are important to the counteraction review at an early stage, the detailed taxpayer information for tracking the impact on tax returns could be provided at a later stage for challenge and monitoring purposes, so the immediate timescale may be less important.
ICAS is opposed to attempts to limit the use of “reasonable excuse”, or apply it differently for the interpretation of behaviour under DOTAS penalty provisions, when compared to other tax provisions. The principle is widely understood and applicable to a range of tax events, albeit it is still open to challenge in some common situations. Any change in interpretation would lead to increased confusion and complexity across tax provisions as a whole. If provisions are drafted clearly and HMRC has made its case well, no doubt the Tribunal will agree.

ICAS is also concerned about the impracticality of adding DOTAS obligations to individuals as well as those of a firm, given each is a separate legal person. Questions would arise as to which particular individual in a firm would be subject to such obligations, and may run counter to an employment law duty of confidentiality from an employee to an employer. The proposal is also based on the proposition that a very small number of individuals are targeted by this provision, individuals who are probably the very ones to seek to escape the obligation, however it is framed, for example by moving offshore. Accordingly it is difficult to see how this could be applied without imposing an additional and unnecessary obligation on most professionals; and as no case is made that this is a proportionate administrative response and it should be rejected on these grounds.

**Question 5**

The changes proposed in paragraphs 5.16 to 5.17 appear to give appropriate clarity to the confidentiality hallmark and would be proportionate and effective.

Concerns arise in relation to the fee arrangement issues in paragraph 5.18, such that they might bring into the disclosure regime, normal commercial fee arrangements. Examples are where there was bespoke tax planning advice which would not meet another hallmark of the DOTAS regime, or where there was a particular point of law where a case is to be taken of wider benefit, by a test case taxpayer with a fighting fund, which again may not be within any other hallmark. It is also not clear how, or whether, this fee hallmark would apply where a taxpayer may have taken out professional fee insurance where third party insurers provide cover for the costs of HMRC enquiries, regardless of any possible implications of the DOTAS regime. There is already a contingent fee disclosure provision at Hallmark 3, not discussed as part of this consultation document but which may be expected to catch the third situation described, for contingent fees.

The fee features incorporated by promoters are designed to suggest the taxpayer could not be worse off by undertaking the planning, as opposed to doing nothing. Given there will be real fee costs involved, and promoters are unlikely to bear these themselves willingly, the mis-selling regulations might be the more effective route to deal with the fee issue.

**Question 6**

Our comments at Question 5 above also apply; the changes at paragraph 5.16 appear appropriate.

**Question 7**

The objective of ensuring that disclosure is made of loss making schemes is understood, but this is an area where the practical line to distinguish between bona fide commercial schemes and abusive tax arrangements needs to be defined. The use of the new hallmark test only where there is an unregulated collective investment scheme under the definitions of the Financial Services and Markets Act 2000, serves to add potential complexity given the specialist nature of that legislation, but should serve to exclude ordinary business start-ups. Confirmation is needed however that ordinary business partnership arrangements do not fall within the definition of unregulated collective investment schemes, or would be excluded.
**Question 8**

Our response to the HMRC consultation on the General Anti-Abuse Rule, referred to above, discussed the place of well understood interpretations of legislation which had been in the public domain and unchallenged for years, in terms of being open to a potential challenge as tax avoidance. The relevant extract reads:

“Consider then the legislation in part 14 CTA 2010. It has been recognised for many years, as being effective only if a particular ordering of steps occurs in relation to the change of ownership of a company and a major change in the nature or conduct of its trade. A brief foray into the ICAS library reveals, in a widely read and respected book (even in the 6th edition, published in 1994), “Taxation of Companies at Company Reconstructions”, by Bramwell, Hardwick, James and Kingstone, full details of the provision and when the loss restriction does and does not apply, according to the ordering of events. One might therefore have considered arranging a company’s affairs so as to protect trading losses in such circumstances was in accordance with published practice at that time, and that Parliament had been accepting of the drafting, whether or not it was its original intention. It is unlikely that many tax professionals would regard this as tax avoidance, never mind aggressive or abusive planning.

However, the HMRC consultation document, “Lifting the Lid on Tax Avoidance Schemes” in relation to the disclosure regime, uses a different conceptual term, “benign” tax planning, as discussed at 5.33. The first example given at 5.33 then causes concerns about the intention of these proposals and the landscape of tax certainty. It describes “arrangements which go beyond what could reasonably be described as benign planning; for example, involving the acquisition by a group of a trading company with carried-forward losses, followed by the transfer of the trade to another company in the group after which the trade undergoes a major change in its nature and conduct. The middle step is inserted to avoid the losses being cancelled under part 14 of CTA 2010...”. This is exactly the situation that might have been concluded on not to have been caught by the GAAR as explained above, nor to be challengeable tax avoidance, but the publication of this statement puts clearly into the tax practitioner world an indication that HMRC may challenge its use, understood to be a change in practice over many years. This causes uncertainty and serves to illustrate the point being made on the need for greater clarity from HMRC”.

The ICAS view is therefore that the type of straightforward planning discussed around part 14 CTA 2010 is “benign” tax planning. A definition of “benign” would clearly be needed to ensure the starting point on this point of debate is clearly established, but otherwise this would fall within the situation in paragraph 5.32.

On the other example in the consultation document, relating to consortium losses, a potential problem arises in a real situation described by one ICAS member; a client company A acquired a 65% shareholding in another company B, with the 35% remaining with an individual shareholder. B suffered a substantial trading loss in its most recent accounting period which cannot be accessed by A. The individual shareholder owns another company, to which his 35% shareholding could be transferred, and the consortium relief conditions satisfied. Advice on this type of routine planning might be expected to be implemented by more than one client of a tax advisory firm but remains in the nature of plans that should not, in ICAS view, need to be the subject of the DOTAS regime.

The potential appears to be to still be much broader than necessary or intended and further conditions are required.
Question 9

The hallmark would appear workable.

Question 10

The hallmark may be workable, but it is not clear whether a sizeable volume of disclosures of non-aggressive planning would need to be made.

Question 11

It is difficult to see how or what “standard products” filter might be designed, or defined, to try to differentiate the types of scheme under discussion. One option might be the equivalent of the “white list” used in the Stamp Duty Land Tax regime.

A filter based on the tax advantage could also achieve the desired objective; that may give a target for promoters to come beneath but the response could be monitored to ensure a suitable level was reached.

Question 12

No comments.