Raising the stakes on tax avoidance

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.

General comments

1. ICAS welcomes the opportunity to comment on the consultation ‘Raising the stakes on tax avoidance’ which was issued on 12 August 2013.

2. ICAS appreciates the concerns HMRC has about working with “those who have chosen to work outside the professional standards HMRC expects of mainstream advisers” (para 2.5), who can taint by association the professionalism of the vast majority of competent and well informed tax agents and advisers. It is essential therefore that clarity of definition and objectivity in assessment is the essential first step in making these proposals workable in practice.

3. HMRC has recently been sent (via Sue Walton) a copy of the updated version of the professional bodies’ guidance on this subject, “Professional Conduct in Relation to Taxation”. This includes expanded and updated sections on the expected professional conduct in relation to tax planning and tax avoidance and on the Disclosure of Tax Avoidance Schemes regime. The comments below are consistent with, and build upon, that approach. It is worth stressing that compliance with those guidelines would be considered by ICAS to take members out of the scope of being a “high-risk” promoter to be targeted by the proposals in this current HMRC consultation and that consideration informs the response to the particular questions below.

Questions in the consultation paper

Q1 - Do you think that the objective criteria in Approach One are, on their own, sufficient to identify high-risk promoters or do you agree that the second approach would be more effective?

ICAS believes that clear and objective legislation, properly targeted, provides taxpayers and businesses with certainty in law and prefers that clarity to be in legislation rather than by wide HMRC discretion. This suggests that a hybrid of options one and two would be preferable. Option one would need the additional factors of confidentiality from HMRC being required in the scheme, and around promotional material with a lack of risk warnings. HMRC’s use of discretion would be needed but could then be limited to leaving out those otherwise caught by the objective criteria, taking account of those discretionary factors, rather than adding in new factors.

Q2 - Do you consider that the suggested objective criteria would provide effective reassurance for advisers who are not high-risk promoters?

A concern has to be that for a sizeable professional partnership, one client perhaps of one partner having a case which in HMRC’s view would appear to be caught by the GAAR would taint the entire business of that partnership. This would be disproportionate, so an exception for cases where the outcome would be disproportionate to the general nature of the business would be necessary; this is the corollary of the “all or substantially all of the promoters business” point in 3.17.

There remains uncertainty about what would be caught by the GAAR, and so what “appears to be caught” by itself may only depend on a particular HMRC view. Comfort on that applicability from the GAAR Panel should be required before this was adopted.
Q3 - In relation to the objective criterion based on disciplinary proceedings, do you think it is necessary to narrow the criterion to specific disciplinary matters?

This should be restricted to matters relevant to tax avoidance business in order to effectively focus on the purpose of the legislation.

Q4 - Are there any other objective criteria you would suggest?
Q5 - Are there any other factors you would suggest for the second approach?

See the approach under question 1.

Q6 - Are there any other circumstances where you think it would be appropriate for an immediate high-risk designation?

None noted.

Q7 - Should a high-risk designation apply from the date of designation or the date that any appeal against the designation is dismissed?

As with other judgements, the designation should stand but be described as ‘suspended pending appeal’.

Q8 - Do you think that these safeguards are sufficient to ensure that only promoters that are genuinely high-risk will be designated as such?
Q9 - Do you have any suggestions to improve the process?

The question of the timescales for requests for re-categorisation to be dealt with arises; these should be prompt and provided in statutory protections.

Q10 - Do you think it is reasonable to include in the objective criteria or factors for designating a promoter high-risk the fact that an entity is a successor entity or associated entity of an existing high-risk promoter?

An associated entity of a high risk promoter will not necessarily carry out the same activities as the promoter, neither will its predecessor. This also follows from the principle adopted that re-categorisation will be possible if behaviours change. However it would be too easy to avoid the provisions by moving around a group or set of associated entities. Automatic continuity of such entities within the regime should therefore follow, subject to a timely right of appeal and exclusion similar to the re-categorisation process as described above.

Q11 - Do you think that whether or not an entity is a successor or associated entity could be established through key individuals?

This should be explored for completeness, however the combination of measures described above may in most cases suffice.

Q12 - Do you think that the proposed information powers will be both appropriate and sufficient to provide HMRC with the information necessary to understand the promoter’s products and trace its intermediaries and users?
Q13 - Are there any other information powers that it would be useful to apply to high-risk promoters?

These are questions HMRC itself would need to consider. Whether all the user information is held by a promoter, as opposed to an intermediary, might be confirmed.

Q14 - Do you agree that naming high-risk promoters will serve to put their intermediaries, users and the public on notice of their high-risk status and the consequences?

An obligation on the intermediary to inform the user of the promoter’s status appears to have been omitted; putting the obligation on the promoter to make sure the intermediary does is impractical.
Q15 - What safeguards should be provided?
No comment.

Q16 - Are there any issues with the proposed obligations on the intermediary?
Q17 - Are there any further obligations that should be imposed on an intermediary acting for a high-risk promoter?
Q18 - Should there be any further safeguards provided for an intermediary acting for a high-risk promoter?

A practical cut-off measure will be required for an intermediary becoming aware of a promoters high risk designation, to apply to activities from that date.

Q19 - Do you agree that the user of a product marketed or implemented by a high-risk promoter should be required to declare to HMRC that they have done so?
Q20 - Do you think it is reasonable that users of products marketed or implemented by high-risk promoters should be subject to extended time limits for assessing?

The notification obligation on the user is consistent with others in the chain, but is dependent on the user having been made aware of the promoters’ status and/or reference number. Nevertheless the consequences would be consistent with the failure to notify under DOTAS.

Q21 - Is this proposal to create a specific rule that will allow intermediaries and users to disclose information to HMRC reasonable?
Q22 - What would this legislation need to achieve to be effective? Do you think it will achieve its aim of improving transparency and encouraging users to provide information to HMRC?

Any such provisions, to override contractual duties of confidentiality, would need legal advice, but it is our understanding that clear statutory duties would need to be established.

Q23 - Is this level of penalties appropriate for high-risk promoters?
Q24 - Do you have any other suggestions on the level of penalty appropriate for high-risk promoters?

It is difficult to comment on specific amounts, however to be an effective deterrent and given the indications of fees charged by such promoters, sizeable and proportionate amounts are required to be an effective deterrent.

Q25 - Do you foresee any issues with imposing the higher standard for reasonable excuse and reasonable care?
Q26 - Is it reasonable to extend the higher standard to other circumstances for high-risk promoters?

ICAS has in the past, in our response to the HMRC consultation ‘Lifting the Lid on Tax Avoidance Schemes’ of October 2012 opposed the limitation of use of “reasonable excuse”, on the grounds of complexity and potential confusion, given the established meanings already in place.

It appears that there are two proposals; in 4.39 for high-risk promoters, likely to be around 20 in number according to the document, and in 4.41 for users; due to the small number of high-risk promoters the complexity and potential confusion issues will be more manageable if the provision is limited to them.

It is also considered impractical to require “no assumptions on matters that may be relevant”. In any technical opinion, even on non aggressive arrangements, there are likely to be assumptions written for clarification purposes. This provision would have to be targeted on a particular set of schemes if it is not to have much broader effect than just high-risk promoters arrangements, and if assumptions are to be limited, then it should only be to matters that are critical or highly material to the tax analysis.
Q27 - Should there be a statutory limit for the period that HMRC allows for taxpayers to amend their returns?
Q28 - Alternatively should there be a statutory minimum period which could be extended at HMRC’s discretion?

It is important that any timescale permits sufficient time for taxpayers to consider the comparability of their situation with the test case, and this will often be in complex scenarios.

Q29 - Should HMRC be able to impose this requirement if they win a case at any point at a tribunal or court where the taxpayer does not appeal further, or is there a minimum level in the court hierarchy that should be reached before the requirement can be imposed?

The importance is that a judgement creates a binding precedent.

Q30 - Would defining a scheme as “any scheme or arrangement for which it would be reasonable to conclude that the obtaining of a tax advantage was the sole or main purpose” capture the tax avoidance schemes that this measure is intended to catch?
Q31 - Are there any other suitable criteria that could be applied?

The definition used is very broad; it could catch two different tax bespoke tax planning structures around which genuine technical differences of opinion would properly be tested in the courts, but which both related to the use of the same tax relief. The provision needs to be targeted by reference to the particular ‘set’ of schemes, perhaps designating these by having particular features, or SRN.

Q32 - Do you agree that once notified that the avoidance scheme they have used has been proven to fail in litigation, other users of the scheme should be required to amend their self-assessments to negate the tax advantage they had gained?
Q33 - Are there other ways to bring the tax to account without offering scheme users further opportunities to delay settlement?

Taxpayer consistency of treatment requires this, assuming of course the ‘scheme’ was identical so that the judgement reasonably applied.

Q34 - Do you agree that a penalty should work in this way to encourage taxpayers to comply with these obligations?
Q35 - Do you have any further comments on how this new requirement and penalty should work in detail?
Q36 - Are there any other penalty models or structures which you believe would work more effectively?

A penalty should apply only once suitable time has elapsed for proper evaluation, as at questions 27 and 28 above. The suggestion is that the penalty should be geared to the amount of tax advantage gained; to be consistent with the incentive to comply, should it not be geared to the length of period of unreasonable (and not appealed) failure to amend the self-assessment?

Q37 - Do you think it is reasonable for the prescribed information to include all material provided to prospective users of an arrangement, sample copies of all documents signed by users, a full analysis of the tax advantage that the arrangement is designed to obtain and an explanation of how the arrangement produces the tax advantage?

One question that arises is whether the information should be that provided by promoters to intermediaries as well as users; that may have been implied but it was not clear from the proposal.

The volume of information needs to be considered; the suggestion is that the ‘all material’ option would apply to all notified schemes, rather than just those of high-risk promoters. It would appear to apply regardless of the extent of implementation of a scheme notified. If such schemes are capable of counteraction there seems little practical advantage to HMRC of requiring ‘all material’, as opposed to documentation only on request.
Q39 - Do you think that the high-risk promoter and follower penalty proposals will have a wider impact on individuals and households than that already identified?

Q40 - Do you have any comments on the assessment of the equality impacts for either proposal?

Q41 - The high-risk promoter proposals will only impact a small number of promoters some of which may change their behaviours to avoid being designated high-risk. The impact of the proposals on promoters designated high-risk will vary depending on the type of information power and level of penalties to which the promoter is subject. What do you think will be the cost to the high-risk promoter of the following?
   a) Providing information under the specific information power
   b) Providing information under the general information power
   c) Informing intermediaries and users of their high-risk designation.

Q42 - What changes in costs will businesses face in complying with the follower penalty proposal compared to the current situation? Please refer to compliance costs not potential penalties and tax settlements.

The impact may be wider than that noted for those involved in tax planning advice, but not found to be the high-risk promoters, as they consider what impact these provisions will have on their businesses and potentially amend operational plans. These would give compliance costs for those who are not the target of the provisions.

All and any new tax legislation places a compliance burden on the responsible taxpayer, who needs to be familiar with the provisions if only to rule out their application to that taxpayers business.