Institute of Financial Accountants

Corporate

Strengthening Sanctions for Tax Avoidance

Response to Consultation

(published: 30 January 2015)

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Introduction

1. The Institute of Financial Accountants (IFA) and the Federation of Tax Advisers (FTA) welcome the opportunity to comment on the consultation document in respect of the consultation on strengthening sanctions for tax avoidance published by HM Revenue and Customs on 30 January 2015.

2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

3. Information about the IFA and the FTA is given below.

Who we are

4. The IFA is an internationally recognised professional accountancy membership body whose members work for small and medium-sized enterprises (SMEs) or who run or work in small and medium-sized accounting practices (SMPs) that advise SMEs.

5. Following the amalgamation of the IFA with the Institute of Public Accountants (IPA) of Australia on 1 January 2015, the IFA is now part of the IPA Group. It is the world's largest SME/SMP focused accountancy group, with more than 35,000 members and students around the world, which will take the global lead on accountancy, tax and business matters for micro, small and medium-sized enterprises.

6. At the IFA, we put small and medium enterprises (SMEs) first, recognizing their role as vital wealth-creators, as employers to more than half of the UK's private sector workforce and as the power behind vibrant urban and rural communities. We hold the interests of small and medium practices (SMPs) in the accounting profession in equal regard.

7. The FTA is the Tax Faculty of the IFA and is the modern membership body for agents who provide tax compliance and planning expertise to SMEs and entrepreneurs. It is the tax representative for IFA and FTA members.

8. We are proud of our unique relationship with our members, who predominantly come from a SME/SMP background. As a professional accountancy body, we aim to provide the very best support and guidance to our members who operate within this arena, frequently tailoring policies and recommendations to meet the unique challenges and trading relationships associated with smaller business.

9. Founded in 1916, the IFA supports over 9,000 members and students in more than 80 countries with a programme of professional qualifications and education. As well as resources, events, training and seminars. IFA members uphold high standards of conduct, confidentiality and ethics and undertake annual continuing professional development (CPD) activities.

10. The IFA is a full member of the International Federation of Accountants (IFAC), the global body for the accountancy profession. As such, the IFA takes it place alongside the UK and Ireland's six chartered accountancy bodies, as well as 135 national and regional accountancy organisations representing 125 countries and jurisdictions.

11. The IFA is formally recognised as an awarding organisation by Ofqual, the public body responsible for monitoring standards, exams and qualifications (other than degrees) in England, underlining the quality of the IFA's work and the integrity of its qualifications; and is authorised by HM Treasury for Anti Money Laundering supervision.

General Comments

12. Thank you for the opportunity to respond the consultation.

13. Our overriding comment in relation to the consultation is that whilst the IFA agree that HMRC should have the powers and resources it requires to effectively tackle tax evasion and abusive tax avoidance, we have some concerns and reservations about these proposals. Our main concern is how a 'serial avoider' is defined and that HMRC may use taxpayer's historic behaviour to determine those who should now be included within these proposals.

14. In addition to our general comments above, our comments on specific questions as set out in the consultation document are set out below

Strengthening Sanctions for Tax Avoidance

Question 1:

What should be the starting point for identifying those who should be the subject of new legislative measures? Should it, for example, be based on the number of schemes used over a certain period or in any one period or are there other criteria that could be used?

Response:

15. The starting point for identifying those who should be the subject of new legislative measures should be assessing whether the taxpayer has been using a scheme which has been proven to be abusive and continues to use the scheme after this has been proven. Has for instance the GAAR Advisory Panel opined on the scheme in question or a similar scheme which would lead the taxpayer to consider that proceeding with a course of action could be viewed abusive by HMRC.

16. Taxpayers should not be considered 'serial avoiders' just because historically they have used tax avoidance schemes which at the time would have had counsel's opinion and which the taxpayers were told were legal and met the letter of the law.

17. Historically if a taxpayer had been informed that a particular tax saving scheme had counsel's opinion and that their advisers told them that the scheme was totally legal, it would not have been unusual for a taxpayer to use a number of these schemes. Therefore, using the number of schemes used by a taxpayer as an identifying starting point would appear unjust as many taxpayers would have used multiple schemes on the basis that they were legal.

18. Many schemes were aggressively marketed and taxpayers were often approached by professionals looking to secure commission from the introduction. We suggest that sanctions and penalties should be reserved for the promoters in such instances and this is already provided for in legislation.

19. If the scheme has been proven not to work in the courts or by the GAAR Advisory Panel and the taxpayer in full knowledge and understanding of this then continues to use the scheme or a similar scheme, then this scheme could count as an indicator of whether a taxpayer should be liable for sanctions and/or a penalty.

Question 2:

To what extent would a surcharge be a deterrent to taxpayers who repeatedly use tax avoidance schemes that are shown not to work?

Response:

20. We consider that taxpayers historically used tax avoidance schemes because they were informed that the schemes were legal and in accordance with the letter of the law.

21. It is possible that taxpayers may have previously been involved in a number of tax avoidance schemes but only because they had been informed that the planning was legal.. This is significantly different from a taxpayer who sets out to commit tax evasion which has always been illegal.

22. It is our opinion that the behaviour of a taxpayer seeking to minimise their tax liability by using tax avoidance schemes which they were advised were legal, should not be confused with an individual that sought to evade tax by illegal means.

23. Taxpayers sign their tax returns to the best of their knowledge and belief. If the scheme, which they have implemented has had counsel's opinion and is legally correct and fully disclosed on the tax return, then it is not right for the taxpayer to be penalised in the future for a scheme that is subsequently proven not to work.

24. There are already penalties in place for incorrect tax returns. We do not consider that there is a requirement for additional penalties for taxpayers who have used schemes that at the time they were implemented were considered to be compliant with the letter of the law.

Question 3:

Use of how many tax avoidance schemes, over what period, should trigger the surcharge?

Response:

25. Please see the response to questions 1 and 2 above. We consider that the penalty regime currently in place for incorrect tax returns is sufficient and that a secondary penalty regime merely to deal with serial avoider, many of whom due to the introduction of the Accelerated Payment Notices would no longer obtain the cashflow benefits that were previously available, is unnecessary.

Question 4:

What level of financial sanction would best deter the sorts of negative behaviour described here?

Response:

26. Only cases where taxpayers continue to use avoidance schemes that have been proven in the courts not to work would display negative behaviour.

27. The use of Accelerated Payment Notices (APN) has already reduced the incentive for participation in schemes by taking away the cash flow advantage.

28. Under the Follower Notice provisions, those who seek to appeal the notice in court will be subject to an additional penalty should the case fail.

29. We do not consider that any further sanctions are necessary.

30. HMRC's discussion document in relation to penalties questions whether financial sanctions in themselves are an effective deterrent and the level of the financial penalties within the existing regimes are considered to be a sufficient deterrent.

31. There is also statistical evidence to show that where the financial penalties are too high, penalising the taxpayer does not encourage them to change their behaviour.

Question 5:

Could subjecting a serial avoider to special measures, such as additional reporting requirements, conduct notices, or restricting access to reliefs be an effective and proportionate approach to encouraging less risky behaviour?

Response:

32. Although we support HMRC's drive to change taxpayer's behaviours to make them more compliant, we have concerns over the introduction of 'special measures'.

33. The consultation document suggests that serial avoiders are insulated from the impact of an enquiry by a scheme provider or an accountant. We do not agree with this statement. Taxpayers engage agents to deal with HMRC for the professional expertise and guidance that they provide.

34. The taxpayers pay for the advice, expertise and guidance which, when a taxpayer is under enquiry or investigation may help him resolve his issues with HMRC in a more satisfactory way. Accountants and tax advisers will explain the administrative processes involved and clients' rights and obligations.

35. Most taxpayers find investigations and enquiries stressful regardless of whether they have professional representation. Subjecting these people to even greater scrutiny and additional requirements would seem unnecessary and compound their anxiety and worry.

36. The reason that a threat of an enquiry or burden of compliance does not *appear* to 'carry weight' is because the vast majority of people who used avoidance schemes were informed that they acted legally and the planning was effective.

37. The use of the DOTAS regime and the issue of a DOTAS number were in part to highlight the participation in a scheme on a taxpayer's tax return. HMRC acknowledged that investigating and enquiring into a number of taxpayers all of who had participated in the same scheme would create multiple copies of the same documentation from each taxpayer who used that particular scheme. HMRC direct their questions to the scheme promoters to provide the detail of the schemes whilst keeping an open enquiry on the taxpayer and informing them of the progress with the promoters. The 'special measures' undermine this policy and seek to place a further administrative burden on the taxpayer.

38. The use of 'special measures' to compel taxpayers to provide additional information merely because they have historically used a tax avoidance scheme is unjust.

39. Making taxpayers comply with a conduct notice or a stop notice requiring them to refrain from a certain action, with a view to improving their tax compliance is dictatorial.

40. Tax reliefs are available by law to all taxpayers who qualify for such reliefs. It should not be HMRC's decision as to who can and who cannot access a relief – this is the remit of the legislators not HMRC.

41. In summary we consider that 'special measures' are unnecessary, inappropriate and unfair and we consider that they are ultimately likely to deter taxpayers from changing behaviour patterns.

Question 6:

What sort of special measures would best positively influence the behaviour of serial avoiders?

Response:

42. Please see the response to question 5.

Question 7:

What threshold conditions should trigger entry into special measures?

Response:

43. Please see the response to question 5.

Question 8:

What consequences should follow from failure to comply with special measures?

Response:

44. Please see the response to question 5.

Question 9:

In particular, would the prospect of publicly naming serial avoiders be an effective and proportionate approach to encouraging behaviour change?

Response:

45. There is already provision within the tax legislation under Finance Act 2004 s94, the Managing Serious Defaulters scheme (MSD) for the publishing of individual's names where there has been a civil penalty for deliberate, or deliberate and concealed behaviour. Taxpayers who historically used tax avoidance schemes on the advice of professional firms should not be considered to display the same behaviour patterns as those within the MSD scheme.

Question 10:

Should special measures be imposed for a set period of time or lifted only when the avoider has demonstrated objectively a change in behaviour?

Response:

46. Please see the response to question 5.

Question 11:

What safeguards do you think would be necessary and proportionate to ensure the fair application of each of the proposed measures?

Response:

47. Please see the response to question 5.

Question 12:

The Government would welcome views on whether and how such a threshold condition might work, and in particular what proportion and/or how many adverse decisions should trigger the threshold condition?

Response:

48. We welcome any initiative that would seek to purge the tax profession of unscrupulous high risk promoters who implement tax avoidance schemes knowing them to be ineffective.

49. We agree that such firms are damaging to the reputation of tax advisory business and that the Promoters Of Tax Avoidance Scheme (POTAS) rules will assist in changing the behaviour of some promoters.

50. We are in agreement that where promoters design tax avoidance schemes in the full knowledge that they have little or no chance of success that this should be addressed.

51. It has been accepted in the consultation that this group of high risk promoters is small. It should therefore be possible to monitor this group more closely and deal with each promoter individually and therefore no blanket threshold should be applied.

Penalties for the GAAR

Question 13:

To what extent would a GAAR penalty act as an effective deterrent?

Response:

52. Any financial penalty will have an effect on the recipient. However, the question is whether such a penalty would act as an effective deterrent.

53. Taxpayers are often persuaded to participate in tax avoidance schemes by sales people. Often, whilst the benefits may look 'too good to be true', the taxpayer is persuaded with supporting documentation that the course of action has counsel's opinion or is within the letter of the law and is 'won over' to the tax planning idea.

54. A taxpayer may be drawn to a tax avoidance scheme because of a need for liquidity to help in their failing business, or to maintain their mortgage payments and a roof over their heads.

55. Penalising the taxpayer over and above the penalties set out in Schedule 24 to the Finance Act 2007 is unnecessary and unfair.

56. There needs to be clarity as to what is 'avoidance' and what is 'abusive tax planning'. There should be greater publicity so that taxpayers understand HMRC's concerns – this publicity should be in the form of official documentation rather than media reports that sensationalise but often do not provide the full story on tax avoidance.

57. We consider that any GAAR specific penalties should be reserved for the promoter of the 'abusive' tax avoidance, as it is the promoter who should be aware that such avoidance is abusive and likely to be rejected by the GAAR panel.

58. We do accept that if prior to the submission of a tax return the GAAR Advisory Panel had already provided a clear opinion that the GAAR applies to a comparable case, then this should be made aware to the taxpayer and if the taxpayer has submitted their return already they should be given an opportunity to correct their return.

Question 14:

Do you think an alternative sanction such as a surcharge might act as a more appropriate deterrent? What form might such a sanction take

Response:

59. We do not agree with alternative sanctions against taxpayers such as a surcharge. We support a penalty which is aimed at the creator/promoter of the tax planning which is subsequently proven to be abusive, when it should have been clear to the creator/promoter that this would ultimately be the case.

Question 15:

Do you agree that it would not be appropriate to charge a penalty when a taxpayer has correctly included a GAAR adjustment on their return?

Response:

60. We agree that it would be inappropriate to charge a penalty when a taxpayer has correctly included a GAAR adjustment on their return.

Question 16:

Should a GAAR specific penalty apply when the GAAR applies, without exception?

Response:

61. As explained in our response to Question 13, we do not consider that a GAAR specific penalty aimed at taxpayers who have been convinced by professional finance advisors that a particular piece of tax planning works should then be penalised when it is later proven that the tax planning is seen abusive.

Question 17:

Do you agree the submission of the taxpayer's return ought to be the trigger point for a specific GAAR penalty to become chargeable?

Response:

62. If a taxpayer has submitted their tax return correctly to the best of their knowledge, the submission should not then trigger a GAAR specific penalty.

Question 18:

Are there any points at which you think a GAAR penalty or other sanction could become chargeable?

Response:

63. We do not consider that there are any points at which a GAAR penalty or other sanction could become chargeable.

Question 19:

Should a GAAR specific penalty be tax-geared? If so, what do you consider would be an appropriate rate of penalty?

Response:

64. We do not consider that a GAAR specific penalty for taxpayers should be applied, tax geared or otherwise.

Question 20:

If you consider that a fixed penalty would be more appropriate, why do you think this is? How much would you consider to be an appropriate fixed penalty?

Response

65. We do not consider a fixed penalty to be any more appropriate than a tax geared penalty.

Question 21:

Should the normal penalty mitigation rules apply? Should it be possible to levy higher penalties according to taxpayer behaviour?

Response:

66. We do not consider that it necessary for HMRC to be able to levy higher penalties according to taxpayer behaviour. We also fail to see how the normal mitigation rules in relation to co-operation and disclosure could be used.

Question 22:

Should it be possible to charge a GAAR penalty in addition to a penalty under Schedule to the Finance Act 2007?

Response:

67. The tax system requires simplification in order that taxpayers understand their obligations under the legislation and the ramifications and effects of not meeting those obligations. Having to educate taxpayers to a whole new penalty system purely for the GAAR would add a level of complexity which we consider unnecessary.

Question 23

Do you agree that existing rights of appeal would be appropriate for a GAAR penalty?

Response:

68. Although we do not agree in principle with a GAAR specific penalty, should one be introduced it would be imperative that the existing rights of appeal in relation to penalties are extended to a GAAR specific penalty.

Taxes Impact Assessment

Question 24:

Do you think either of these measures would impact disproportionately on those with protected characteristics (as defined under the Equality Act 2010)?

Response:

69. Subject to the points and concerns that we have raised, we do not consider that these measures would impact disproportionately on those with protected characteristics (as defined under the Equality Act 2010).

70. Should you wish to discuss our responses further, please contact AdamL@ifa.org.uk in the first instance.