

PENALTIES FOR ENABLERS OF TAX AVOIDANCE SCHEMES: DRAFT GUIDANCE

Response by the Association of Taxation Technicians

1 Introduction

- 1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to provide comments on the draft guidance on *Penalties for enablers of tax avoidance schemes* published by HMRC on 20 October 2017 (the guidance).
- 1.2 The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.
- 1.3 We have split our comments into several sections. Sections 2 to 5 each set out our substantive comments on a specific part of the guidance whereas Section 6 brings together our wording and presentational observations from the whole document.

2 Section 5.1: Who is an enabler

- 2.1 Section 5.1.6 of the guidance states that *"In the case of a partnership which is the person (or body of persons) carrying on the business, it is the partnership that will be the enabler."*
- 2.2 It is not clear what this statement means in terms of penalties. Schedule 16 does not refer to either a partnership or a body of persons, and does not appear to provide a *lookthrough* method of recovering any unpaid penalties from partners. Will partners be jointly and severally liable for these?

3 Section 5.3: Manager of arrangements

- 3.1 Section 5.3.1.6 of the guidance sets out Example 8. This involves a tax agent submitting a client's tax return which reflects the position resulting from implementing abusive tax arrangements.

3.2 The conclusion to the example states that *“Provided the tax agent is adhering to their professional requirements, the tax agent should not expect to be an enabler because they won’t have had an involvement in organising or managing the arrangements”*.

3.3 This example appears to be at odds with the position set out in the Professional Conduct in Relation to Taxation (PCRT)¹, which states at Paragraph 3.6:

“A member should take care not to be associated with the presentation of facts he knows or believes to be incorrect or misleading nor to assert tax positions in a tax return which he considers have no sustainable basis.”

And at Paragraph 4.50:

“A member should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis based on the information provided to him”

3.4 These requirements appear to go beyond what is indicated in Example 8, where it would seem that the agent would be in contravention of his responsibilities under PCRT if he were to file the client’s tax return without querying the basis for the tax advantage claimed.

3.5 We also note that the guidance doesn’t address the position if the adviser in question were not a member of a professional body. Would they potentially be put in a more privileged position compared with a professional body member to whom PCRT applied?

3.6 This Example should also cross refer to where the PCRT is discussed in Section 5.9 of the guidance.

4 Section 5.7: Excluded person

4.1 Section 5.7.3.1 of the guidance sets out Example 14 to illustrate the exemption for group companies who act as enablers. In the scenario, ABC Group acquires a company, Company X, which has been managing the group’s tax avoidance arrangements.

4.2 The conclusion to this example states that:

“Company X will not be an excluded person under the enablers legislation in relation to the enabling activities provided to ABC group prior to joining the group, and will remain in scope for a penalty. However, it will be an excluded person in relation to any subsequent enabling activities provided to ABC group after joining the group.”

4.3 We do not believe that this is how the Penalties for Enablers legislation operates.

4.4 Paragraph 13 of Schedule 16 does not refer to the time when the conditions for exemption have to be met. Instead, the use of the present tense ‘is’ in 13(1)(b), without linking it to any time other than the present, could indicate that the situation of someone being an external adviser and then becoming an in-house adviser was not contemplated during drafting.

¹ See https://www.att.org.uk/sites/default/files/PCRT%20Effective%201%20March%202017%20FINAL_211216.pdf

- 4.5 There therefore appears to be a discrepancy between the guidance and the legislation as it currently stands.

5 Section 11.2: When a declaration can be made

- 5.1 It would be helpful to expand Section 11.2.11 of the guidance, as it is currently unclear whether the intended message is that there can be parallel liability to both penalties.
- 5.2 In particular, it would be helpful to state under what circumstances penalties will arise under Paragraphs 1 and 45 (e.g. where a declaration is incorrect) and also specifically refer to the fact that someone making a declaration (and not just the person named in it) can be liable to a penalty under Paragraph 45.

6 Minor wording / presentational points

- 6.1 In Section 1.2.2 of the guidance “*while providing safeguards to the vast majority of tax professionals*” would make more sense if it was changed to “*while providing safeguards for the vast majority of tax professionals*”
- 6.2 Section 2.2.3 of the guidance states that a penalty can only be assessed where HMRC have “*considered a GAAR Advisory Panel opinion that is relevant to the arrangements in question*”. We would recommend changing this to read “*considered a GAAR Advisory Panel opinion that relates to the arrangements in question or equivalent arrangements (see section 8)*” to make it clear that the opinion does not have to relate to the specific arrangements.
- 6.3 In Section 5.1.8 of the guidance it would be helpful to give a brief description of what a *declaration* is, for example by expanding the wording to say a “*declaration in respect of legally privileged communications*”.
- 6.4 Section 5.9.4 of the guidance refers to a quote from PCRT as being in paragraph 2.28. The quote given is actually contained in paragraph 2.29 of PCRT.
- 6.5 Section 7.3.1.2 of the guidance is difficult to understand on first reading. It would be helpful to refer to what the various notices (e.g. those under Paragraph 24, Paragraph 26, Paragraph 35 etc.) are as well as providing links to the more detailed guidance (for example as is done for Paragraph 25 in the second bullet point).
- 6.6 Section 8.4.1 of the guidance is difficult to read and repetitive in places. A simpler version of this could read along the lines of the following:

“Paragraph 23(3) of Schedule 16 FA (No.2) 2017 explains that a GAAR Advisory Panel opinion provided following a referral under paragraph 26 of Schedule 16 FA (no.2) 2017 can be applied to the relevant arrangements where either:

- The opinion is in relation to the relevant arrangements, or*
- The opinion is in relation to arrangements that are equivalent to the relevant arrangements, and the conditions of paragraph 35 of Schedule 16 FA (no. 2) 2017 have been met.”*

If it is preferred to keep the current wording, the insertion of an *or* between the two alternative conditions would provide more clarity.

- 6.7 In Section 8.5.1. of the guidance, when referring to Paragraph 28, a link should be inserted to Section 8.7 to help readers access detailed guidance on that Paragraph.
- 6.8 The first sentence of Section 12.5.2 of the guidance appears to just repeat the statements made in the previous section. This section could be edited to read:

“The process here will generally follow the same approach as for publishing details of deliberate tax defaulters (PDDD – see CH19040). Persons will generally have 30 days in which to make representations.....”

7 Contact details

- 7.1 We would be pleased to join in any discussion relating to this guidance. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Emma Rawson, on 07773 087111 or at erawson@att.org.uk

Yours sincerely

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Co-Chair of ATT Technical Steering Group

8 Note

- 8.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has over 8,000 members and Fellows together with over 5,700 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.