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TACKLING PROMOTERS OF TAX AVOIDANCE

Response by Association of Taxation Technicians

1 Introduction

1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the HMRC consultation document *Tackling Promoters of Tax Avoidance*[1] ('the Consultation') issued on 21 July 2020 together with supporting draft legislation.

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 appreciated the opportunity to discuss detailed aspects of the Consultation with representatives of HMRC in a virtual meeting on 3 August. We do not cover that same ground in this response. Rather, we respond to specific questions in the Consultation and focus on what we see as key points.

1.4 In section 2 of this response, we offer some wider observations before aligning the subsequent section numbers with the chapters of the Consultation.

1.5 Where we offer a comment which is not in direct response to a Consultation question, we identify that with the prefix C and the number of the question to which it most closely relates.

2 Wider observations

2.1 The Foreword to the Consultation refers to its publication, the concurrent publication of the *Call for evidence on tackling disguised remuneration schemes*[2] and the publication on 19 March of both the *Call for evidence on raisings standards in the tax advice market*[3] and the *Policy paper on tackling promoters of mass-marketed tax avoidance schemes*[4] as being "part of a co-ordinated strategy". Although the call for evidence on raising standards in the tax advice market is, in sharp contrast to the other three publications, wide-ranging in its focus, we are strongly of the opinion that enduring solutions to the narrower issues raised in the other three

[1] https://www.gov.uk/government/consultations/tackling-promoters-of-tax-avoidance
[2] https://www.gov.uk/government/consultations/call-for-evidence-tackling-disguised-remuneration-tax-avoidance
[3] https://www.gov.uk/government/consultations/call-for-evidence-raising-standards-in-the-tax-advice-market
[4] https://www.gov.uk/government/publications/tackling-promoters-of-mass-marketed-tax-avoidance-schemes

are likely to require consideration of the introduction of some form of mandatory oversight of all who are involved in any way in any aspect of the tax advice market (with the widest definition of that term).

2.2 The call for evidence on raising standards is a response to the Morse Report and it makes frequent reference to avoidance schemes. Amongst the options which it outlines are two which might significantly reduce the opportunity for activity by promoters:

- Option E envisages a legal requirement for anyone who wanted to provide tax advice on a commercial basis to belong to a recognised professional body, and

- Option F envisages a legal requirement for anyone who wanted to provide tax advice by way of business to register with a government regulator before they could operate in the market.

Either of these options would require a significant lead-in time and a lot of issues would require detailed consideration but it would be very helpful to establish whether HMRC regard such a general regulatory approach as providing at least part of a better (albeit not immediate) way to tackle promoters and enablers than recurrent adjustments to specific anti-avoidance legislation.

2.3 The response of promoters to the provisions relating to fee-based penalties for failed avoidance schemes (referred to in section 6.14 of the Consultation) demonstrates the obvious point that designers of schemes that purport to defeat the intention of Parliament in relation to general tax law are also likely to be adept at frustrating the effective application of legislation which specifically targets them.

2.4 Another option suggested in HMRC's 19 March call for evidence is helping consumers to make better choices (Option C). One step in that direction (which could tie in readily with either Option E or Option F just referred to) might be a public register of advisers who satisfied relevant criteria. That would provide the consumer with a register of the 'good' in contrast to the focus in the Consultation on identification (through naming) of the 'bad'. Such an approach would be much more in line with other consumer-protection measures and might well be more effective than naming promoters in a public document of which few users or potential users of schemes were ever likely to be aware.

2.5 In the remainder of this response, we focus on the specific shorter-term proposals in the Consultation.

3 Tackling promoters who do not disclose avoidance schemes to HMRC

3.1 *Q1. Would 30 days give a reasonable amount of time to furnish HMRC with information on the schemes that the promoters or enablers have been promoting or enabling?*

A1. We would expect that to be the case.

C1. We wonder whether the 30-day period itself could be used productively – for example by requiring the recipient of the information notice to notify (within a prescribed timescale) all relevant contacts (including existing and potential purchasers) of their receipt of the notice.

C2. Could the information notice permit the recipient to make a voluntary DOTAS disclosure thereby shortening the period for the issue of an SRN and reducing the demand on HMRC resources?

3.2 *Q3. How useful would information on the scheme be, without the name of the promoter, to help potential purchasers of the scheme understand the risks of using it? How might this information be published in order to be most helpful?*

A3. We are doubtful whether publication of such incomplete information could be brought to the attention of potential purchasers (or any significant proportion of them) in a manner which would alert them sufficiently to the risks of using the scheme.

3.3 *Q4. Are the grounds of appeal against the issue of a new SRN the right ones?*

A4. Section 3.21 of the Consultation states: "The grounds of appeal would be that HMRC did not have "reasonable grounds for believing" that the arrangements are notifiable and had not met the conditions for issuing an SRN under this procedure." That does not appear to reflect the wording of draft 311B(3). The three alternative grounds specified there are the two procedural points and the substantive ground that the arrangements/ proposal for the arrangements are not in fact notifiable arrangements/a notifiable proposal.

We think the grounds as specified in the draft legislation (but not in the Consultation) are appropriate. Departmental guidance will need to reflect the legislation and make a clear distinction between the condition for issue of an SRN by HMRC (failure to satisfy HMRC - see 311(3)(c)) and the grounds for appeal (arrangements not in fact notifiable - see 311B(c)).

3.4 *Q5. Are there any other grounds that should be considered?*

A5. We have not identified any.

3.5 *Q6. Would naming those in the supply chains for promoting tax avoidance schemes help make taxpayers aware that they risk falling into a scheme that HMRC suspects does not work?*

A6. We are doubtful whether such naming by HMRC could be brought to the attention of relevant taxpayers (or any significant proportion of them) in such a manner that it would alert them sufficiently to the risks of using a particular scheme.

C6. We think that our suggestion in C1 above might be more effective approach – at least in alerting potential purchasers who were already in contact with a promoter/enabler.

3.6 *Q8. To what extent do the safeguards proposed achieve a balance between ensuring that the new power would be used appropriately and ensuring that the new powers are not sidestepped by promoters and others, allowing them to continue to market their scheme to taxpayers?*

A8. It is unclear how HMRC could prevent a delay in their imposition of an SRN if a promoter provided a substantial volume of paperwork which needed a full review before HMRC could conclude that the promoter had failed to satisfy them that the scheme was not notifiable.

3.7 *Q9. Do you agree that the proposed new rules, as described above, should also apply to DASVOIT?*

A9. Yes, in principle.

4 Dealing with promoters who sell schemes that do not work

4.1 *Q11. Do the conditions for issuing earlier stop notices achieve a sensible balance between ensuring appropriate safeguards are in place, whilst ensuring that HMRC is able to promptly tackle schemes that are destined to fail for the benefit of taxpayers? If not, how could they be better targeted to achieve this balance?*

A11A. The proposed change in the conditions attaching to the issue of a stop notice are very significant. The replacement of the requirement for both a final defeat of a scheme in litigation and the subsequent issue of a follower notice with the requirement for there being reasonable suspicions on the part of HMRC looks more like the scrapping than the lowering of the bar and more like the discarding than the amending of the safeguards.

We appreciate that the existing provisions facilitate significant tactical delays and therefore require amendment but we are concerned as a matter of principle with a provision whose sole criterion is that HMRC suspect (which is precisely what we would expect HMRC to do). We think that it would be helpful to consider the possible involvement in the revised process of the GAAR panel (or some equivalent independent body) so that the issue of a stop notice was not entirely a matter for HMRC. We emphasise that we support the stated objectives of the proposed change but we believe there must be some safeguard against its arbitrary use (regardless of how unlikely that might be).

A11B. We note that the alternative criteria (in section 4.12 of the Consultation) for the issue of a stop notice include the previous issue of a DOTAS SRN to the relevant promoter. We can see the relevance of that in respect of an SRN imposed under the proposals contained in chapter 3 of the Consultation but section 4.12 reads as if it would apply equally to a voluntarily disclosed scheme. That would appear to discourage voluntary disclosure and work against the Consultation objectives.

4.2 *Q13. How can HMRC best ensure that the internal review and appeals process work appropriately for recipients of stop notices?*

A13. We note that draft section 236D(1)(a) does not specify any time period in which the "and has not promoted" part of the condition must have been met. Depending on how tightly the description of arrangements is specified in the notice, that could make it difficult to determine whether that condition was fulfilled. We think that it would be mutually helpful (at both request and appeal stage) for the stop notice itself to specify the time period and for the wording of section 236D(1) to reflect that fact.

C13. We think that the references in the Consultation to the request for the notice to cease to have effect (draft section 236D) as a review/internal review (section 4.14 and in Q13) could mean that the process was mistakenly understood to be the same as the statutory review of a decision as part of the normal appeals process. There are similarities in the two processes but they are not identical.

4.3 *Q14. To what extent would publishing stop notices help inform taxpayers of the risks of entering into that scheme?*

A14. We are doubtful whether the publication of stop notices could be brought to the attention of relevant taxpayers (or any significant proportion of them) in such a manner that it would alert them sufficiently to the risks of using a scheme.

4.4 *Q15. If the notice is appealed (and not subsequently withdrawn) – when would publishing of the details of the promoter best provide taxpayers with the information they need? Should this be after the First-tier Tribunal has reached a decision or later?*

A15. Draft sections 236D and 236E are both written on the basis that a stop notice continues to have effect unless and until any of the following events:

- HMRC issue a decision notice or a withdrawal notice that provides for a stop notice to cease to have such effect
- HMRC fail to issue a decision notice within the prescribed 45-day period
- the tribunal direct that the stop notice shall cease to have effect.

Accordingly, the stop notice would have remained operative from the time of its issue until the time of the First-tier Tribunal's decision. If the tribunal confirmed HMRC's refusal to withdraw the stop notice, that would mean that the stop notice continued to operate unless and until the tribunal's decision was overturned.

It would defeat the objectives of the proposed changes to the legislation if publication of the details of the promoter could be delayed until eventual finality of the position. Conversely, if HMRC could publish the promoter's details immediately upon receipt of the tribunal's confirmation of the refusal to withdraw the stop notice, that would mean in the event of the tribunal decision being overturned that the (irreversible) publication of the promoter's details had been inappropriate.

Identifying any middle ground route between those two extremes is difficult. Our only suggestion is that publicising detail of the promoter should be delayed until the later of:

(a) the deadline (56 days of the date of the decision letter) for the appellant to seek the permission of the First-tier Tribunal to appeal the decision and

(b) in the event (only) of the appellant seeking such permission within that period, the later of:

  (i) the date of that tribunal's refusal to grant such permission and

  (ii) the final decision reached by any higher tribunal or court following the grant of such permission by the First-tier Tribunal (as distinct from the permission of any higher tribunal or court).

This suggestion is made on the understanding that the First-tier Tribunal itself rarely grants such permission. Where such permission is given, that may be indicative of a concern on the part of the tribunal about interpretation or the implications of a binding precedent. In this way, in considering whether to grant permission, the tribunal would be aware that refusal of such permission carried with it publication of the promoter's details.

The intention behind our suggestion would be to provide an early and relatively speedy decision which was made in the tribunal's knowledge that publication turned upon it.

4.5 *Q16. Would the proposal be a suitable way to achieve the government's objective (as set out in para 4.9)? Are there any modifications that would help deliver that objective more effectively?*

A16. Please see our responses in sections 4.1 to 4.5 above.

4.6 *Q17. Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposal?*

A17. Please see our response in section 4.5 above.

5 Dealing with promoters who seek to sidestep the POTAS Regime

5.1 *Q18. Are the proposals to deal with promoters who hide behind other business structures/entities or individuals appropriately targeted?*

5.2 *Q19. Does the opportunity to comment on the proposed terms of the conduct notice continue to provide an appropriate safeguard?*

5.3 *Q20. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?*

5.4 *Q21. Do the proposed changes achieve an appropriate balance between providing a clear window for those in receipt of a conduct notice and the need to ensure that promoters cannot continue to manipulate the rules to prevent HMRC taking action against them?*

5.5 *Q22. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?*

5.6 *Q23. Are the proposed updates to the POTAS threshold conditions to include further DOTAS failures proportionate?*

5.7 *Q24. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?*

5.8 A18-A24. Overall, we regard the Chapter 5 proposals as appropriate.

6 Penalties for those who enable tax avoidance schemes that fail

6.1 *Q25. Do you agree that this change would enable HMRC to engage with potential enablers and get the required information from them to determine whether an enablers penalty is appropriate?*

A25. If the revised legislation worked as described, that would appear to be the case.

6.2 *Q26. Where an enabler receives a notice from HMRC seeking information on other enablers in the avoidance chain how readily would the recipient have that information? Would it cause any problems for the recipient of the information notice?*

A26. We anticipate that matters might be structured to deny enablers access to detail of other enablers in order to defeat the objective of this proposed change.

6.3 *Q27. Do you agree that penalties should be raised in all cases once there is a final judicial ruling confirming that the scheme is abusive avoidance?*

A27. There is an obvious asymmetry in the current legislation. The 50% threshold test involves a comparison between successful defeats and known scheme usage. As explained in section 6.14 of the Consultation, that asymmetry can be used to frustrate the assessment of penalties.

Under the proposed change, HMRC would only need to have achieved a single final judicial ruling. New paragraph 21(2A) appears to mean that such a single final judicial ruling in favour of HMRC could be an outlier.

There could be a greater number of final judicial rulings (for example at First-tier Tribunal) in respect of the same scheme which had not been decided in favour of HMRC. In that situation, paragraph 21(2A) would be replacing one asymmetry with another. If a single final judicial ruling is to be the foundation for enabler penalties, we think that consideration should be given to that only applying if:

- Either there was no contrary final judicial decision
- Or the single final judicial ruling was by a higher tribunal or court than any of the contrary final judicial decisions.

We emphasise that we support the stated objectives of introducing an alternative to the threshold condition but we believe there should be some safeguard to prevent reliance on a single final judicial ruling if that particular decision ran against the tide of decisions. Given that all the decisions would necessarily relate to the same arrangement, we would hope that the lead case procedure could be used to ensure that there was not more than a single final judicial ruling in respect of any arrangement.

6.4 *Q28.To what extent do the proposed tiered threshold percentages provide a suitable balance between ensuring that penalties can be issued to enablers promptly while providing sufficient time for enough 'defeats' to confirm that the scheme is likely to fail?*

A28. We think that the introduction of the tiered 'number or percentage of relevant defeats' does provide such a suitable balance.

6.5 *Q29. To what extent do the conditions in 6.21 provide a suitable threshold for naming enablers of tax avoidance schemes who have received penalties if the addition threshold in 6.22 is removed (in order to ensure that HMRC can advise taxpayers of that enabler's penalty position)?*

A29. The conditions in 6.21 would appear to provide a suitable threshold.

6.6 *Q31. What factors should the government consider in determining whether it would be appropriate to apply these measures from the introduction of the penalty regime in 2017?*

A31. The suggestion that the introduction of the revised proposals might be back-dated to 17 November 2017 is supported in the Consultation by the assertion that the arrangements in question would be clearly abusive. That is very likely the case and there might well be little sympathy for any enablers who incurred penalties as a result of retrospective legislation but there are important principles here (no retrospection and the importance of the rule of law) which must be considered. In common with other professional bodies, we tend to be supportive in our comments on anti-avoidance provisions but we think that the integrity of the tax system depends on adherence to such fundamental principles. For that reason only, we would oppose the back-dating of any changes.

7 Maintaining the General Anti Abuse Rule

7.1 *Q32.Do the proposed changes to the legislation make it sufficiently clear as to how the GAAR would apply to partnerships?*

7.2 *Q33. To what extent are the existing safeguards within the GAAR suitable for cases involving a partnership, and for a responsible partner?*

7.3 *Q34. To what extent would the existing procedural safeguards that apply to this regime continue to provide an appropriate amount of internal scrutiny to any future use of these powers if changed under these proposals?*

7.4 *Q35. Are there any additional amendments that are required to the draft legislation in respect of partnerships to ensure the changes are effective?*

7.5 A32-A35. On the understanding that the proposed provisions would only apply where a partnership return was made on the basis that a particular tax advantage arises (or might arise) to a partner from the arrangements in question, they would appear to be appropriate. That would mean that they would not be invoked if the arrangements in question were made by an individual partner in such a manner that they had no effect on the partnership return.

8 Contact details

8.1 We would be pleased to join in any discussion relating to this consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Will Silsby on 07970 655813 or wsilsby@att.org.uk.

The Association of Taxation Technicians

9 Note

9.1 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 more than 9,000 members and Fellows together with over 6,000 students. Members and Fellows use the practising title of 'Taxation Technician' or ‘Taxation Technician (Fellow)’ and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.