



30 Monck Street
London
SW1P 2AP

T: 020 7340 0551
E: info@att.org.uk
W: www.att.org.uk

TOUGHER CONSEQUENCES FOR 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 *Tougher consequences for promoters of tax avoidance*¹ ('the Consultation') issued on 27 April 2023.
- 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 18 May 2023. 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 The Consultation seeks comments on two proposals:
 - to include a new criminal offence for promoters of tax avoidance who fail to comply with a HMRC notice to stop promoting an avoidance scheme; and
 - to expedite the disqualification of directors of companies promoting tax avoidance.
- 1.5 In section 2 of this response, we offer some wider observations on the proposals before dealing with the specific aspects of the Consultation in sections 3: A criminal offence for promoters for failing to comply with a Stop Notice, and section 4: Expediting the disqualification of directors of companies involved in tax avoidance.

¹<https://www.gov.uk/government/consultations/consultation-tougher-consequences-for-promoters-of-tax-avoidance>

2 Wider observations

- 2.1 The Introduction to the Consultation summarises the progress made to date in tackling marketed tax avoidance and contextually places the proposed new measures within the current administrative framework.
- 2.2 The ATT agrees that there is no place in our society for those involved in the creation, promotion, and sale tax avoidance schemes that do not work, within the letter or spirit of the law, and supports the Government's work in deterring, disrupting and otherwise frustrating promoters of tax avoidance. However, one caveat we would place on this is that the powers, sanctions, and safeguards must be appropriate and proportionate.
- 2.3 It is essential also to see this Consultation in the wider context of the Government's commitment to raise standards in the tax advice market generally. Many of the issues surrounding the promotion and marketing of tax avoidance schemes (egregious tax planning) would not arise (or at the very least could be countered more swiftly and effectively) if the provision of all tax services in the United Kingdom was subject to a common system of professional regulation. As long as activities relating to taxation can be undertaken by anyone who chooses to do so and without any effective regulation, there will be the opportunity for those engaged in promoting tax avoidance activities to do so with scant regard for the effect on the UK Exchequer or consumer protection.
- 2.4 We therefore look forward to the promised publication of HMRC's wider consultation on "options to improve the wider regulatory framework that supports standards in tax advice in consultation with stakeholders and in a way that fulfils the three criteria of clarity, transparency and enforcement."²
- 2.5 The comments within the Forward to the Consultation by the Financial Secretary to the Treasury that "these proposals do not target legitimate tax advisers." and that at 1.5 "promoters are rarely members of professional bodies..." are a welcome acknowledgement that these promoters are often unaffiliated to professional bodies and are thus acting without restriction or risk of sanction.
- 2.6 We are also pleased to note at 1.14 that "the government recognises that most tax advisers adhere to high professional standards and are an important source of support for taxpayers. The new proposals outlined in this document are not aimed at professionals who help taxpayers fulfil their obligations to pay the right amount of tax at the right time, including those who support taxpayers to get out of avoidance and pay the tax they owe."
- 2.7 ATT members are held accountable through our Professional Rules and Practice Guidelines. These rules require our members to maintain high compliance standards of competency, integrity, and professional behaviour.
- 2.8 The Professional Conduct in Relation to Taxation (PCRT)³ was prepared jointly by seven professional bodies and associations, including the ATT, and sets out the Fundamental Principles and Standards for Tax Planning which all members are expected to observe. Compliance with PCRT is mandatory and where there is a question over a member's conduct and/or professional behaviour, their observance of and adherence with the PCRT will be highly influential in the action taken.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037174/Raising_standards_in_the_tax_advice_market_-_professional_indemnity_insurance_and_defining_tax_advice_-_summary_of_responses.pdf

³ <https://www.att.org.uk/professional-standards/professional-conduct-relation-taxation#>

Formal complaints are dealt with by the Taxation Disciplinary Board, which was established as an independent Taxation Disciplinary Scheme, to manage complaints made regarding the professional conduct of members and students of the Association of Taxation Technicians and Chartered Institute of Taxation.

3 A criminal offence for promoters for failing to comply with a Stop Notice

- 3.1 Stop Notices were most recently amended in Finance Act 2021, following consultation on the draft technical guidance *Tackling the promoters of tax avoidance*⁴ issued on 23 March 2021. The intention was that the legislation would stop promoters from selling schemes that HMRC suspected did not work, reduce the number of clients buying into such schemes, and reduce the risk of taxpayers continuing to use a scheme for multiple tax years and potentially ending up with larger tax bills if the scheme was ultimately found not to work.
- 3.2 It was accepted within the published guidance that the statutory provisions would give HMRC the power to issue Stop Notices relatively early in the enquiry process, and that in some cases, HMRC may have seen only limited information and documents relating to a scheme at the time it issued a notice.
- 3.3 The Stop Notice was designed to take immediate effect with significant financial penalties being imposed for the failure to adhere to it – the level of the financial penalty is indicated at para 2.10 of the Consultation.
- 3.4 However, some promoters may still not be deterred by the financial penalties for failing to comply with a Stop Notice. The Government therefore wishes to strengthen the consequences for those who continue to promote a tax avoidance scheme subject to a Stop Notice more severe by creating a ‘strict liability’ criminal offence which would both reinforce the importance of the Stop Notice and act as a strong deterrent against non-compliance.
- 3.5 The ATT supports actions aimed at any persistent and determined group of promoters of tax avoidance who seek to exploit every opportunity to profit by attempting to sidestep the rules. The question we raise is whether a strict liability offence will be sufficient to deter the ‘whole’ of this group or whether there will be some that remain undeterred by the threat of criminal actions.
- 3.6 We also have concerns that the safeguards initially designed to support a civil penalty have not been strengthened to take account of the proposed ‘strict liability’ criminal offence, potentially leaving some exposed to a criminal record with little recourse. This is explored further in our response to question 5 below.
- 3.7 **Q1: Do you agree that focusing a criminal offence on the continued promotion of a scheme covered by a Stop Notice will help to deter promoters?**
- 3.8 Focusing a criminal offence on the **continued** promotion of a scheme covered by a Stop Notice may well help to deter promoters, but for the reasons stated below, we have reservations that it will have the jurisdictional reach necessary to deter all promoters.
- 3.9 We understand from our roundtable discussion with HMRC and the Consultation, that the number of promoters who continue to create, promote and sell tax avoidance schemes is around 20 to 30

⁴ <https://www.gov.uk/government/publications/tackling-promoters-of-tax-avoidance-draft-guidance>

organisations, and that whilst this figure has remained reasonably constant over the years, new promoters have entered the marketplace whilst others have chosen to leave – potentially deterred by the existing civil legislative powers and penalties. We understand that of those who remain, some are based offshore and hide behind complex corporate structures. It would be worthwhile understanding how many of the promoters fall into this category of offshore entities, as these will undoubtedly be the more difficult to prevent and deter.

- 3.10 Clearly several promoters are already choosing to leave the marketplace and are no longer promoting tax avoidance schemes, presumably as noted above, deterred by the existing civil financial sanctions. That would suggest that these powers and penalties are sufficient to discourage several organisations from engaging in the promotion of tax avoidance schemes. However, are these deterred promoters onshore promoters (for whom the sanctions can easily be enforced) or both onshore and offshore promoters?
- 3.11 The jurisdiction in which any offshore promoter is based may mean that a criminal sanction would have no more impact in discouraging or preventing the promoter from continuing to exploit UK taxpayers than the current financial penalties, due to a lack of perceived or actual ability to enforce the criminal penalty.
- 3.12 We have seen the response from the Chartered Institute of Taxation and agree that where an offshore promoter uses entities based in the UK to facilitate the promotion and marketing of their schemes, the UK entities should also be made criminally liable (in a similar way that UK entities have been made liable to penalties for facilitating tax avoidance by offshore promoters by the provisions introduced in Finance Act 2022). This would increase the deterrent effect and make it more difficult for promoters based offshore to promote their products to the UK market.
- 3.13 ***Question 2: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a comprehensive deterrent for promoters?***
- 3.14 For the reasons stated above, we do not agree that the twofold approach of civil penalties and a criminal offence will provide a 'comprehensive' deterrent for promoters.
- 3.15 The Consultation states at 1.4 that “some promoters have left or have significantly reduced their activity in the market while new promoters have entered the market; this is largely the reason why the numbers have been broadly the same over the last few years ...”. This would indicate that the existing civil sanctions have had a positive impact on disrupting and frustrating some promoters to the extent that they have chosen to leave the market, but the fact that new promoters are still entering the market would suggest that either the rewards still outweigh the deterrents or that the sanctions are not being sufficiently well-known to dissuade new entrants. It would therefore be interesting to understand the make-up of new entrants and whether these are onshore or offshore promoters and, if offshore, where they are based.
- 3.16 The ability to enforce a criminal penalty in their home country will presumably be the main determinant for new offshore entrants in whether to continue with the decision to promotion of tax-avoidance schemes. If there is no ability to enforce the penalty because there are not the necessary reciprocal agreements with that jurisdiction, then this is unlikely to discourage those persistent promoters who still see the UK market as a place to exploit.

- 3.17 It is therefore essential that HMRC continue to promote to taxpayers the dangers of engaging with promoters of tax avoidance schemes, and what those schemes might look like, using all possible media options from traditional advertising in appropriate outlets, to the use of social media.
- 3.18 It is encouraging to learn at 1.2 that “the estimated tax gap arising from marketed avoidance has reduced from an estimated £1.5 billion in the tax year 2005 to 2006 to £0.4 billion in the tax year 2020 to 2021.” Promoters of tax avoidance schemes remain in this market space because it is financially worthwhile for them to do so. It is therefore imperative that the threat of financial sanctions remains present if the activities of promoters are to be disturbed and frustrated.
- 3.19 Where promoters have a network of related businesses, controlled directly or indirectly, which engage in promoting their avoidance schemes, we fully support that each entity within the ‘chain’ should be accountable for their actions. As described in 1.7, “there is a range of offences which might be committed by those who promote tax avoidance schemes or advise on their use. These can include tax specific offences such as cheating the public revenue or the fraudulent evasion of income tax or VAT, as well as general offences such as the offence of fraud or breaches of laws intended to protect consumers from unfair commercial practices. It is also an offence to attempt these offences, conspire to commit these offences, or to aid, abet, counsel, or procure, these offences.” The ATT fully supports HMRC’s use of sanctions to deter, discourage and prevent the promotion and enabling of tax avoidance schemes.
- 3.20 Given the relatively small number of promoter organisations (20 to 30), HMRC should use its limited resources to target and frustrate the actions of each of these organisations individually, tailoring the intervention necessary to deter their actions and activities.
- 3.21 ***Q3: In the circumstances set out in the example provided, as Mr A is significantly influencing the continued promotion activity, do you agree that Mr A is in scope of the criminal offence?***
- Yes – we agree that Mr A is significantly influencing the continued promotion activity and agree that Mr A should be in scope of the criminal offence.
- 3.22 ***Q4: Do you agree that these other obligations, where they do not relate to continued promotion, should not be subject to the criminal offence?***
- Yes - we agree that these other obligations, where they do not relate to continued promotion, should not be subject to the criminal offence.
- 3.23 ***Q5: Do you agree that these safeguards provide the right level of protection for those who may face potential criminal prosecution?***
- 3.24 Whilst the Consultation at para 2.25 “recognises it is important that the right balance is struck between HMRC having an effective criminal deterrent and ensuring that robust legal safeguards are in place” and appreciates the design principles that should be incorporated in any safeguards, it is disappointing that there are no proposed additional safeguards over and above those that are already in place for a civil penalty.
- 3.25 We consider, given the severity of a criminal conviction, that the opportunity should have been taken to review the POTAS legislation in its entirety and strengthen the safeguards around the use of Stop Notices by building in independent oversight and operational transparency.
- 3.26 We support the need to deter the small yet persistent group of promoters still in the market, but we have concerns that the proposed strict liability offence could result in a promoter being convicted of a

criminal offence even where ultimately the court system could prove that there was no unlawful tax avoidance.

3.27 We appreciate the comments at 2.8 that:

- “the person receiving the Stop Notice can make a request to the authorised officer for it to be withdrawn”
- “the authorised officer must consider the request and decide whether or not to withdraw the notice.”
- “the person has the right to appeal that decision to the Tax Tribunal.”

The taxpayer can then make a request for a Stop Notice to be suspended. However, all the decisions prior to an appeal to the Tax Tribunal are made by the authorised officer responsible for the initial issue of the Stop Notice. There is no additional internal review, segregation of duty or oversight which would demonstrate fairness, impartiality and transparency in the review and decision-making process.

3.28 If the Tax Tribunal agree to a suspension of a Stop Notice, it is unclear at what stage and date the suspension takes effect. Is it that the suspension is applied at the time that the Tribunal gives its decision? Or is it some earlier date? Is it possible that a promoter could be issued with a Stop Notice, continue to promote the scheme (in default of the Stop Notice), appeal against the Stop Notice to the Tax Tribunals and successfully obtain a suspension to the Stop Notice but still have been exposed to a suspension during the period from receiving the Stop Notice to obtaining the Tax Tribunal’s agreement? The Consultation would seem to say yes.

3.29 The Consultation states at 2.17 that “the promoter would have the opportunity to argue that they had a reasonable excuse for not complying with the Stop Notice and present evidence to HMRC or the courts to support this. However, mirroring the existing civil regime, certain reasons would not constitute a reasonable excuse. For example, an open appeal against the Stop Notice would not constitute a reasonable excuse. Similarly, ongoing litigation of the tax avoidance scheme would also not be regarded as a reasonable excuse.” This again would support the position that a promoter could receive a criminal record simply for not stopping to promote a tax scheme (i.e., not complying with the Stop Notice) even if ultimately it is decided in the courts to be completely lawful. Given that the Stop Notice can be appealed against via the Tax Tribunal, it would seem prudent to wait until after the court judgement is made on any appeal before seeking enforcement of any non-compliance with the Stop Notice.

3.30 , The above scenario seems to go against the principles embedded in the HMRC Charter Standard of “treating you fairly.” We would encourage the Government to consider incorporating the ability for any criminal record to be retracted or rescinded should the Stop Notice be overturned upon appeal, or the tax scheme upheld in the courts to be lawful.

4 Expediting the disqualification of directors of companies involved in tax avoidance

Q6: Do you agree that allowing HMRC to consider and bring disqualification proceedings against directors and those who control or exercise influence over a company involved in promoting tax avoidance will help deter and tackle tax avoidance?

Q7: What other factors should HMRC take into account when considering a director disqualification?

Q8: Do you have any suggestions for ensuring these proposals deal effectively with those who directly or indirectly control or exercise influence over a company, for example shadow directors?

Q9: Should undertakings form part of HMRC's approach to director disqualification?

Q10: Do you consider the current sanctions for breaching a disqualification or undertaking are sufficient for tax avoidance-related disqualifications?

Q11: Do you consider the current safeguards outlined above are sufficient and provide adequate protections for directors? If not, what additional safeguards could be introduced?

4.1 The Government wants to strengthen HMRC's ability to tackle the remaining group of promoters still in the market who persist in promoting tax avoidance schemes. It proposes to do this by expediting the disqualification of directors and other individuals who control or exercise influence over a company that engages in the promotion of tax avoidance.

4.2 The proposals are that HMRC should be able to initiate director disqualification proceedings against promoters of tax avoidance in the following circumstances:

- disqualification following a winding-up in the public interest
- disqualification of a director of a 'live' company

and that under both proposals, HMRC would need to provide relevant and appropriate evidence to the court when making applications for disqualification, as is currently the case for the Insolvency Service (INSS).

4.3 It is anticipated that with these provisions HMRC would be able to act more quickly to disqualify directors of companies involved in promoting tax avoidance, removing them from the avoidance market and preventing them from setting up new companies. Moving quickly should directly disrupt the business models of promoters who use stooge and intermediate shadow directors and, in turn, may deter other individuals from becoming directors of companies involved in promoting tax avoidance.

4.4 We can see from the example at 3.11 that the process of obtaining a disqualification can be frustrated and held up by both the involvement of INSS and the taxpayer and as a result there would be benefits of moving more quickly to disqualify directors, 'stooges' and intermediate shadow directors who operate companies involved in unacceptable tax avoidance practices.

4.5 Our members are unlikely to be involved in providing advice to taxpayers faced with a disqualification as this would fall outside the usual advice provided by a tax adviser and is more likely to be undertaken by solicitors and barristers trained in this very technical area.

4.6 However, whilst we do not feel qualified to provide member-based comments on these proposals we would make a couple of general observations.

4.7 We appreciate that at para 3.14 "HMRC would need to provide relevant and appropriate evidence to the court when making applications for disqualification as is currently the case for INSS. The director would have the opportunity to respond to HMRC's case and defend themselves during the hearing. The court would then make the decision whether to grant the order." The Consultation does not explain what additional training is to be given to compliance officers to ensure that the information and documentation gathered for the courts is "relevant and appropriate evidence." Whilst it is welcomed that it is the 'totality' of the evidence that would be used to determine which cases were considered for disqualification, some of the

evidence referred to in the Consultation on its own (correspondence with other promoters/enablers, previous non-compliant behaviour) would seem insufficient to support such severe actions.

- 4.8 It is welcomed that the Consultation recognises at 3.36 that “disqualification is a serious outcome which often has long-lasting financial consequences for individuals. It is important that the right balance is struck between enabling HMRC to apply for the disqualification of directors of companies involved in promoting avoidance and ensuring that robust legal safeguards are in place which do not catch those who have acted appropriately.” We consider that given the potential seriousness of a disqualification, the Government should look at ways to further educate directors (and would be directors) to fully understand their fiduciary duties and what checks they should undertake on entities looking to engage them as directors. This could be done in conjunction with other Government departments such as the Department for Business and Trade and Companies House where directors are bound to have significant interaction.

5 Contact details

- 5.1 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 atttechnical@att.org.uk.

The Association of Taxation Technicians

6 Note

- 6.1 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 9,500 members and Fellows together with over 5,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.