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ENHANCING HMRC'S POWERS: TACKLING TAX ADVISERS FACILITATING NON-COMPLIANCE

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 on 'Enhancing HMRC's powers: tackling tax advisers facilitating non-compliance '[1] (the Consultation).

1.2 The primary charitable objective of the ATT is to promote the education and 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 acknowledge that the tax system is built on the principles of 'fairness, trust and compliance', but we have gone further in developing our own ten principles for the tax system[2] which we employ when commenting on and evaluating tax policy and processes. Where appropriate our response draws on these principles.

1.4 We welcome that the Consultation is taking place at Stage 1 of the consultation process and appreciate the engagement by HMRC through two workshops and a roundtable discussion to further explore the reforming opportunities. Should the decision be taken to progress any of the proposals further, we look forward to the opportunity provided within Stage 2, to consider the options and comment on the detailed policy design.

1.5 For a Consultation looking at strengthening the powers and sanctions against professional tax advisers who facilitate non-compliance in their client's tax affairs, and whose actions contribute to the tax gap or otherwise harms the tax system, we consider that a six week consultation period was insufficient to allow full

[1] Enhancing HMRC's powers: tackling tax advisers facilitating non-compliance - GOV.UK
[2] The ATT's principles for the tax system | The Association of Taxation Technicians

consideration of the impact and potential ramifications of the Consultation proposals, especially as this consultation period included both Easter and the May Bank Holiday.

1.6 In this response, we have provided an Executive Summary in Section 2, made some General Observations in Section 3, followed by detailed responses to the Consultation questions in Sections 4-9.

2 Executive Summary

2.1 Exploring the Proposals

The fact that there remain 'wilfully incompetent' and 'dishonest' tax advisers servicing the tax needs and requirements of some taxpayers causing harm to the tax system would suggest that HMRC could still do more to tackle both these groups of tax advisers. There is already a significant body of law available to HMRC to tackle both incompetent and dishonest tax advisers. We would urge HMRC to fully assess and utilise these provisions before rushing to add more legislation to the statute.

2.2 Enhancing powers to enable HMRC to investigate and request information from tax advisers

We do not agree that HMRC should be granted easier access to information from tax advisers based solely on a 'reasonable suspicion' that the adviser has facilitated an inaccuracy in a taxpayer's document or return. Our concern lies primarily with the vague and potentially subjective definition of 'reasonable suspicion', but we also have concerns about the ambiguity around what constitutes 'facilitation of an inaccuracy,' and the risk that some compliance officers may use this lower threshold to justify unwarranted inquiries into unco-operative tax advisers.

2.3 Enhancing financial penalties for tax advisers who cause harm to the tax system

We do not have statistical data to comment on the adequacy of the current penalties when considering whether they are a deterrent against harm to the tax system by tax advisers. However, we consider that the current financial penalty for dishonest conduct (ranging from £5,000 to £50,000) could be seen by some unscrupulous tax advisers as being an acceptable cost of doing business and built into their financial modelling. We therefore support the review of the penalty provisions.

2.4 Broadening disclosure of HMRC's concerns about tax advisers to professional bodies

We support efforts that could make it easier and faster for both HMRC and the professional bodies to respond to and address sub-standard behaviour and work by tax advisers at an earlier stage (even where this does not constitute misconduct, but still causes harm to the tax system), which could reduce the level of future damage being caused by some tax advisers.

2.5 Broadening the scope of publication of tax adviser details when they are the subject of an HMRC sanction

We believe that it is in the public interest for HMRC to publish more information about its activities. This could help taxpayers to be better informed about the choice of tax adviser by knowing which tax advisers are subject to sanctions or have had limitations imposed on their ability to act effectively for clients. The procedure for making a publication needs to be robust with adequate safeguards given the potential reputational and commercial ramifications to the tax adviser of having their details published.

3 General Observations

3.1 We are encouraged by the Consultation's recognition that 'most tax advisers in the UK are dedicated professionals who adhere to rigorous standards, helping millions of taxpayers pay the right tax'[3] and that 'competent tax advisers add real value to the UK tax system'[4]. These are comments which we wholeheartedly support and endorse.

3.2 We also welcome the acknowledged need for 'appropriate safeguards that ensure enhanced powers are used appropriately' and that 'changes remain fair, proportionate and lawful'.[5]

3.3 We have concerns that the Consultation is trying to reconcile and address (in one set of enhanced sanctions) the behaviours of two very different types of tax advisers: those who are getting things wrong on behalf of their clients due to not taking reasonable care, and those tax advisers whose behaviour is either dishonest and fraudulent. We appreciate that the actions of both these groups of tax advisers can facilitate a potential loss of revenue to the Exchequer, however, we consider that the behavioural traits of the two groups are so distinct and separate that, without having potentially complex and varied levels, the sanctions and potential burdens on tax advisers could prove to be both disproportionate and unfair.

3.4 We acknowledge that there will always be a need for HMRC to respond robustly to non-compliance in all its guises, however, it is essential that any responses are appropriate, proportionate, fair and thought through.

3.5 We would also encourage the Government to continue to look at ways to simplify the tax system. If the tax system was easier to understand and navigate with fewer 'grey' areas, there would be less opportunities for non-compliance.

4 Exploring the proposals

4.1 Question 1: Do you agree that HMRCs powers to tackle tax advisors who harm the tax system could be more effective?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

4.2 YES (subject to the comments at 4.3 – 4.8 below)

4.3 The fact that there remain 'wilfully incompetent' and 'dishonest' tax advisers servicing the tax needs and requirements of some taxpayers causing harm to the tax system would suggest that HMRC could still do more to tackle both these groups of tax advisers.

4.4 There are already significant deterrents available to HMRC for dealing with 'dishonest' practitioners operating in the tax market, with penalties being able to be charged on tax advisers:

- Who enable defeated tax avoidance[6]

[3] Foreword
[4] Chapter 2: Introduction
[5] Chapter 1: Executive Summary - safeguards
[6] FA(No 2)A 2017 s 65 & Sch 16

- Who enable offshore tax evasion or non-compliance[7]
- Who facilitate avoidance schemes involving non-resident promoters[8]
- Who promote tax avoidance in accordance with the Promoters of Tax Avoidance (POTAS) regime powers[9]
- Where an error in a taxpayer's document is attributable to another person[10]
- As part of the dishonest tax agent regime[11] (Explored further within this Consultation)

4.5 Although not clear from the Consultation, we would have expected HMRC to have already obtained, considered, assessed and evaluated the data on the use and success of each of these penalty deterrents to establish whether or not the existing powers are being used effectively, and highlighted whether there were any gaps in the powers that needed addressing . We would encourage HMRC to share those findings so that interested parties can be better informed.

4.6 We understand that some compliance officers are reluctant to use some of the existing powers fearing that if the sanctions are successful rebutted in the courts, than this will limit and undermine their use and effectiveness in the future. Compliance officers should therefore be adequately trained and supported with relevant guidance to understand exactly when it is appropriate for a particular sanction to be used and be encouraged to do so where applicable. Where more than one sanction is possible, it should be clear both to the compliance officer and the taxpayer which penalty sanction would take preference, thus avoiding doubt and double jeopardy.

4.7 There are also existing means for dealing with those tax advisers who are seen as being 'incompetent'. HMRC will engage with tax advisers where there are concerns that identifiable standards fall below its own Standard for Agents[12]. For those tax advisers who are a member of the seven Professional Conduct in Relation to Taxation (PCRT)[13] professional bodies[14], there are further requirements to meet the PCRT principles and maintain the standards of behaviour in their tax work or face potential disciplinary actions.

4.8 A significant concern that we have with the enhanced proposals is that they are attempting to address and reconcile two quite different tax adviser behaviours – incompetency and dishonesty. It is only right that those who act dishonestly and actively seek to create harm in the tax system are treated robustly and removed from the tax market. This cohort undermine and damage trust in the tax profession and harm their clients and the public finances. However, those who are incompetent would first benefit from additional training, guidance, and possible mentoring to improve competency and standards.

[7] S 162 & FA 2016 Sch 20
[8] FA 2022 Sch 13
[9] FA 2014 Part 5 & Schs 34 to 36, FA 2015 Schedule 19 and FA 2017 s24
[10] FA 2007 Para 1A Sch 24
[11] FA 2012 Sch 38
[12] HMRC standard for agents - GOV.UK
[13] Professional Conduct in Relation to Taxation | The Association of Taxation Technicians
[14] PCRT is comprised of the following professional bodies: Association of Accounting Technicians (AAT) • Association of Chartered Certified Accountants (ACCA) • Association of Taxation Technicians (ATT) • Chartered Institute of Taxation (CIOT) • Institute of Chartered Accountants in England and Wales (ICAEW), • Institute of Chartered Accountants of Scotland (ICAS) • Society of Trust and Estate Practitioners (STEP

4.9 Question 2: Do you agree with the government's aim that any enhanced powers should allow for swift, effective, and proportionate action in cases of tax adviser activities that result in harm to the tax system and facilitate non-compliance?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

4.10 MAYBE – subject to powers remaining fair, reasonable, proportionate and in accordance with the law and HMRC's powers and safeguards principles.

4.11 The Consultation does not fully explain why the use of the significant current powers referred to at 4.4 are failing to produce the desired 'swift and effective' action. If HMRC shared its understanding and concerns of where the delays are, we would be in a better position to comment.

4.12 If what is blocking the 'swift and effective' action is delays within the tribunal system, then we do not consider this to be an acceptable reason for withdrawing the appeal safeguards as outlined in the Consultation. A possible solution (if this is a concern) could be for HMRC to work with the tribunal system to implement a 'fast track' system to speed-up actions requiring judicial overview within these powers.

4.13 Question 3: What actions that lead to harm being done to the tax system should be within scope of the proposals outlined within this consultation? Please give reasons for your answer.

4.14 We consider HMRC is best positioned to understand the specific actions of tax advisers that harm the tax system. If HMRC shared these insights, we would be better placed to assess whether such actions should fall within the scope of the proposals.

4.15 It is imperative that the proposals and sanctions are specific to the actions of the wilfully incompetent and dishonest tax advisers to avoid disproportionate burdens being placed on the wider tax adviser community.

4.16 Question 4: Do you have any other suggestions for how HMRC might enhance its powers to tackle non-compliance facilitated by tax advisers? Please give reasons for your answer.

4.17 We consider that the Government should continue to explore a regulatory framework around the mandatory registration of tax advisers with a recognised professional body, as explored in the 2023 raising standards in the tax advice market – strengthening the regulatory framework and improving registration consultation[15]. Such a regulatory framework could be designed to assist with dealing with the minority of people responsible for unprofessional behaviour who are at the heart of poor standards and public mistrust and might otherwise remain outside effective regulation. This could have a positive effect on tackling facilitated non-compliance.

4.18 However, we recognise that neither regulation nor this consultation's proposals will address those tax advisers who are based and operate offshore in jurisdictions where the UK has no agreement for the provision of assistance in enforcing either civil or criminal sanctions.

[15] Raising standards in the tax advice market – strengthening the regulatory framework and improving registration - GOV.UK

5 Scope of the proposals

5.1 Question 5: Do you have any comments on the proposed scope?

5.2 YES.

5.3 In our consultation response to 'Raising standards in the tax advice market – strengthening the regulatory framework and improving registration'[16], the majority of our members (90% of respondents) were in favour of regulation applying to all tax advisers not just those who interacted with HMRC.

5.4 We therefore support the current Consultation aim 'that tax advisers who act by way of business, whether in the UK or overseas, and who provide tax advice or services in relation to UK tax, are in scope of the proposals'. We agree that the 'act by way of business' definition should ensure that organisations which do not operate for profit, such as charities, and people acting in a voluntary capacity are kept outside of the scope.

5.5 It is our view that limiting the 'out of scope' groups to an absolute minimum is necessary and important if the policy objectives are to be met, otherwise some unscrupulous tax advisers may seek to claim that they fall within one of those 'out of scope' groups.

5.6 We note that the Consultation does not consider the definitions of 'tax advice' and 'tax services' when considering what the scope should be, but we believe that these need to be considered if advisers are to be clear whether they fail within the scope or not. The definitions should be widely drawn, and principles based so that they can be built on over time. Without definitions it is possible for advisers to argue that they do not fall within the scope because they are not providing tax advice or tax services, in the way in which they interpret those definition. The definitions would need to be enforced actively to demonstrate that all tax advice and services comes within the definitions unless specifically excluded. For the avoidance of doubt, we consider that the definitions must include:

- The activities of tax avoidance boutiques
- Umbrella companies operating disguised remuneration schemes
- Advice embedded in software
- Tax advice embedded in wider advice

5.7 Whilst recognising that creating a legislative definition of 'tax practitioner' is complex, and ascribing descriptions and classifications of 'tax advice and tax services' complicated, we can see that having these definitions in legislation would be beneficial to taxpayers, agents and HMRC, and could ensure that there is no confusion or misunderstanding in the scope of what is caught by any enhanced legislation.

5.8 The challenge here would be to create legal definitions that are broad enough to capture all the necessary permutations without being too prescriptive, whilst at the same time being specific enough as to clearly articulate what is being defined.

5.9 In an earlier consultation, the Government indicated that it would undertake further consultation on the proposed legislative definitions. If that remains the case, we will welcome the opportunity to contribute to any future discussions.

5.10 We agree that the proposals should apply to tax advisers regardless of whether they are members of professional bodies, or how they define their activities. We recognised in our response to the consultation on 'raising standards in the tax advice market' that there are situations where an individual or a firm may be subject to more than one regulatory regime including possibly regimes within different professional

[16] 2024 - RESPONSE - condoc - Raising the standards in the tax advice market - Website version.pdf

disciplines - for example auditing, surveying or even what is defined as a reserved activity in law. However, the fact that a person or a firm may be regulated and maintain appropriate CPD for say investment advice, would not confirm their competency to provide tax advice. We therefore welcome that professions such as solicitors, auditors and financial advisers would be in scope of these proposals for any work they do which amounts to tax advice or tax services.

5.11 While we firmly believe that all tax advisers should fall within the scope of the proposed measures, HMRC must give careful consideration to how it approaches advisers who may have offshore connections. It is our understanding that all current known promoters of tax avoidance schemes —estimated to number between 20 and 30— have some element of offshore structuring, and this is part of the reason why dealing with this cohort can be so problematic. If tax advisers who are not actively promoting avoidance schemes choose to establish residency in jurisdictions where UK civil or criminal penalties cannot be enforced, HMRC may face significant challenges in curbing this inappropriate behaviour and reducing the tax gap. Therefore, we advocate for proactive education aimed at discouraging taxpayers from engaging dishonest advisers and promoting a culture of compliance across the profession

5.12 Question 6: Are there any other groups HMRC should consider?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

5.13 YES

5.14 With the growing sophistication and influence of Generative Artificial Intelligence ('Gen AI') embedded within software in providing tax advice, thought should be given as to whether tax software providers should also now be within the scope.

6 Enhancing powers to enable HMRC to investigate and request information from tax advisers

6.1 Question 7: Do you agree that it should be easier for HMRC to obtain information from tax advisers where HMRC reasonably suspects the tax adviser's activity has facilitated an inaccuracy in a taxpayer's document or return.

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

6.2 NO

6.3 The Consultation is proposing to amend the requirement that a tax adviser has behaved 'dishonestly' (before issuing a conduct notice and requesting information in a file access notice) to being able to exercise its powers where HMRC 'reasonably suspects' the tax adviser has 'facilitated an inaccuracy in a taxpayer's document or return'. The Consultation also proposes that a conduct notice and file access notice should be able to be issued at the same time to gather information that would help determine the extent to which a tax practitioner's actions have led to the inaccuracy.

6.4 We do not agree that HMRC should be granted easier access to information from tax advisers based solely on a 'reasonable suspicion' that the adviser has 'facilitated an inaccuracy in a taxpayer's document or return'. Our concern lies primarily with the vague and potentially subjective definition of 'reasonable suspicion,' which we explore further in section 6.6. We are also concerned about the ambiguity around what constitutes 'facilitation of an inaccuracy,' and the risk that some compliance officers may use this lower threshold to justify unwarranted inquiries—particularly where a tax adviser is perceived as difficult or uncooperative.

6.5 Question 8: Do you believe that 'reasonable suspicion' is the right threshold to issue a conduct and information notice? Are there any alternatives HMRC should consider?

- Yes
- no
- maybe
- don't know

Please give reasons for your answer.

6.6 NO

6.7 The Consultation is looking to lower the threshold for issuing a conduct and information notice under schedule 38 Finance Act 2012 from proving 'dishonesty' to merely having a 'reasonable suspicion'.

6.8 Whilst we understand the concerns within the Consultation that obtaining information necessary to prove that a tax adviser has acted dishonestly can be difficult, we do not support the position where HMRC can request information from tax advisers merely on a 'reasonable suspicion'.

6.9 The Consultation does not provide for a definition of 'reasonable suspicion' which could be written into legislation. Under the proposals, HMRC would be able to issue both a conduct notice and an information notice ('file access notice') together without tribunal approval. Therefore, the first instance in which a tax adviser can question the actions of a compliance officer is at an appeal hearing against a file access notice. We consider this to be too late in the proceedings.

6.10 Any intrusion or intervention into a tax adviser's affairs could be costly and time consuming for both the tax adviser and HMRC. It is only right that these interventions are undertaken on the back of concrete data and information and not on a 'reasonable suspicion'.

6.11 The Consultation provides no indication that a compliance officer or HMRC would face any consequences for issuing a file access notice that was later found to have been incorrect or successfully appealed. As a result, there appears to be no meaningful disincentive against issuing such notices, especially if the only outcome of a successful appeal is that the notice is simply set aside.

6.12 Question 9: Do you agree with the proposed changes to the powers to gather information from tax advisers?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

6.13 NO

6.14 The proposed changes to the powers to gather information from tax advisers are extensive and justified on the basis that they would bring the information powers for tax advisers in line with those for taxpayers and third parties found in Schedule 36 Finance Act 2008.

6.15 Whilst we normally support the alignment of powers and safeguards across taxes for taxpayers, we are not in favour of aligning powers and obligations across taxpayers and tax advisers. The Self-Assessment regime was introduced primarily to modernise and streamline the process of collecting income tax from individuals and businesses. Self-Assessment shifted the responsibility to taxpayers to declare their income/gains and expenses, and calculate the tax they owe, albeit that they could be supported in their obligations by a tax adviser. It is these primary taxpayer obligations which mean that we do not consider that information powers of taxpayers and tax agents should be aligned. We would not want to see a legislative creep whereby there was a deemed 'secondary' responsibility being placed on tax advisers for taxpayers' obligations.

6.16 To expand on the above point, a tax adviser may prepare a tax return for a client where the tax consequences of a transaction or item of income or expense is 'grey' or uncertain and the legislation is open to interpretation. If the tax adviser prepares and submits the tax return on behalf of a client where there is some ambiguity in the tax treatment of some of the figures, and the client is aware of those ambiguities, then we would want it to be made clear that the proposals are not seeking to penalise the tax adviser in a case where on enquiry the interpretation was proven wrong. Whilst the tax adviser may have prepared and submitted the tax return for the client, it is the client who (by confirming that the return can be submitted) is ultimately taking responsibility that the return as submitted is both complete and correct to the best of their knowledge and belief.

6.17 We are concerned that the proposal to remove safeguards at the same time as lowering the bar to access the sanctions against tax advisers could lead to inconsistent use by compliance officers. It is therefore imperative that the rules and safeguards are applied consistently by all HMRC staff and that there is clear guidance to ensure that some staff don't use one penalty route whilst others use another route.

6.18 Question 10: Do you have any comments about the proposal to remove the safeguard requiring tribunal approval for a file access notice?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

6.19 YES

6.20 Currently HMRC must first determine that the tax adviser has behaved dishonestly and have issued a conduct notice before being able to request information from the tax adviser in a file access notice. It is proposed that the file access notice could be issued without tribunal approval on the basis that there is a reasonable suspicion that the tax adviser has facilitated the inaccuracy in a taxpayers return. For the reasons provided, we believe that HMRC should not be reducing safeguards at a time when proposals for the criteria for issuing notices are being lowered. We consider that without sufficient accountability, the requirement for HMRC to only demonstrate a 'reasonable suspicion' could lead to potentially more appeals being made to the tribunals, albeit at a slightly later stage.

6.21 Question 11: Are any other changes to safeguards needed to ensure Schedule 38 can be used more swiftly and effectively?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

6.22 YES

6.23 There should be some safeguard which would hold HMRC/compliance officers accountable where file access notices are issued and successfully overturned at tribunal. Merely having the notice set aside is not a sufficient outcome. Defending a file access notice could be both stressful and time consuming, taking the tax adviser away from their day-to-day business, and having to focus on crafting the appeal and then dealing with the appeal process.

6.24 We consider that as a minimum, HMRC should be required to meet all of the tax adviser's costs incurred in successfully rebutting a file access notice. There could also be additional financial recompense to compensate for the time, stress, and aggravation of dealing with a 'failed' file access notice. Only stringent accountability, both internally before issue, and externally through the tribunal system, will ensure that compliance officers are fully mindful of the potential detrimental ramifications of their actions on tax advisers when issuing a file access notice.

6.25 Question 12: Are there any unintended consequences of the proposed changes?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

6.26 MAYBE

6.27 The proposed changes would allow HMRC to issue a file access notice where it had a 'reasonable suspicion' that the tax adviser has 'facilitated an inaccuracy in a taxpayer's document or return'. This could potentially have an adverse effect on the cost of securing Professional Indemnity Insurance (PII) where tax advisers have been issued with such notices. This could be the case even if those notices are later proven on appeal to have been incorrect. This is because insurers often take a cautionary approach to risk and merely having had a file access notice served, could raise concerns for the insurer.

6.28 Question 13: Are there additional/alternative ways HMRC should gather information related to tax advisers who cause harm to the tax system?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

6.29 DON'T KNOW

6.30 We are not aware of additional/alternative ways to gathering information from tax advisers and consider that the current system can provide this information. It appears that it is the delays within the tribunal system that are frustrating the ability to 'swiftly' obtain this information, rather than the process itself.

7 Enhancing financial penalties for tax advisers who cause harm to the tax system

7.1 Question 14: Do you believe that the current penalties under Schedule 38 Finance Act 2012, Tax Agents: Dishonest Conduct provide an adequate deterrent against non-compliance that causes harm to the tax system?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

7.2 DON'T KNOW

7.3 In order to assess whether the current penalties under Schedule 38 Finance Act 2012, Tax Agents: Dishonest Conduct provide an adequate deterrent against non-compliance to the tax system by tax advisers, it would

be helpful if HMRC provided some statistical data on how the penalty provisions have been applied to date, with an indication of the average penalty imposed in each case. This would provide the data necessary on which an assessment of the adequacy of the current penalties could be appropriately assessed and evaluated.

7.4 The current financial penalty for dishonest conduct ranges from £5,000 to £50,000. It may be that for high value tax loss cases the maximum penalty of £50,000 could be seen by some unscrupulous tax advisers as being an acceptable cost of doing business and built into their financial modelling.

7.5 Whilst the current penalty range may prove insufficient to deter the actions of some dishonest tax advisers, it might be seen as an appropriate level for those tax advisers who are deemed incompetent. Therefore, if the penalty range is intended to cover both dishonest and incompetent behaviour, there must be sufficient flex in the system to cater for both actions.

7.6 As a general point on penalties, it should also be noted that the Powers Review between 2005 and 2012 concluded that penalties should influence behaviour, be effective and be fair. This concept was considered further in February 2015 when HMRC published 'HMRC Penalties: A Discussion Document'[17] which recognised five broad principles that should underpin any new penalty regime. We agree with those principles and repeat them here:

> 1. The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues.
>
> 2. Penalties should be proportionate to the offence and may take into account past behaviour.
>
> 3. Penalties must be applied fairly, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant.
>
> 4. Penalties must provide a credible threat. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner.
>
> 5. Customers should see a consistent and standardised approach. Variations will be those necessary to take into account customer behaviours and particular taxes.

7.7 Whilst the penalty regime under review here is aimed at tax advisers, the penalty principles are just as relevant when assessing whether the penalty regime meets its desired objectives.

7.8 Question 15: Do you believe that penalties should be introduced for tax advisers who have facilitated non-compliance that causes harm to the tax system?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

7.9 MAYBE

[17] HMRC Penalties: a discussion document

7.10 In principle we support the introduction of penalties for tax advisers who have facilitated non-compliance that causes harm to the tax system. However, the Consultation does not adequately define what is meant by 'facilitates non-compliance', and this would need to be understood before we could fully support the introduction of penalties.

7.11 Any amendments to the current penalty regime would need to be adequately defined with clear and unambiguous guidance provided to tax advisers so that it is understood exactly how and when the sanctions would be applied.

7.12 As explained further at 7.15 we support a penalty regime which would hold the company, firm, or other business responsible for any financial penalty in the first instance, and this is explored further at 7.44 et seq.

7.13 Question 16: Should the government reassess how penalties for tax advisers are determined to enhance deterrence against non-compliance?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

7.14 YES

7.15 We would support changes to the legislation, as proposed in the Consultation, which hold the company, firm, or other business responsible for any financial penalty in the first instance. It is the company, firm or other business that has the professional engagement with the client, albeit that the relationship handling may be with an employee within the tax adviser business. See also our comments at 7.44 et seq.

7.16 Holding the company, firm, or business responsible for any financial penalties is also consistent with other regulatory requirements such as the Anti-Money Laundering provisions.

7.17 Question 17: Which approach do you think will be most effective to reduce tax advisers facilitating non-compliance in their client's returns?

A. a penalty based on the potential revenue lost
B. a penalty based on the tax adviser's fees
C. a penalty based on a business's global turnover
D. other (please specify)

Please give reasons for your answer.

7.18 B

7.19 OPTION A - We oppose any penalty that would be based on the Potential Loss of Revenue (PLR).

7.20 We appreciate that the penalty could be calculated on the PLR caused by the tax adviser's unacceptable actions, and that this would align with the penalty range for taxpayers deliberately submitting an inaccurate document to HMRC in Schedule 24 Finance Act 2007. However, it is only right and fair that a taxpayer penalty is based on the PLR as that was the amount that the taxpayer stood to gain from the actions. By contrast, the only gains made by the tax adviser as a result of the actions is their fee from the taxpayer. The tax adviser's fee could be small in relation to the PLR, and that would not seem like a fair and appropriate basis for a

penalty. Basing the penalty on the PLR where large penalties could be issued, might mean that some tax advisers are no longer able to trade. For these reasons, we are against this option as it would be disproportionate, and against the second of the five broad principles that should underpin any penalty regime (see 7.6).

7.21 OPTION B - We support a penalty based on the tax adviser's fee for providing the advice.

7.22 In supporting this option, we accept that quantifying the penalty could be harder to calculate than in either of options A or C, but we consider this to be the most equitable penalty calculation.

7.23 A basic scenario could be where a taxpayer has paid an unscrupulous tax adviser 30% of a tax saving of say £1,000 based on advice which was either dishonest or grossly incompetent. The tax adviser will have received £300 (either directly from the client or will have deducted it from the total repayment issued) and the taxpayer/client will receive the balance of £700. If the tax saving is proven to have been incorrect, then the taxpayer will be required to repay the entire £1,000 to HMRC. The taxpayer may have recourse against the tax adviser, but this would depend on the advice given and the terms of the engagement and any agreement signed.

7.24 In our scenario outlined at 7.23 above, it is the taxpayer who is the 'victim' of the unscrupulous tax adviser not HMRC. HMRC will have received the full £1,000 back from the taxpayer, albeit that this will not be at the time when it would have been originally due. However, HMRC apply rates of interest that ensure that there is commercial restitution for not having the amounts paid at the correct time, so would not have been adversely affected.

7.25 We recognise that applying a penalty where the tax adviser is only being deprived of the fee that was initially received from the taxpayer may not prove a sufficient deterrent for the tax adviser to cease their actions. We have considered this position further when considering whether there should be a maximum penalty discussed at 7.30 et seq.

7.26 OPTION C - We oppose any penalty that would be based on a business's global turnover.

7.27 Unless the firm is solely involved in dishonest behaviour and assisting all its clients in the facilitation of non-compliance, then a penalty based on its global turnover would be wholly disproportionate, and against the second principle with the five broad principles that should underpin any penalty regime (see 7.6).

7.28 We consider that financial penalties should not be applied with the objective of raising revenues, a point drawn out within the principles underpinning a penalty regime. A penalty based on either options A or C could be seen as revenue raising penalties rather than as a deterrent, being potentially disproportionate to the advantage gained by the tax adviser.

7.29 Question 18: Do you believe there should be a maximum penalty amount?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

7.30 NO

7.31 We are not in favour of quantifying a maximum penalty as in the case of the current financial penalty for dishonest conduct where the maximum is an apparently arbitrary £50,000. We do however think that the way in which the penalty is calculated could create its own maximum, and that is explored further at 7.33

7.32 Question 19: If you believe a maximum penalty should be in place, how do you feel it should be calculated? Please give reasons for your answer.

7.33 As explained at 7.21 et seq. we consider that the most appropriate basis for calculating a penalty should be based on the fees received by the tax adviser for undertaking the work that led to the non-compliance by the taxpayer. In 7.25 we recognised that applying a penalty where the tax adviser is only being deprived of the fee that they initially received from the taxpayer for providing the advice may not prove a sufficient deterrent for the tax adviser to cease their actions. We would therefore support a penalty which is calculated on up to say 150% of the fees received by the tax adviser, reserving the 150% penalty for the most heinous deliberate behaviour. This could ensure that any payment made to HMRC in the form of a penalty (in those cases) could include not only the funds that had originally been received from the taxpayer/client for payment of the work but could also include the payment of some of their own funds. We consider this could be a greater deterrent, as it is unlikely that such penalties could be supported within a business model.

7.34 Question 20: Do you agree the penalty should escalate in stages, based on additional instances of facilitation of non-compliance?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

7.35 No

7.36 The Consultation considers escalation as a supplement to a penalty charge calculated on the potential loss of tax revenue caused by the tax adviser's unacceptable actions. The argument for a penalty based on the potential loss of tax revenue is that this would align these provisions with the penalty range for taxpayers deliberately submitting an inaccurate document to HMRC in Schedule 24 Finance Act 2007.

7.37 We do not support the calculations of penalties for tax advisers based on the potential loss of tax revenue for the reasons provided at 7.20. We are therefore not in support of adding an additional option to escalate the penalty further, for each new instance of non-compliance, up to and potentially over the total of the revenue lost.

7.38 Whilst we understand the concept and reasoning behind escalating penalties for each new instance of non-compliance, we consider that keeping track of 'new' instances of non-compliance could be difficult, for instance, would small changes to a known facilitated non-compliance constitute a 'new' instance or merely an extension of an existing non-compliance? If the penalty escalates for each 'new' instance, how would the escalated penalty be calculated? Would the escalated penalty level remain in place for a set period of time or indefinitely?

7.39 Any changes to penalties based on behaviour should take account of the responses to the current consultation document on the 'Reform of behavioural penalties'[18] due to end on 18 June 2025. Although this

[18] Reform of behavioural penalties - GOV.UK

consultation is looking at taxpayer behaviour, any potential reformations of behavioural penalties for taxpayers could impact the thinking around penalties based on tax adviser behaviour.

7.40 Question 21: What other changes to the maximum and minimum financial penalty thresholds would be needed to ensure that a penalty charged in a case is more proportionate to the tax loss poor tax advice has caused?

7.41 For the reasons stated at 7.20 we consider that aligning any financial penalty to HMRC's Potential Loss of Revenue or the tax loss caused by poor tax advice would be disproportionate to the advantage gained by the tax adviser, and we would not be in support of this as a method of calculation.

7.42 We consider that the imposition of a minimum financial penalty in line with the current financial penalty for dishonest conduct, together with no maximum penalty value could be sufficient to create changes in tax adviser behaviours.

7.43 Question 22: Do you agree with the government's proposal to introduce an option to charge penalties on tax adviser business entities rather than individuals, except where it can be evidenced that the wider business was not aware of the individual tax adviser's actions?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

7.44 YES

7.45 As explained in 7.15 we would support changes to the legislation which hold the company, firm, or other business responsible for any financial penalty in the first instance. It is the company, firm or other business that has the professional engagement with the client, albeit that the relationship handling may be with an employee within the tax adviser business. There would have to be a defence for the company, firm, or other business if the individual who instigated the non-compliance worked outside of the firm's procedures.

7.46 Although a criminal offence, the procedures for the corporate offences of failure to prevent the criminal facilitation of tax evasion contained in part 3 of the Criminal Finances Act 2017[19] could be used as a template to cover instances for the facilitation of non-compliance by tax advisers. The elements that would be required in order for the penalty to apply on the company, firm or other business would be:

- There would have been an acknowledged tax non-compliance by a client of the company, firm, or other business (relevant body)
- The non-compliance had been facilitated by a person associated with the relevant body, acting in that capacity
- The relevant body failed to prevent the person associated with it from committing the facilitation act

However, the relevant body would have a defence if:

- It has put in place 'reasonable prevention procedures' to prevent its associated persons from committing tax non-compliance on behalf of the client, or

[19] Criminal Finances Act 2017

- It is unreasonable to expect the relevant body to have such procedures in place

7.47 HMRC already have published detailed guidance[20] in which it explains that there are six guiding principles that underpin the defence of having reasonable prevention procedures. These could be incorporated into a defence for tax adviser firms where there has been facilitated non-compliance. The principles are:

- risk assessment;
- proportionality of risk-based prevention procedures;
- top level commitment;
- due diligence;
- communication, including training; and
- monitoring and review.

7.48 Where the relevant body has a legitimate defence, then there should be a mechanism whereby the penalty is 'transferred' to the individual responsible for the non-compliance.

7.49 Question 23: What else should be considered when looking at penalties charged on tax advisers?

7.50 We fully support a modern tax administration system which seeks to prioritise informing and educating tax advisers of their obligations to taxpayers, clients and HMRC, over penalising them. We believe that HMRC should work with tax advisers and professional bodies to improve standards, rather than penalising tax advisers, especially in one off instances.

8 Broadening disclosure of HMRC's concerns about tax advisers to professional bodies

8.1 Question 24: Are there any reasons why HMRC should not make further non-PID disclosures to professional bodies, as well as continuing with PIDs (where appropriate)?

8.2 We support efforts that could make it easier and faster for both HMRC and the professional bodies to respond to and address sub-standard behaviour and work by tax advisers at an earlier stage (even where this does not constitute misconduct, but still causes harm to the tax system), which could reduce the level of future damage being caused by tax advisers.

8.3 The Consultation indicates some examples of non-compliance with HMRC's Standard for Agents[21] which HMRC could identify during regular compliance work, and which might be suitable for non-PID disclosures to include:

- repetition of similar errors despite HMRC intervention explaining that such errors must not continue, but where tax loss or harm caused falls below thresholds for using other powers
- low technical awareness/ability in an area where the tax adviser is particularly active in representing clients (it may be, for example, that only one aspect of an adviser's work needs addressing, so a more severe sanction would not be appropriate)
- isolated incidents, or first instances, of unprofessional behaviour, or obstruction
- occasional instances where a tax adviser has failed to keep their own tax affairs or return filing up to date

The ATT would support non-PID disclosures in all of the above cases.

[20] Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion

[21] The HMRC standard for agents - GOV.UK

8.4 Question 25: What types of behaviours or activities do you consider it appropriate for HMRC to make further disclosures about?

8.5 It is difficult to provide a list of behaviours and activities which would be appropriate for HMRC to make further disclosure to professional bodies (PBs), but there is an argument that all behaviours that do not constitute misconduct but still cause concern for HMRC should be disclosed to PBs. Whilst we would support greater disclosure, we could not guarantee that all disclosures would lead to an investigation and sanctions in all cases, and we would reserve the right to deal with each disclosure on a case-by-case basis in accordance with our professional standards, rules, and guidelines.

8.6 HMRC could also provide PBs with details of the 'themes' that they are encountering from tax advisers who are causing concern to HMRC. This would allow PBs to support their members through targeted guidance and member support services such as presentations, webinars, newsletters and help sheets. Presentations, webinars, and website postings are also often available to members of the public, so would have a greater reach than just members.

8.7 Where HMRC encounter significant themes of tax adviser facilitation of non-compliance, then it is possible that the Professional Conduct in Relation to Taxation[22] principles and standards could be amended to provide specific guidance in that area, by amendment or refining existing help sheets, or creating new guidance.

9 Broadening the scope of publication of tax adviser details when they are the subject of an HMRC sanction

9.1 Question 26: Do you believe that it is in the public interest for HMRC to publish more information about its activity, such as the details of tax advisers subject to a formal sanction by, or a restriction on their dealings with, HMRC?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

9.2 YES

9.3 We believe that it is in the public interest for HMRC to publish more information about its activities. This could help taxpayers to be better informed about the choice of tax adviser by knowing which tax advisers are subject to sanctions or have had limitations imposed on their ability to act effectively for clients.

9.4 Publishing details of a specific individual or business can be a powerful deterrent which could discourage poor practice and promote adherence to professional standards if handled correctly.

9.5 Given the reputational and commercial impact that publication could bring to an individual or a firm, we would want to ensure that there were suitable safeguards in place so that the appropriate and right tax advisers were being publicised.

9.6 The current dishonest tax adviser legislation provides for publication of dishonest tax advisers,[23] however, we have been unable to trace where (or whether) any tax advisers have been published. If a basic internet search engine examination has failed to direct ourselves to any published details of dishonest tax advisers, then it is

[22] Professional Conduct in Relation to Taxation | The Association of Taxation Technicians
[23] Finance Act 2012, schedule 38, section 28

unlikely that members of the public will know where they need to go to view this information. The publication then becomes ineffective. We would therefore urge HMRC to consider carefully where any information is being published and how it is being promoted.

9.7 We are aware that the publishing details of deliberate tax defaulters (PDDD)[24] is on GOV.UK[25], although it is our understanding that this page is visited infrequently. We would suggest that HMRC undertake diagnostics on the webpage to consider the number of 'hits' that the page has received, and the length of time that visitors remain on the webpage, as this would either support or dispel our concerns that this information is not being accessed.

9.8 The PDDD legislation is aimed at defaulting taxpayers not dishonest tax agents, so publication on GOV.UK may be appropriate where there are defaulting taxpayers. However, in order for the publication of dishonest tax advisers to be more than just an ability for HMRC to demonstrate that it has taken action against this cohort, the lists must be publicised widely, using outlets such as the internet, social media, and trade publications.

9.9 Question 27: When considering where to set the threshold of proportionality for publication, which types of sanctions do you believe should be included, and which should be left out?

9.10 The Consultation identifies that sanction could arise in two scenarios:

- because of failures to meet professional standards which cause a tax loss, or
- because of non-compliance by the tax adviser with their own tax obligations.

9.11 For failures to meet professional standards which cause a tax loss, the Consultation indicates that this could apply in the following instances:

- Where there has been a suspension of agent codes
- Where there has been a pausing of repayment claims submitted by a tax adviser
- Where sanctions have been imposed by a Professional Body following a PID
- Where HMRC have refused to deal with a tax adviser

We would agree that all of the above instances could lead to a tax adviser having their details published.

9.12 The Consultation proposes that HMRC could publish details of tax advisers where there has been non-compliance in their own tax obligations. It suggests that publication could be made of those who fail to file more than two returns, or whose outstanding liabilities remain unpaid for more than two years.

9.13 We have some reservations in supporting the publication of tax advisers where they have failed to comply with their own tax obligations. Whilst failure to comply with their own tax obligations may suggest that a tax adviser does not take their own tax affairs seriously, it would be wrong to simply imply that they would not take the tax affairs of their clients seriously. PCRT provide members with a help sheet[26] on members personal tax affairs, where it states that a 'member's own tax affairs should be kept up to date'. While not mandatory a member in a disciplinary case may be asked to explain why they did not follow the help sheet guidance.

We consider that as tax agents are taxpayers themselves, they have an entitlement to the same levels of confidentiality and be treated in the same way as any other taxpayer. HMRC have a legal requirement

[24] Finance Act 2009 section 94
[25] Current list of deliberate tax defaulters - GOV.UK
[26] E_members_Personal_Tax_Affairs_1_March_2019.pdf

enshrined in the Charter standards[27] to treat taxpayers fairly. Additionally, there are already sanctions and penalties in place for late filing of returns and payment of tax, and these would adequately financially address tardy tax advisers' behaviour.

9.14 Question 28: Is the short-form and long-form approach to publication sufficiently flexible to allow HMRC to take a proportionate response to different degrees of poor tax adviser behaviour?

- yes
- no
- maybe
- don't know

Please give reasons for your answer.

9.15 MAYBE

9.16 The Consultation has proposed that short-form publication would involve lists on GOV.UK, updated at regular intervals, of tax advisers that HMRC has imposed sanctions or restraints on, and why. Long-form publication would be reserved for more extreme and complex cases, with statements detailing the issues of concern about a specific tax adviser.

9.17 We consider that there should be a distinction between essentially incompetent tax advisers and dishonest tax advisers, when publishing their details. We consider that the process for allocating a case between short-form or long-form publication needs to be clear and well defined. We have concerns where there is any element of subjectivity, as that can, without sufficient 'checks and balances', potentially lead to the wrong allocations.

9.18 Question 29: What information about each tax adviser should be published, and is there anything that should not?

9.19 The Consultation indicates that the details to be published could align with the Publishing Deliberate Defaulter Details with minor changes for context, such as:

- the name of the individual tax adviser, business, and any trading names previous names or pseudonyms
- the name of the firm in which that tax adviser is either employed, a partner or a director
- the tax adviser's address or registered office – to prevent possible confusion arising with other tax advisers of similar name
- for short-form publication, a brief statement of the reason for publication and how long any restrictions on interacting with HMRC will remain in place
- for long-form publication, detailed descriptions of the activity of concern, the measures HMRC has taken, and how the tax adviser responded to them

9.20 We consider that the information that should be published about a tax adviser or firm, should be limited to that which is sufficient to ensure that that tax adviser/firm can be clearly identified and not confused with other similar names or practices, and that the reason for disclosure is unambiguous. We would therefore support the details contained in 9.19, subject to the comment at 9.21.

[27] The HMRC Charter - GOV.UK

9.21 We understand why HMRC may want to publish the tax adviser's address to avoid possible confusion with other advisers of a similar name, but we are not in support of the publication of private addresses, even where these are the business address of an individual as this could infringe on human rights.

9.22 Question 30: For how long should details remained published and in the public domain for short-form publication, and for long-form publication?

9.23 We agree with the Consultation proposal that short-form publications could remain viewable for 12 months after the end of the period to which they apply.

9.24 For long-form publication, we consider that it raises questions as to who would assess when there was no longer a risk to the tax system from the tax adviser. If the assessment was made wholly by HMRC staff, we have concerns that this lacks transparency and accountability and could lead to tax advisers remaining on lists for longer than is necessary.

9.25 Question 31: Which criteria for publication would set a fair and proportionate threshold for using publication?

9.26 We agree that any threshold for publication must be set at a fair and proportionate level. We also consider that such thresholds should be unambiguous and clear, especially given the potential reputational and commercial ramifications of publication. There should be no doubt that the threshold had been passed, and therefore the most obvious threshold would be a financial threshold. The PDDD regime has a financial 'entry level' set at £25,000, and this is clear and unambiguous to taxpayers facing deliberate penalties.

9.27 Whilst a pure financial threshold would provide clarity and simplicity, thought would have to be given to the threshold level to ensure that only those dishonest tax advisers intended to be caught by the provisions were published. See also our comments at 9.30.

9.28 Question 32: Do the proposed safeguards provide for a fair, proportionate, and workable publication framework?

9.29 We agree that there needs to be appropriate safeguards in place to ensure that any publication power is not misused, and that 'innocent' or 'honestly incompetent' tax advisers are not wrongly listed. This is especially important given the potential reputational and commercial impact that publication could bring to an individual or a firm.

9.30 We agree that HMRC should have a robust approval process for publication, and where there is a long-form publication anticipated, an external board should take the decision, to demonstrate independence and impartiality. If the decision for short-form publication is to be take internally, then the official approving the publication should be separated from the case handler.

9.31 Where details of a tax adviser are considered for publication, then the tax adviser must have sufficient time to make representations against the publication, and if the representations are not accepted, must have the ability to appeal via the tribunal system.

9.32 Question 33: Are there any other safeguards which you think the government should consider for this publication power?

9.33 Besides the safeguards already referred to above, there are no other safeguards which we think that the Government should be considering in relation to these publication powers.

10 Contact details

10.1 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 technical officer, Steven Pinhey on spinhey@att.org.uk.

11 Acknowledgement of submission

11.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Association of Taxation Technicians is included in the List of Respondents when any outcome of the consultation is published

The Association of Taxation Technicians

12 Notes

12.1 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.

12.2 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.

12.3 The Association has more than 10,000 members and Fellows together with over 7,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.