Consultation response

Tackling promoters of tax avoidance

September 2020

Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to respond to HMRC's consultation on *Tackling promoters of tax avoidance*[1]. We have the following comments to put forward for consideration.

General comments

We note the overlap between this consultation, the consultation on *tackling disguised remuneration tax avoidance*[2] and that on *raising standards in the tax advice market*[3] (*raising standards* call for evidence). We support strong action against the promoters of tax avoidance schemes, and we refer to our comments on this in response to the *raising standards* call for evidence[4]. We note that HMRC acknowledges that the difficulties are driven by a small number of repeat 'offenders' who promote such arrangements. As we noted in our response to the *raising standards* call for evidence, we consider that any changes should not cause extra compliance costs (in terms of time and financial costs in complying with further legislation) for the majority of tax advisers who do adhere to professional standards. We note this same concern in our response to this consultation.

While we agree with HMRC that education of taxpayers and working in partnership with tax advisers is desirable, there will likely always be a small number of promoters selling aggressive tax avoidance schemes who simply cannot be stopped in any other way apart from direct action against them. We are not aware of a concerted effort by HMRC to prosecute the remaining promoters or those individuals who are repeatedly involved behind any particular entities used. We would advocate these proposed legislative changes being accompanied by a strong focus of effort by HMRC in that direction. Although we agree that many of the changes proposed in the consultation document are desirable, we note some of them are broad and we would hope they will not be used by HMRC in an effort to target reputable advisers and others who may be

[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.lawscot.org.uk/media/369382/20-08-28-tax-reg-aml-raising-standards-in-the-tax-advice-market.pdf

tangentially (and perhaps inadvertently) involved in the supply chain as being 'softer' targets than the promoters (either for information or for penalties), simply because they are UK based and subject to professional regulatory regimes (for example, solicitors or accountants) unlike many promoters.

HMRC have previously noted that it is difficult to target enforcement action at promoters. We have also heard opinions that HMRC already has sufficient powers to do so but is not using them. Changes which clearly enable targeting the individuals behind the various entities that may come and go may assist HMRC in this regard. In any event, we note that, despite the 'cardinal principle' that each taxpayer is responsible for their own affairs as referred to in the introduction to the consultation, public anger over aggressive tax avoidance schemes, such as the recent scheme targeting NHS workers, is generally directed at promoters, and so strong enforcement action against such promoters would, we suggest, assist in maintaining public trust and public revenues.

Consultation questions

Chapter 3. DOTAS RULES. Tackling promoters who do not disclose avoidance schemes to HMRC

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?

We consider that 30 days would be sufficient as the information should be readily available to the promoter. A shorter period of time from receipt of the notice could lower the risk of promoters changing structure. We suggest that electronic methods may be used to reduce the period for receipt of the notice.

We have two suggestions here:

1) It appears that the intention is that there will be a thorough HMRC process requiring demonstration of reasonable grounds of believing DOTAS is in point before an information notice is issued – to ensure that this process takes place and to ensure consistency, we suggest there be a specialised team within HMRC who would be required to approve all such notices; and

2) If that is done, we suggest that the promoter should be named at that stage. This will help to support that there is a high-level of certainty that HMRC has a genuine and strong case. The proposal to publish details of the scheme but not the promoter at this stage would not be as helpful as naming the promoter. We consider that it is likely that a taxpayer searching for information would search the name of the promoter or the name used on the materials, rather than a description of the scheme.

   If HMRC intends to identify the scheme, we suggest that identifying the promoter as well would seem sensible, as long as it is clear that the status is only 'under investigation' or similar so it is clear that HMRC is not definitively stating there has been any improper behaviour. We consider that naming only of promoters, or those who have acted akin to a promoter, should be appropriate at this stage –

naming those who have minor roles (and who may have not known what they were involved in) would not be appropriate.

Q2. Would the proposed approach prevent persons from obstructing enquiries by claiming not to be a promoter, or in other ways such as by restructuring or moving offshore? If not, why not?

"Any party in the supply chain" (per paragraph 3.16 in the HMRC document) is broad and it should be clarified how this will operate in practice, especially how it will interact with legal privilege (i.e. what information HMRC would seek and what it would accept would be privileged) and with instances where an adviser has performed an "execution only" type service (for example, a conveyancer registering the transfer and filing an SDLT return) without having any meaningful details of the tax planning that lies behind that. We consider that HMRC should largely focus on the promoters than those with minor involvement (even although the latter may be easier to reach due to being regulated professionals).

Offshore promoters need not be a difficulty for HMRC if there is a move to legislate that any person providing tax advice, schemes or tax services in the UK must establish and maintain a substantial presence in the UK, for example, UK based companies, directors and assets that HMRC can target. This links to our response to the *Raising Standards* call for evidence.

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?

We consider it would be beneficial for there to be greater promotion of information about schemes at an early stage to help taxpayers understand the risks. However, in order for this to be of most benefit of taxpayers, this has to be done in a timely, accessible and comprehensible manner. For example, publishing details via *Spotlight* is likely to reach some agents but not many taxpayers who are unlikely to look at such publications. Mainstream and social media may merit consideration for mass campaigns, as well as other HMRC communication channels. COVID-19 schemes (such as the Job Retention Scheme and Self Employment Income Support Scheme) were widely promoted to taxpayers which demonstrates that this is achievable. As well as paid for advertising, it may be possible to have coverage on money advice shows and other current affairs type television programs.

It is crucial that communication is timely. At present, it is common for there to be a delay in having schemes published in *Spotlight* which is likely to reduce the value of publishing the information while taxpayers continue to use schemes. Providing feedback to professional bodies about schemes that are being used is also of assistance so that they promote details of the known issues with the schemes to their members. In this regard, we consider that detailed tax technical analysis from HMRC could play a role. Without contrary analysis of the scheme from HMRC, some taxpayers and agents will continue to consider a scheme suitable and where obtained, counsel's opinion may be persuasive.

In terms of the specific question asked, we consider using the name of the promoter in anti-scheme publicity to be important as that is what a taxpayer will likely use in searching for information when they are considering entering a scheme.

In the context of SDLT and LBTT in Scotland, it is common for claims businesses to obtain details of recent purchases from the Land Registry or Registers of Scotland and to write to taxpayers stating that they have paid too much tax. Commonly, the correspondence is misconceived. We are aware of reports of some taxpayers receiving in the region of five such letters from different businesses following a purchase. It would be of benefit if there was greater promotion by HMRC of the dangers of engaging with these promoters.

The tax system and associated legislation is very complex and is unlikely to be well understood by many taxpayers. Our experience is that many smaller taxpayers' involvement in their tax affairs is limited to selecting an agent and providing information to them. In such circumstances, taxpayers may not be aware that they are being sold an aggressive tax avoidance scheme and are unlikely to be able to easily identify if there is a problem with a scheme. Where feasible, we support a direct approach being made to taxpayers to make them aware of concerns about a scheme. In this regard, we welcome the disguised remuneration pilot which HMRC is carrying out. Where it is not possible to make a direct approach, public communications require to be sufficiently clear and simple in order for taxpayers and advisers to be able to identify if they are being sold/promoted such a scheme and to understand the risks involved. As noted above, ideally the promoter's name and any other key phrases or titles used by the promoter should feature in the publicity and warnings as it is likely to be these words that a taxpayer will search for when seeking to obtain information about a scheme. It is unlikely that a taxpayer would search for terms that may be used by tax experts or HMRC, for example "disguised remuneration".

We highlighted in our response to the *Raising Standards* call for evidence that we consider that there are opportunities for HMRC to improve its processes for accepting intelligence reports about poor practice and schemes which are being promoted, and that there is a need for HMRC to respond timeously and robustly to such reports. There is also a need for HMRC to be seen to so respond. HMRC understandably says it cannot comment on individual cases, however it could publicise (for example, at monthly intervals) that it has received intelligence in certain areas/sectors (including perhaps an indication of number of reports) and that it is acting on these reports in certain ways.

Other actions HMRC could consider (and which we set out in our *Raising Standards* response) include:

- appropriately raised HMRC inquiries – as a good way of HMRC finding out about schemes which are being promoted;
- an increase in avoidance staff at grass-roots guidance level – this would be helpful in investigating schemes and showing HMRC is able to act on intelligence reports; and

- HMRC could consider offering or requiring 'product rulings' as, for example, offered by the New Zealand Revenue[5] - the absence of a ruling would then act as a warning to a taxpayer that HMRC had not approved a scheme (despite what a promoter may say on that point).

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

See our comments at question 2 above on legal professional privilege and with instances where an adviser has performed an 'execution only' service.

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

See our comment at question 4.

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?

Yes; please see our comments above.

HMRC could consider hosting a web page with a colour coded system or similar to indicate the degree of concern it has with different schemes. Publicising a list of promoters' names and SRNs online, with an explanation of what 'SRN' means, on a page headed 'Tax Avoidance cases HMRC is currently investigating' (or similar title) may be useful.

Q7. Are there any other specific procedural safeguards which you think should apply to this power but which would not dilute the effectiveness of the proposed measure?

See our comments at question 1 regarding a dedicated, specialised team within HMRC to approve notices being issued.

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?

A period of 2 months between issuing the information notice and the potential publication of the promoters' name would allow many more taxpayers to be sold schemes that HMRC is considering, without them receiving effective warning. As noted above, publishing details of the promoters' name and details of the scheme at the time the information notice is issued would achieve this in a timelier manner. As referred to above, it is important that this information makes it clear that HMRC is not saying the scheme is definitely abusive avoidance or that the promoter has acted improperly, only that it is looking into it. The safeguard should be a strong, high-level internal HMRC team that deals with the issue of the notices and ensures these

[5] http://taxpolicy.ird.govt.nz/publications/2009-ip-binding-rulings/chapter-2-binding-rulings-system, see para 2.6

are done on a reasonable basis and that the supply chain targeted is focused only on those with the most detailed information on the scheme's operation (promoters in most cases).

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

Yes.

Q10. Are there any modifications to the proposals for the new power in DOTAS that would be needed in order for it to work appropriately in the DASVOIT regime?

No comments.

Chapter 4. POTAS RULES. Dealing with promoters who sell schemes that do not work

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?

It should be necessary for HMRC to have *reasonable grounds* to consider the (i) person is promoting (or likely to promote) a scheme and (ii) that scheme does not work to achieve the tax advantage promised. The draft legislation, section 236A, says the officer has to only "suspect" or "consider" this.

A person could, as worded in 4.12 of the consultation document and draft legislation, be subject to a stop notice simply because they have had a DOTAS SRN issued for another matter in the past. While we agree past conduct could be relevant here (especially to establishing the person is a promoter), it should not be enough in itself for a notice to be issued. We consider that HMRC should still have to show grounds for both points (i) and (ii) above.

As noted elsewhere, the power should be exercised by a specialist HMRC team.

Naming a promoter at the time the stop notice is issued would seem the most effective way of ensuring the public were aware the scheme may be one to avoid, but with the publication noting that the stop notice can still be appealed. Alternatively, this could be done at the time of the conclusion of any appeal process or when the appeal period is up. If any appeal process against the notice would be public in any event, then HMRC notifying that a notice exists could not be said to go any further than saying what was already public. We suggest that this may come down to how it is phrased by HMRC i.e. as being "subject to/under an appeal process".

Q12. Are there any other conditions that should be considered?

Please see our comments above in which we suggest that HMRC should be required in all cases to show reasonable grounds, and that these powers should be exercised by a specific, specialist team within HMRC to ensure consistency and proper consideration is given to the issue of notices.

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

We suggest that a review carried out by an officer or panel not involved in the initial decision would seem appropriate, with written submissions from the promoter and the initial HMRC officer (rather than undocumented personal contact between HMRC officers) and a written report with reasons being produced and sent to both the initial officer/s involved and the promoter.

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

See our comment above at question 11 regarding naming. Also, to avoid risks of different companies or structures being set up to sell the same thing, we suggest that publication should be of the names of those behind any corporate structure, for example, the directors and shareholders, especially if they have been previously involved in other promotion cases.

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?

See our comment above at question 11 regarding naming.

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?

See our comment above at question 11 regarding naming.

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?

See our comment above at question 11 regarding a specialist team.

Chapter 5. POTAS RULES. Dealing with promoters who seek to sidestep the Promoters of Tax Avoidance Schemes Regime

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

We consider the entities that the promoter uses and the individuals who control them or benefit from the sales of the schemes should be targeted. Both should be included, for stop or conduct notices and financial sanctions. We refer to our response to the *Raising Standards* call for evidence, and the comments there that it would be appropriate in the most egregious cases to impose personal culpability (for example, naming and financial sanctions) on those behind failed schemes. Therefore, we welcome the extension of the POTAS obligations to the individuals who control or significantly influence the promoter entities.

Separately, we note that the draft legislation seeks to amend schedule 34A in relation to relevant defeats to include DAC6 arrangements. We consider that some caution is required in this regard. While we appreciate that HMRC will need to meet existing POTAS conditions in order for behaviour to be able to be caught by the provisions, the provisions of DAC6 are wide in scope and includes normal commercial transactions. There could be a risk that an amendment made to DAC6 arrangements which may have nothing to do with tax avoidance could be at risk of being caught by the relevant defeat provisions.

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

No comments.

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 (paragraphs 5.7-5.9)?

No comments.

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?

It seems the proposal would mean HMRC cannot act during the two-year appeal period which does not seem effective in terms of HMRC monitoring what the promoter may do during that time.

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 (paragraphs 5.11-5.13)?

No comments.

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

No comments.

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 (paragraph 5.15)?

No comments.

Chapter 6. ENABLER PENALTIES. Penalties for those who enable tax avoidance schemes that fail

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?

We consider that the change would enable HMRC to engage with potential enablers to get the required information without requiring a scheme to have been defeated. However, we query whether this is appropriate in all cases, in particular for minor players (i.e. apart from the main promoters). It appears HMRC could waste time and resources investigating penalties for possible enablers only to find the scheme itself is not defeated at tribunal. While it may not be appropriate to wait until tribunal stage, we do not think minor players should be pursued too early, before HMRC is certain it has established a strong substantive case that there is in fact an abusive avoidance scheme in existence.

Legislation and guidance require to be carefully drafted so as to protect client confidentiality and legal professional privilege.

We note that in relation to SDLT, there are likely to be different scenarios arising in relation to potential enablers. In some cases, promoters may have 'tame' solicitors who will implement schemes but in other cases, solicitors may not be aware of a scheme until close to the conclusion of a transaction (for example, schemes involving reservation agreements). A strong steer from HMRC on such schemes (i.e. a list of schemes it is looking into) would help to support those solicitors who are themselves being misled.

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?

We consider that this will depend on the circumstances of the case. We expect that promoters themselves would be likely to be able to provide the required information, however, secondary enablers in the supply

chain may not be able to provide information about others involved. We consider there would be merit in clear guidance on this so as to set out expectations clearly.

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?

We consider that the central purpose of the measures generally should be to change behaviour rather than to issue penalties *per se*. Having said that, we consider that there is a strong case for imposing penalties on those involved in promoting abusive avoidance schemes. This is particularly so where those behind the schemes have repeatedly been involved in promoting such schemes. We support penalties in these cases, and personal culpability and liability for those individuals involved (irrespective of whether they act through another entity). This recognises the fact that there are repeat 'offenders' making significant profits from tax avoidance schemes and that public perception and trust in the tax system being enforced in a fair manner would be bolstered by attacking these. Please see our more detailed comments (on penalties for advisers and the link to regulation of tax advisers) in our response to the *Raising Standards* call for evidence.

In terms of the specific question here, we agree that once there has been a final court or tribunal ruling on one case in a scheme, a penalty should be able to be imposed for all cases involved, without waiting until 50% of cases have been defeated.

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?

There could be different reasons for settling which may not mean HMRC is correct that this is an abusive tax arrangement; if the GAAR Advisory Panel had concluded that it was, we would be more comfortable with this proposal.

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 additional threshold in 6.22 is removed (in order to ensure that HMRC can advise taxpayers of that enabler's penalty position)?

Where there has been a judicial defeat that results in penalties, this may be different to a case where penalties are simply imposed because enough taxpayers have settled. If there were a GAAR Advisory Panel opinion that this was an abusive arrangement and penalties were appropriate, then we would be more comfortable with this naming of enablers (as distinct from clear promoters) when there has not been a court case to defeat the scheme.

Q30. 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?

See our answer at question 29.

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?

This would mean retrospective application of the changes to the penalties (and possible naming) to any arrangements already enabled. If this were done, would HMRC go back over past cases and look again at those – in order that those persons are not treated differently from those whose cases HMRC has yet to review? If that were done, while there would be fairness between all who may be subject to these rules, we consider that retrospectivity would be concerning and on balance we are not in favour of it.

Chapter 7. GAAR. Maintaining the General Anti Abuse Rule

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

While these changes appear reasonable, has HMRC considered how GAARs in other countries deal with these circumstances (and in particular whether they consider it necessary to spell out the process in detail in this way, and so add to the level of tax legislation as well as perhaps inadvertently limiting reconstructive action)?

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

No comments.

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?

No comments.

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

No comments.

For further information, please contact:
Alison McNab
Policy Executive
Law Society of Scotland
DD: 0131 476 8109
alisonmcnab@lawscot.org.uk