HM Revenue & Customs

Tackling Promoters of Tax Avoidance

Summary of responses

3 March 2021

Contents

Foreword

The promotion of tax avoidance is unacceptable. The vast majority of people in Britain pay the taxes they owe promptly and in full, and they quite rightly expect everyone else to do the same. But the behaviour of a small minority of tax avoiders undermines the good work of the majority, withholds money from the public revenue and damages the integrity of the tax system. Many of these people are persuaded into it by unscrupulous promoters of tax avoidance schemes. HMRC are committed to tackling both tax avoiders and those who devise and promote tax avoidance schemes.

Vigorous activity by HMRC has led to many promoters shutting up shop, with a significant proportion having left the avoidance market since 2014. Measures introduced by the Government to clamp down on promoters have helped to drive the avoidance tax gap down from 0.9% of total theoretical liabilities in the tax year 2005-06 to 0.3% in the tax year 2018-19. But a few, hardened promoters remain, primarily focussed on mass-marketed avoidance schemes.

At Spring Budget 2020 HMRC published a broad new strategy for tackling promoters of tax avoidance schemes, outlining a range of approaches they are taking to disrupt the promoter market. This included the measures detailed in this document to make changes to the existing anti-avoidance regimes, enabling HMRC to obtain more information about promoters earlier, and to act against them faster.

I am grateful to all those who took the time to respond to the consultation document. HMRC have considered these responses carefully. I am particularly grateful that professional advisers, representative bodies and individuals were willing to work constructively with HMRC on the proposals, contributing thoughts and ideas on how to tackle tax avoidance.

The Government will be legislating in Finance Bill 2021 to strengthen the existing anti-avoidance powers and tighten the rules designed to tackle promoters and enablers of tax avoidance schemes.

The Government's work against tax avoidance is continuing. Beyond this summary of responses and the subsequent amendments to legislation, it will shortly be publishing a response to the call for evidence on tackling the use of disguised remuneration tax avoidance schemes, including the role of promoters in those schemes. A summary of responses on raising standards in the tax advice market was also published in November, and the Government will shortly be undertaking a follow-up consultation on proposals to require tax advisers to hold Professional Indemnity Insurance.

In addition, the Government will also shortly be launching a consultation on a further package of measures, announced in November, which aim to benefit taxpayers by giving them greater protection from promoters, while ensuring promoters face tough actions to discourage them from operating.

The Promoters Strategy is designed to be effective and proportionate. It is intended to tackle those promoters who exploit every opportunity to side-step the rules, and not those tax advisers who adhere to high professional standards. These amendments to anti-avoidance legislation will be a core part of the Government's continuing efforts in this important area.

Rt Hon Jesse Norman

Financial Secretary to the Treasury

1. Executive Summary

1.1. Tax avoidance is bending the tax rules to seek to gain a financial advantage never intended by Parliament. It deprives important public services of the funding they need. Most tax avoidance schemes simply do not work as intended, and those who use them may end up having to pay much more than the tax they tried to avoid, including penalties.

1.2. The government is committed to tackling those who promote tax avoidance and announced at Budget 2020 a package of measures to strengthen further the regimes that target those who promote and market tax avoidance schemes. The consultation *Tackling Promoters of Tax Avoidance*,[1] including draft legislation, was launched on 21 July 2020 and closed on 15 September 2020.

1.3. The government received 16 written responses and held five meetings with stakeholders.

1.4. Respondents to the consultation were generally supportive of the package and in favour of taking strong action against the promoters of tax avoidance schemes. They recognised that these proposals were not aimed at professional advisers providing legitimate advice and were focussed on promoters of tax avoidance schemes.

1.5. Respondents sought assurance that the proposals would be applied and managed by HMRC with appropriate safeguards to minimise the risk that the measures inadvertently affect compliant tax advisers and professionals providing legitimate advice.

1.6. As well as specific comments on the proposals, there were some that related more generally to more than one of the anti-avoidance regimes. These covered the publishing of details about promoters, communications to help taxpayers steer clear of avoidance, and legal professional privilege (LPP).

1.7. There was universal acknowledgement that HMRC's communications to taxpayers needed to be improved. A number of respondents noted that good communications are an essential underpinning of all of HMRC's efforts to tackle the promotion of avoidance schemes.

1.8. The government agrees that good communications are essential. In November, HMRC launched its campaign *Tax avoidance: don't get caught out* [2] to help contractors who are self-employed, or employed through an agency, to make informed choices about their tax affairs, so they are not tempted by tax avoidance schemes that promise higher take-home pay.

1.9. Respondents had mixed views about publicising details at an early stage in HMRC's enquiries about promoters and the schemes they promote (often referred to as "naming"). While there was some support for naming, and some respondents believed this should take place at the earliest opportunity available, this view was not universal, with others considering that naming should not happen until any appeal process has been finalised.

---

[1] https://www.gov.uk/government/consultations/tackling-promoters-of-tax-avoidance

[2] https://taxavoidanceexplained.campaign.gov.uk/

1.10. By contrast there was a consensus that when publicising details about avoidance schemes, HMRC needed to become better than they are now at reaching the target audience of potential users: respondents pointed towards an over-reliance on publishing details on GOV.UK through HMRC's Spotlight publication.

1.11. The government believes there is value in publicising details of schemes as early as possible to help potential users from becoming involved in schemes which do not work and to make it more difficult for promoters to sell those schemes in the first place. HMRC will implement operational processes to complement the statutory safeguards before promoters of avoidance schemes are named. These processes will help strike the correct balance between ensuring promoters have appropriate opportunities to make their case, helping HMRC make the right decision, and ensuring potential users of the scheme are alerted as early as possible.

1.12. Two respondents raised concerns regarding LPP. They were concerned HMRC might request information that LPP would prevent members of the legal profession from providing or from making adequate representations under these proposals.

1.13. The government acknowledges the concerns of the legal profession regarding LPP. It is not the intention that these proposals alter that principle. The government will seek to ensure there is an appropriate balance that does not disadvantage those relying on LPP while ensuring that the proposals work effectively to protect taxpayers.

1.14. HMRC will draw on the findings from the *Evaluation of HMRC's Implementation of Powers, Obligations and Safeguards introduced since 2012* to help ensure taxpayers are aware of their rights as well as their obligations. This includes ensuring HMRC's guidance, letters and factsheets set out the governance processes on how the proposals will be applied clearly and transparently. These products will also set out the role of authorising officers and how the review and appeal processes will work.

1.15. The government is grateful for the comments received. Having considered the feedback from respondents, the government is proposing to go ahead with the proposals subject to a number of changes which are detailed below, and will legislate in Finance Bill 2021.

Disclosure of Tax Avoidance Schemes

1.16. The proposals would enable HMRC to obtain information at a much earlier stage than it can now about tax avoidance schemes which have not been notified under Disclosure of Tax Avoidance Schemes (DOTAS) or Disclosure of Tax Avoidance Schemes for VAT and other Indirect Taxes (DASVOIT). HMRC would be able to issue an initial notice to those they suspect are promoters or otherwise involved in the supply chain of the scheme, giving them the opportunity (within 30 days) to explain why the scheme is not notifiable. In the absence of a response or of a response that satisfies HMRC that the scheme is not notifiable, HMRC would be able to issue a Scheme Reference Number (SRN) to the promoter and those involved in the supply chain of the scheme, and will be able to publish details of the recipients of the notices and the scheme (often referred to as "naming").

1.17. Respondents to the consultation were broadly supportive of the proposals, although there were some concerns that compliant advisors giving genuine advice might be caught inadvertently by the proposals, and some respondents considered that the naming of those involved in the promotion and marketing of avoidance schemes should apply to promoters only. Respondents were keen to see strong internal governance processes adopted by HMRC when deploying the proposals.

1.18. The government believes that the 30 day time limit to reply to an initial notice under the new power provides a suitable balance between giving recipients sufficient time to satisfy HMRC that the scheme is not notifiable, while not providing an opportunity for promoters or those involved in the supply chain of schemes to delay or avoid receiving an SRN. The government will proceed with the proposed time limit of 30 days in which to respond to a notice.

1.19. It is possible for some businesses to be unknowingly caught up in the supply chain of advisers and promoters that leads to an avoidance scheme being developed and marketed. Where that happens HMRC would still need information from those involved in that supply chain to help tackle the promoter. Nobody involved in the supply chain of an avoidance scheme would be named automatically and anyone HMRC is considering naming would have the opportunity to make representations and explain to HMRC why they believe they should not be named. The government agrees that HMRC should not be able to name those involved until after an SRN has been issued.

1.20. The government agrees with respondents about the need for strong governance and will ensure HMRC applies robust governance processes to ensure these powers are used appropriately. HMRC will publish guidance setting these out.

Promoters of Tax Avoidance Schemes – Stop Notices

1.21. The proposals would amend the existing power to issue stop notices so that HMRC would be able to issue them earlier than it can now, in order to reduce the time period during which a tax avoidance scheme can be sold.

1.22. All respondents supported the aims of tackling those who promote avoidance schemes, and there was broad support for the proposals. There were some concerns about what was felt to be a low threshold for issuing a stop notice and the subjective nature of some of the proposed conditions. The government has listened to these concerns and will provide guidance about the conditions for issuing a stop notice.

1.23. The draft legislation published alongside the consultation document included new penalties for failures to comply with the amended stop notice or information notices. The government has decided that these penalties should apply as they would provide an appropriate deterrent, encouraging promoters to comply.

1.24. Having listened to respondents' concerns, the government will revise the proposals to include additional legal protections. This includes changing the test in relation to stop notices: instead of a stop notice being issued where there is a "reasonable suspicion of the main benefit of the arrangements being a tax advantage", it will require an authorised officer to "consider that it is likely that arrangements/proposed arrangements will not be able to obtain a tax advantage". This will ensure that anyone providing tax advice where along with

commercial benefits one of the main benefits was a tax advantage, would now no longer be automatically covered by the "reasonable suspicion" test. HMRC will still be able to issue a stop notice to promoters who are promoting tax avoidance schemes that HMRC has good reason to consider do not work.

1.25. The government has also decided to make a further change to the legislation to tackle promoters who do not co-operate and fail to provide necessary information that the promoter has access to. The legislation will include a power for HMRC to issue a stop notice where promoters fail to provide information required under the proposed earlier DOTAS/DASVOIT power (see paragraph 4.11). .

1.26. HMRC will make clear that where a scheme has been disclosed under DOTAS, including for Stamp Duty Land Tax (SDLT) and Inheritance Tax (IHT) schemes, a stop notice will only be issued where the scheme continues to be promoted.

Promoters of Tax Avoidance Schemes – Business Structures

1.27. Under the proposed changes HMRC would be able to attribute POTAS threshold conditions, conduct notices, and monitoring notices to a new entity where a person who had significant influence or control of a previous entity sets up that new entity and transfers their promoting activities into it.

1.28. The majority of respondents supported these proposals and thought the approach was a balanced one, although there were concerns that legitimate businesses may be caught inadvertently by the revised POTAS rules. Respondents wanted to see supporting guidance and details of the governance to be put in place to ensure that the relevant safeguards are applied appropriately.

1.29. There were limited comments on the proposals to extend the length of conduct notices to the full two years, and up to five years where there have been POTAS failures. The government believes these proposals provide an appropriate balance that allows HMRC to take action against those who continue to promote avoidance schemes while providing a clear time frame to those in receipt of a conduct notice, and will proceed with these changes to the legislation.

1.30. Where a conduct notice is issued to a promoter who has had three separate defeats by HMRC in relation to tax avoidance schemes, this will count, in line with the current POTAS legislation, as a single threshold condition having been met. Providing no other threshold conditions have been met, or are met during the term of the conduct notice, the conduct notice is proposed to run for a maximum of three years. If further POTAS threshold conditions are met, the period to which the conduct notice runs will extend to five years.

1.31. As outlined above HMRC will provide updates to existing guidance that set out how the legislation will be applied and set out the relevant safeguards and governance processes.

Enablers

1.32. The proposed changes to the legislation would put beyond doubt that HMRC can use the information powers at Schedule 36 Finance Act 2008 in the same way as they are used in a compliance intervention: to check whether a person is, or may become, liable to enablers penalties. The proposals would also amend the rules for abusive tax arrangements that are used by multiple people (often referred to

as “multi-use schemes”) and the point at which HMRC could publish details of enablers who had received substantial enabler penalties.

1.33. The majority of respondents were supportive of the proposed changes. In relation to information powers they considered the changes better reflected the original intention of the legislation, although respondents wanted assurance that the changes would be applied in a way that protected client confidentiality. For the proposed tiered thresholds that have to be met before HMRC can charge an enablers penalty for multi-use schemes, respondents broadly agreed they provided a balanced approach and would predominantly affect promoters with large numbers of users of tax avoidance arrangements. Respondents also considered that the proposed changes to the rules allowing HMRC to publish details about an enabler provided a balanced approach in that the provisions are likely to only apply to promoters who repeatedly market avoidance schemes.

1.34. The government will proceed with the legislation on the basis set out in the consultation. The government recognises that enablers within the supply chain for the development and sale of an avoidance scheme are likely to have only limited information in relation to other potential enablers of that scheme.

1.35. The consultation asked whether it would be appropriate to apply the changes to enablers penalties from the introduction of the penalty regime in 2017. Respondents were universally opposed to any retrospective application of the measures. On balance, the government considers it is appropriate for these changes to apply from Royal Assent.

General Anti Abuse Rule (GAAR)

1.36. The proposed changes to the GAAR legislation would allow HMRC to deploy the GAAR to partnerships, with the partnership statement amended to take into account GAAR adjustments. The adjustments would then be subsequently carried through to each relevant partner’s individual returns.

1.37. Respondents supported the proposed changes to the legislation, agreeing that the changes would clarify how the GAAR applies to partnerships, and that the procedural safeguards in the regime were appropriate.

1.38. The government will proceed on the basis outlined in the consultation.

1.39. Having reviewed the legislation following the consultation, the government will amend the GAAR legislation to allow any one or more of the partners in a partnership to take corrective action in relation to their own liability. This will allow the legislation to work more fairly for taxpayers. HMRC will also make a number of minor technical amendments to the GAAR legislation, which will remove some ambiguities in the legislation (see paragraph 7.13).

2. Introduction

2.1. On 21 July 2020 the government published a consultation document, *Tackling Promoters of Tax Avoidance*. The document invited comments on proposals that would enable HMRC to take action more quickly against promoters and enablers of tax avoidance schemes. While many tax professionals adhere to high professional standards the proposals are aimed at those who use every opportunity to sidestep the rules so that they can continue to market their schemes.

2.2. The consultation document asked for views on proposals to strengthen the legislative regimes that target those who promote or enable tax avoidance arrangements and proposed changes to:

- Disclosure of Tax Avoidance Schemes (DOTAS)
- Disclosure of Avoidance Schemes: VAT and other indirect taxes (DASVOIT)
- Promoters of Tax Avoidance Schemes (POTAS)
- Penalties for Enablers of Defeated Tax Avoidance
- General Anti-Abuse Rule (GAAR)

2.3. Comments were invited on the proposed changes to each of these regimes and HMRC is grateful to those stakeholders who participated in this consultation process. HMRC had five meetings with stakeholders as part of the consultation exercise. We received 16 written responses from:

- 8 representative bodies;
- 5 professional advisors;
- 3 individuals.

2.4. A list of the respondents, excluding individuals, is found at Appendix A. This document summarises the responses received and outlines the steps being taken by the government. The changes outlined here will be included in the Finance Bill 2021.

2.5. These changes are part of the government's continued commitment to tackle tax avoidance and builds on the promoter strategy announced at Budget 2020.[3] When the promoter strategy was published it recognised that changes to the existing regimes, of the type discussed in this document, would only take HMRC so far in dealing with promoters, and further measures were announced in November 2020 to help protect UK taxpayers by clamping down on promoters of

[3] https://www.gov.uk/government/publications/tackling-promoters-of-mass-marketed-tax-avoidance-schemes

tax avoidance schemes. A consultation on these additional measures will be published shortly. At Budget 2020 HMRC also launched two calls for evidence seeking views on how to tackle the future use of disguised remuneration (DR) tax avoidance schemes, including the role of promoters of those schemes, and on raising standards in the tax advice market. The summary of responses and next steps for raising standards in the tax advice market was published in November 2020 and a follow up consultation will be published shortly. The response to the future use of disguised remuneration (DR) tax avoidance schemes will also be published shortly.

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

Overview

3.1. The changes proposed in the consultation would enable HMRC to obtain information about tax avoidance schemes it suspects should be notified under DOTAS and DASVOIT much earlier than is currently possible, in cases when no disclosure is made by the person promoting the scheme.

3.2. Under the proposals, where a scheme was not disclosed and HMRC had reason to suspect that it was notifiable, HMRC would be able to issue an initial notice giving recipients 30 days to satisfy HMRC that the scheme was not notifiable. The notice could be issued to any party that HMRC believed to be in the supply chain for the scheme, though this would not include scheme users. This would extend the current DOTAS and DASVOIT regimes, ensuring that any recipient of a notice would be asked to respond and set out their reasons for considering that the scheme was not notifiable.

3.3. The proposal is that by the end of the 30-day period, if HMRC was not satisfied that the scheme was not notifiable, HMRC would be able to issue a Scheme Reference Number (SRN) to all parties involved in the supply chain of the scheme. All those in receipt of the SRN would then be required to pass it on to anyone else using or involved in the scheme, give HMRC information identifying scheme users and provide any documents and information that would assist HMRC in considering the arrangements.

3.4. Once an SRN was issued, HMRC would be able to publish information about the scheme at any point over the following 12 months. Subject to certain safeguards, this might include the names of the promoters, and certain other information about all those in the supply chain to whom the SRN was sent.

The consultation asked a number of questions about this proposal:

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?

3.5. Most respondents agreed that 30 days was a reasonable amount of time for people to respond to HMRC and would provide sufficient time for recipients of notices to compile and send a response. One respondent added that to allow a longer period could allow non-compliant promoters to take action, such as restructuring their business, to avoid complying with a notice. A small number of responses argued that a period greater than 30 days should be given to allow for delays in the post or in HMRC's internal systems.

3.6. One typical respondent commented:

"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"

Government response

3.7. There needs to be a balance between giving recipients of notices sufficient time to provide a response, while minimising the opportunity for those who are seeking to avoid the consequences of the notice. In the government's view, 30 days achieves this balance and is a reasonable period of time within which to require a response. Allowing a longer period would begin to undermine the purpose of the proposals, which is to accelerate the speed with which HMRC can take a view about new schemes and take appropriate action in response. The proposed approach, as set out in the draft legislation, provides for HMRC to extend this period if appropriate. The government will proceed with the proposed period of 30 days in which to respond to a notice.

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?

3.8. There were mixed views on the effectiveness of the proposals where persons are determined to obstruct HMRC's enquiries. Some felt that those really determined to avoid contact with HMRC would still find ways to do so. Others believed the proposals would have an effect but were concerned about those who were unknowingly involved in the supply chain for the development and promotion of an avoidance scheme, for example because they were asked for advice on a discrete point. It was suggested that such people would be unable to provide HMRC with any meaningful information and yet a result could be issued with an SRN and named.

Government response

3.9. The government believes these proposals will significantly reduce the opportunities for participants in an avoidance supply chain to obstruct HMRC's enquiries. By placing the onus on promoters, and others involved, to satisfy HMRC that schemes should not be disclosed, rather than relying on promoters to volunteer information about disclosable schemes, the opportunities for obstruction are greatly narrowed. By bringing schemes within DOTAS early, HMRC would be able to decide more quickly on their response to a scheme.

3.10. The government recognises that it is possible for some businesses to be unknowingly caught up in an avoidance supply chain, particularly where non-compliant promoters conceal the true purpose of their interaction with that business. Where the SRN was issued under this proposal, all those to whom it was issued would have a right of appeal against the issue of the SRN and the proposed legislation would give them the opportunity to make representations to HMRC as to why they should not be named under the measure. HMRC would still need information from those involved in the supply chain to help tackle the promoter, but it is not the government's intention that those who are unknowingly involved in supply chains of avoidance schemes would be named alongside promoters. HMRC will make clear in guidance how they would deal with such representations.

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?

3.11. Views on the effectiveness of publishing scheme details at an earlier stage than now were mixed though, in general, respondents at least accepted the idea had some merit. But most respondents were sceptical that this could be done in an effective way. There was a strong feeling that HMRC would find it difficult to get the message to the people who need to hear it. Some felt that naming the promoter was a key element of this message and, without that, non-compliant promoters would simply claim their scheme was different from any highlighted by HMRC. A small number of respondents said that publishing details of the scheme ahead of naming the promoter would benefit taxpayers.

3.12. One response stated that no-one should be named under the measure until the scheme in question had been defeated. Another felt that promoters of avoidance schemes should be named as early as possible in order to make it easier for potential purchasers of a scheme to understand the risks.

3.13. One respondent commented:

"Publication of such information might be of some help in warning the public that HMRC believes a scheme is a tax avoidance scheme. However, without the name of the promoter, unscrupulous individuals will simply claim that their scheme is "different" and will likely continue to attract customers. If possible, it would make more sense to have the power to publish the name of the promoter or enabler at this initial notice stage."

Government response

3.14. The government believes there is value in publicising details of schemes as early as possible to help taxpayers from becoming involved in schemes which do not work, and to make it more difficult for those promoters to sell those schemes in the first place. The government is grateful for the views provided by respondents and agrees that the ability to name those supplying avoidance should not occur until the SRN has been issued. Under this proposal HMRC would be able to strengthen communications to taxpayers and their advisers by including details of schemes and the specific risks of becoming involved in them. In line with the promoter strategy published at Budget 2020, HMRC is already taking extra steps to publicise its Spotlight publications and bring them to the attention of the right people. In November, HMRC launched its campaign *Tax avoidance: don't get caught out* to help contractors, who are self-employed or employed through an agency, to make informed choices about their tax affairs, so they are not tempted by tax avoidance schemes that promise higher take-home pay.

Safeguards

Q.4. Are the grounds of appeal against the issue of a new SRN the right ones?

Q.5 Are there any other grounds that should be considered?

3.15. There was general agreement from respondents that the proposed grounds of appeal were right. No further grounds of appeal were suggested.

3.16. One respondent felt that there should also be a right of appeal against the initial notice. Several respondents pointed out that there might be a lengthy period between the SRN being issued and an appeal against the SRN being decided. It might not be proportionate to name those who received the SRN before the appeal process was concluded, as anyone named would face the consequences of being named before a Tribunal had the chance to rule on whether HMRC's decision to issue the SRN was correct.

Government response

3.17. The government is grateful for respondents' views. The government recognises that there is general agreement that the proposed grounds of appeal are right and will proceed with these in line with the proposals in the consultation. The government does not agree with the suggestion made by one respondent that there should be a right of appeal against the initial notice, because providing a right of appeal would risk undermining one of the aims of the proposals: to accelerate HMRC's access to information about avoidance schemes.

3.18. Where a promoter does not provide an adequate response to the initial notice, the only consequence is that HMRC would issue an SRN. The promoter could appeal against the issue of the SRN. There would be a further right for those receiving an SRN to make representations before being named and this opportunity would arise before any appeal process was concluded. The purpose of naming those involved in supplying avoidance at this early stage would be to make it easier for those who might get caught up in a scheme to be made aware of the risks they might run. To delay naming until appeals were finalised would delay HMRC relaying this important information to potential users. Consequently, the government considers that the proposed appeal rights and ability to make representations provide suitable safeguards and the government considers that no further grounds are required and will therefore proceed on this basis.

Q.6 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?

3.19. There was little consensus on the effectiveness of naming those in the supply chain other than promoters. Several respondents repeated the point that any naming could only be effective if HMRC was able to get the information to the people who needed to hear it. One respondent felt that such an approach could lead to compliant advisers and intermediaries, with peripheral involvement in the scheme, withdrawing their services to clients and this could have a detrimental effect on the tax advice market. Others stated that this proposal would increase the risk of people being named who had little or no knowledge of the avoidance scheme and so the power should be used sparingly.

3.20. Comments included:

"This is likely to help in some circumstances but naming those involved in the supply chain will inevitably increase the likelihood of wrongly naming individuals and so such powers must be used sparingly, at least until such time as HMRC can demonstrate that doing this has a consistently positive effect."

"We do not believe that naming promoters will necessarily help taxpayers identify schemes which HMRC do not think work. Taxpayers may be introduced to a

scheme via a variety of methods, such as their accountant, financial adviser, or even a personal acquaintance, and they may not have a great deal of upfront knowledge about who is promoting it"

Government response

3.21. The government considers that it is right to name promoters of avoidance schemes that receive an SRN as is already allowed under the existing DOTAS and DASVOIT rules. The government notes the concerns of some respondents about naming those in the supply chain but believes that there would be value in supporting potential taxpayers from buying into the scheme in the first place, through being able to name those in the supply chain who were involved in delivery of the scheme. However, the government acknowledges the concerns of respondents and confirms that there is no desire to name those on the periphery of the supply chain. HMRC will develop guidance to lay out their approach to naming those in the supply chain.

Q.7 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?

Q.8 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?

3.22. Respondents to questions 7 and 8 emphasised the need for strong HMRC internal governance but generally without providing specific examples of what they would like to see. One suggested HMRC should be certain a person is involved in "aggressive" tax planning before bringing them within the measure.

3.23. One respondent commented that with regards to governance:

"We note that the government does not propose that there should be a right of appeal against the new information notice in new s310D FA 2004. We understand why HMRC is trying to limit appeal grounds to speed up the process, but there must be strong internal governance and review of these notices before they are issued."

3.24. There were mixed views on whether the safeguards achieved a suitable balance between ensuring that the new power would be used appropriately and ensuring that the new powers are not sidestepped by promoters and others. Most agreed that the proposed balance was right, but one respondent wanted HMRC to ensure that new initial notices would not be used in the course of standard tax enquiries or interventions. Another respondent wanted, as stated above, a right of appeal against the initial notice. A small number also repeated that there was a need for strong internal governance.

3.25. One respondent commented:

"there should be a right to appeal against the information notices. Good advisers will want to engage with HMRC as early as possible in this process and giving them the right to appeal against the information notice will help, particularly where they are not a major part in the supply chain."

3.26. Two respondents raised concerns that solicitors and lawyers would be constrained by legal privilege, and as a result would be unable to supply HMRC with the required information under the notice or make adequate representations regarding naming.

Government response

3.27. The government is grateful for the responses given. If enacted HMRC would apply strong and appropriate governance to these measures, but the government does not accept that the power should only be used when HMRC is certain a person has been involved in promoting 'aggressive' tax planning. One of the aims of the proposals is to allow HMRC to leverage information about schemes much earlier than is possible now. It would therefore be counterproductive and create delays, during which the schemes would continue to be sold, if HMRC could only exercise the powers after having proven that this test was met. The proposed changes are designed to allow HMRC access to information about schemes, which they believe should have been disclosed but were not and it would not be appropriate to narrow the types of scheme to which the new power could be applied.

3.28. The government considers the safeguards proposed achieve the right balance between giving rights to dispute HMRC's actions without compromising the effectiveness of the proposal and will proceed on that basis. The government has not excluded from the measure the issue of initial notices in the course of routine enquiries and compliance interventions and considers that the statutory safeguards are sufficient.

3.29. The government recognises the need for strong governance. HMRC would ensure there was an appropriate level of governance applied, with decisions made at a senior level, to ensure these powers were used appropriately and governance arrangements would also be included in the guidance.

3.30. The government understands the concerns of the legal profession regarding LPP. It is not the government's intention that these proposals should impinge on that principle. The government will explore possible ways of legislating to reassure legal professionals that they will not face being named merely because LPP prevents them sharing information with HMRC, while preserving the ability to name legal professionals in appropriate cases.

Disclosure of Avoidance Schemes: VAT and other indirect taxes (DASVOIT) – further consequential proposal

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

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?

3.31. Of those who answered these two questions, all agreed the rules should also apply to DASVOIT and none identified any required modifications to achieve this. The government will therefore proceed with its plans to include DASVOIT in the final legislation.

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

Overview

4.1. The consultation proposed introducing amendments to POTAS so that HMRC would be able to issue stop notices earlier than it can now.

4.2. Under the proposals, a stop notice could be issued for new schemes where HMRC had reason to suspect that:

(i) a person was a promoter,

(ii) that the promoter was promoting arrangements where at least one of the benefits was a tax advantage, and

(iii) that HMRC had reasonable grounds to suspect it did not deliver the tax advantage promised.

4.3. The changes would also provide that a stop notice could be issued for new schemes where both:

(i) HMRC had reason to suspect that a person was a promoter and that promoter was promoting arrangements where at least one of the benefits was a tax advantage, and

(ii) the promoter met a number of conditions which included the promoter meeting any one of the following criteria, namely that the promoter:

- had previously been found to have breached the POTAS regime
- promoted schemes that are caught by the loan charge (see here, schedule 11 Finance (No 2) Act 2017) or are caught by Part 7A Income Tax (Earnings and Pensions) Act 2003 or sections 23A-H Income Tax (Trading and Other Income) Act 2005 for schemes where there are loans made on or after 6 April 2017
- had been issued with a scheme reference number in relation to any scheme under DOTAS, including under the new provisions in Chapter 3.

4.4. The consultation document proposed that HMRC would be able to issue a stop notice if either of the conditions (4.3(i) or 4.3(ii) above) were met. This was intended to ensure that HMRC could both address new avoidance schemes that were unlike schemes of which HMRC was already aware, and schemes where HMRC held limited information on the scheme. However, in the draft legislation that was published alongside the consultation document the two conditions were dependent: both the condition set out in 4.3(i) and any one of the conditions in 4.3(ii) needed to be met before HMRC could issue a stop notice. This meant that even where one of the three categories in 4.3(ii) were met HMRC additionally

had to be clear that the scheme did not work. Many stakeholders commented that they felt that this link was needed as it provided a helpful safeguard and they preferred the legislative approach. Having considered these comments, the government has decided that both the conditions in 4.3(i) and one of the conditions of 4.3(ii) will be required for HMRC to issue a stop notice.

4.5. The government considers that it is also important that HMRC are able to issue a stop notice where they suspect the arrangements do not work but have received insufficient detail about the arrangements, or inadequate information from the promoter for HMRC to be able to confirm they do not work. The government proposes to maintain the ability outlined in the consultation for HMRC to issue a stop notice where an SRN under the new DOTAS proposals has been issued in circumstances where the promoter failed to provide adequate information.

4.6. To ensure that condition 4.3(ii) will apply effectively the government will amend the first bullet of this condition so that only those currently subject to a POTAS Conduct or Monitoring Notice can be required to stop promoting schemes under this condition.

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?

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

4.7. All respondents supported the aim of tackling those who are promoting avoidance schemes. While a large proportion of respondents strongly supported the proposals, a small number expressed concerns about what they perceived to be a low threshold for issuing a stop notice and the subjective nature of some of the conditions. One respondent stated:

"[ ] strongly supports changes that will provide that a stop notice can be issued for new schemes."

"We are concerned by the very low bars for HMRC to issue stop notices described in paras 4.11 and 4.12 of the con doc."

4.8. There was also a concern about giving HMRC the ability to issue stop notices in relation to any scheme disclosed under DOTAS since that regime commenced (in 2004). Some respondents felt this could catch disclosures made where the person disclosing had been uncertain of whether the arrangements needed to be disclosed and had erred on the side of disclosing under DOTAS because they wanted to ensure they were compliant. There was an associated concern about the potential for unanticipated consequences for ordinary tax advisers relating to disclosures of schemes that showed the hallmarks in DOTAS for Stamp Duty Land Tax (SDLT) and Inheritance Tax (IHT) because those hallmarks are drawn widely.

4.9. One respondent was concerned that recipients subject to LPP would be unable to meet the stop notice requirement to provide details of the clients they had provided services to in relation to the scheme. This is because providing such details could breach LPP.

Government response

4.10. The government is grateful for these views and the support for the aim of the proposals to tackle those who are promoting avoidance schemes. Having listened to the concerns raised in 4.4 above, the government has decided that the legislation would be better targeted by focussing on tax avoidance schemes which will likely not achieve the tax benefits that the promoter claims. The stop notice would only be issued if the authorised officer concludes that the arrangements are not likely to be capable of obtaining the claimed tax advantage, rather than the test requiring the authorised officer to have a reasonable suspicion that a main benefit of the arrangements is a tax advantage. This change will mean that HMRC would still be able to issue stop notices in the circumstances outlined in the consultation, but it would strengthen the safeguards to better target arrangements that do not work.

4.11. Reflecting on discussions with respondents the government has decided to make a further change to the legislation. This is to ensure that HMRC are able to tackle those promoters who do not cooperate and fail to provide adequate information about their scheme, resulting in them receiving a DOTAS SRN under the new proposed DOTAS changes above (see paragraphs 3.1 to 3.4). The government is therefore amending the draft legislation so that a stop notice could be issued where, as a result of a failure by the promoter to provide information, HMRC do not have sufficient information to decide whether or not the arrangements are likely to be capable of obtaining the tax advantage claimed by the promoter.

4.12. HMRC would make clear in guidance that where a stop notice was issued for a scheme disclosed under DOTAS, including for SDLT and IHT disclosures, it would be where the scheme continues to be promoted. This means that schemes that have been disclosed to meet DOTAS obligations in the past will only be considered for a stop notice if they continue to be sold and where they meet the other stop notice criteria. Although the SDLT and IHT hallmarks are drawn widely, a stop notice can only apply where arrangements are disclosable or similar to disclosed schemes.

4.13. Currently the information powers within POTAS only apply once a conduct notice has been issued. The draft legislation published alongside the consultation document included an information power which would allow HMRC to obtain details on schemes at an earlier stage. There was no comment from respondents on this proposed legislative approach, but after further consideration the government proposes to amend the proposals set out in the consultation document and include POTAS information powers which are more closely aligned with HMRC's existing information powers in Schedule 36 Finance Act 2008.

4.14. The consultation document stated no new penalties were proposed for POTAS, although the accompanying draft legislation published alongside the consultation document included extending penalties to include failure to comply with the new stop notice and information notice proposals. After further consideration, and to ensure that the proposed POTAS changes provide the appropriate incentive for promoters to meet the requirements of information notices and stop notices, the government will include penalties in the legislation, in line with the amounts chargeable for failures to comply with other areas of POTAS. Penalties will be introduced for failure to comply with a stop notice, failure to make a quarterly report when subject to a stop notice, failure to comply with POTAS information

notices, and failure to inform others that they are subject to a stop notice. These will be issued by an authorised officer in HMRC, following existing POTAS governance processes, and will all be subject to a right of appeal to the Tribunal.

4.15. The government recognises the importance of LPP. Therefore, the current protections in POTAS will continue to operate so that no information or documents will be required where LPP applies.

4.16. HMRC will update guidance to clarify how stop notices will operate and how safeguards will be applied to support those who receive a stop notice.

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

4.17. A number of respondents wanted to see clear and transparent governance processes set out in guidance that explains how decisions to issue stop notices will operate, and clarify how HMRC intend to use the regime. One respondent thought that HMRC should publish internal reviews requested by the person issued with the stop notice and consequent appeals to the Tribunal to demonstrate that reviews are operated effectively. Another considered that there should be an independent oversight body for the stop notice process.

Government response

4.18. The POTAS regime is already supported by strong governance processes including the requirement that authorised officers are senior members of HMRC. The government considers that this is a strong and proportionate governance process and would continue to apply following these changes. The authorised officer can rapidly remove any person from the POTAS regime where it is demonstrated that they should not be subject to it. New appeal rights for stop notices mean cases will be heard in the Tribunal where there is disagreement with the view of HMRC about whether a stop notice should remain in place. Updated guidance will set out how the review and appeal process would work.

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

4.19. A number of respondents thought publishing stop notices would be very helpful and one respondent wanted as much detail to be published as possible. Another respondent doubted communications could be brought to the attention of relevant taxpayers so that they were aware of the risks. Many respondents said it was very important that HMRC communicated this information in a way that reached those who needed to see it, with one seeing a need to communicate beyond the GOV.UK website and another suggesting the communication style should be tailored to being read by an ordinary taxpayer.

Government response

4.20. The government is grateful for the views expressed. HMRC would publish stop notices on GOV.UK but will also explore a wide range of communication techniques to alert relevant taxpayers, agents, representative bodies, and other interested parties.

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?

4.21. There was a range of comments from respondents on this question: some considered that the proposal struck an appropriate balance between the rights of a person issued with a stop notice and the need for HMRC to warn taxpayers of the details of schemes and promoters they should steer clear of; others favoured naming at the time the notice is served subject to it being made clear that the stop notice was subject to appeal; while other respondents argued that, given the irreversible nature of naming, it should not take place until any appeal against the stop notice was resolved. One respondent agreed with the proposal to name the promoter after the First-tier Tribunal had supported the issue of the stop notice, as the proposed legislation is currently drafted, but thought that any scheme subject to a stop notice should be named sooner. The following views were typical of those received:

"*this proposal appears to strike a balance between HMRC's interest in limiting the effects of marketed arrangements, and the promoter's right of appeal*"

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

Government response

4.22. The government recognises the concerns raised and is looking to strike the correct balance between naming sufficiently early to support potential users of the scheme and being certain that the stop notice has been correctly raised. A person subject to a stop notice will be named when the First-tier Tribunal has determined that it should remain in place (or sooner if appeal rights are not exercised) and the government will take forward legislation on this basis. Naming at this point would add to information which would already be public knowledge from the Tribunal case. If there were an appeal against a decision of the First-tier Tribunal on a stop notice, any publication of the name of the promoter would state that the decision had been appealed. Should the appeal be successful, HMRC would remove any person named from publications, and provide any appropriate clarification.

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

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?

4.23. Most respondents agreed that the proposals would achieve their stated policy objective. One respondent commented:

"*We agree that applying a stop notice to the sale of a particular scheme by the entity to which it is issued as well as to any entities that it was associated with, or*

successors to that entity, is a suitable way to prevent promoters avoiding their obligations by changing their organisational structure".

4.24. Another respondent said that it was important that the legislation was not overly broad, although they thought that existing exemptions, for those not providing tax advice or for those not aware that the arrangements or proposed arrangements were an avoidance scheme, should be adequate.

4.25. In addition to the broader request for strong governance and guidance one respondent made clear that there needed to be suitable governance for decisions to issue stop notices so that it could be demonstrated that they were issued on a reasonable basis that was consistent with the policy aims.

Government response

4.26. The government notes these views and will proceed on the basis outlined in the consultation. The POTAS regime already has strong governance processes and authorised officers must be at least Senior Civil Service grade. The government considers the proposed procedural and legislative safeguards are proportionate: HMRC would publish details about the stop notice, including the reason why it was issued, to aid transparency on the use of this power and make clear the schemes it was used to stop.

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

Removing the ability of high-risk promoters to hide behind corporate or other entities

Overview

5.1. The proposals in the consultation would ensure that responsibility for the obligations within POTAS, and any consequent failures to comply with them, are placed on the persons ultimately responsible for the promotion of a scheme, including the entities they control or have significant influence over. This would be achieved by widening the existing statutory definition of persons carrying on a business as a promoter to include individuals who control, or significantly influence, entities that carry on promotion activities. This would also include the people an offshore promoter works through in the UK and other entities that any promoter may have put in place in a fragmented way to frustrate HMRC's ability to tackle them.

5.2. Where a person with significant influence or control of a business promoting tax avoidance set up a new entity into which they transferred their promoting activities, HMRC would, under the proposed changes, be able to attribute POTAS threshold conditions, conduct notices, and monitoring notices to the new entity where HMRC had reason to believe that the new entity was a promoter of tax avoidance.

5.3. Where a stop notice was issued to one of these entities, that entity would have an obligation to pass the notice on to those ultimately responsible for the promotion of the scheme and to entities for which they were responsible. If a stop notice was issued to the person with ultimate responsibility, they would also be required to pass it on to the entities for which they were responsible.

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

5.4. The majority of respondents welcomed these proposals though one respondent was concerned that manipulative individuals could frustrate HMRC due to the subjective nature of the 'control and influence' test. Another respondent was concerned that an adviser may have multiple companies in their business structure for legitimate reasons and said there needed to be safeguards to take account of this. They also wanted HMRC to commit that, where an adviser is engaged by a taxpayer in order to resolve any issues with HMRC, HMRC would not seek to issue conduct notices against it or other connected parties.

"We believe these measures are appropriately targeted. The given examples in the consultation document are all highly contrived ways to get around HMRC's rules on promoters, and we cannot conceive of any legitimate reason why a person would choose to conduct business like this."

Government response

5.5. The government agrees that it is right to tackle those who hide behind corporate structures when they are in fact responsible for promoting tax avoidance. These changes would deal with the manipulation of entities by individuals and enable HMRC to take action against the people concerned. These rules concern the promotion of avoidance schemes and most commercially driven business structures would be very unlikely to be impacted. The governance processes within the POTAS regime would ensure that stop notices were only issued to those involved in promoting avoidance.

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

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)?

5.6. Respondents agreed that the opportunity to comment on the proposed terms of the conduct notice continues to provide an appropriate safeguard. But, one respondent said that there needed to be clear independent oversight of these powers.

"A conduct notice can only be issued on the authorisation of an authorised officer of HMRC, who are senior people in HMRC's Counter-Avoidance Directorate. We believe this is an appropriate safeguard which should be continued. Again, we would suggest that there also be clear independent oversight of these powers"

5.7. There were also concerns from a number of respondents that DAC6[4] arrangements that have nothing to do with tax avoidance could be caught by the defeat notice criteria, under which a promoter that suffers three defeats of schemes they have promoted can receive a POTAS conduct notice.

Government response

5.8. The government agrees that clear oversight of these powers is required. The POTAS regime currently has strong governance processes with authorised officers required to be senior members of HMRC. Under these proposals HMRC would publish details about why a stop notice was issued by the authorised officer and would not publish the name of the promoter until after the First-tier Tribunal had confirmed the stop notice should have effect, or earlier should the recipient not ask for a review or appeal. Any stop notice would cease where it was demonstrated that it should not have effect. The Tribunal would provide an appeal route for decisions by the authorising officer to issue a stop notice and for penalties issued by HMRC.

5.9. Following the end of the UK transition period, the UK will not be implementing the DAC6 hallmarks which the consultation proposed to include as POTAS triggers. This means that there will be no POTAS conditions where DAC6 would be in point.

[4] COUNCIL DIRECTIVE (EU) 2018/822 of 25 May 2018, creating an EU wide reporting regime that covered avoidance arrangements of a certain nature. There are some similarities, particularly for hallmarks A and B, with the UK's DOTAS regime.

Tightening the application of the two-year period for conduct notices

Overview

5.10. The consultation included the following proposals to extend the length of conduct notices:

- The time taken for any legal challenge would be factored into the length of the conduct notice (so that its effect would be realised for a full two years by extending the period by the time taken for the challenge).
- HMRC would still be able to go to a tribunal to apply for a monitoring notice after a conduct notice had ended where it was discovered that there was a breach during the period the notice was live.
- Where a promoter breached the most serious, or multiple, POTAS threshold conditions, the length of conduct notices would be extended up to a maximum of five years. For example, where a promoter failed to comply with the DOTAS legislation and had also been subject to disciplinary action by a professional body, the conduct notice would be extended up to a maximum of five years.
- HMRC would be able to transfer the requirements of a conduct or monitoring notice to any entities used by the promoter in the promotion of schemes.

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

5.11. There were only two responses to this question: one respondent was not sure how the extension to conduct notice time limits would apply to where a person has received three relevant defeats within a period of up to eight years. They thought that there was a risk that larger advisory firms could receive extended conduct notices due to the size of their client base, even if such cases represent a very small amount of their total activity.

5.12. The other respondent said:

> *"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."*

Government response

5.13. The government believes the proposals provide an appropriate balance that would provide clarity to those in receipt of a conduct notice while allowing HMRC to take action against those who continued to promote avoidance schemes, and would extend the time limit for a conduct notice only where strict criteria are met. The government recognises that judicial review is an important safeguard and these proposals are not intended to interfere with this, merely extend the conduct notice period by the time taken to resolve the judicial review. Where a conduct notice was issued as a consequence of the defeat notice threshold condition being met by a promoter who has had avoidance schemes defeated by HMRC

three times within a period of eight years, this would count as a single threshold condition having been met which would automatically count as being significant. Should no other threshold conditions have been met during the term of the conduct notice, the conduct notice would run for a maximum of three years.

5.14. As the consultation document proposes, extended conduct notices would apply where a person meets two or more threshold conditions or where a threshold condition is considered to be automatically significant. This means that those who met more threshold conditions and/or had more serious failures would be scrutinised for a longer period than those who met only one threshold condition.

5.15. The authorised officer would extend the time limit of a conduct notice to take account of periods where HMRC was unable to scrutinise the behaviour of a promoter. The government consider that this would ensure that HMRC is able to monitor the actions of promoters for the full amount of time of a conduct notice.

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)?

5.16. Respondents generally felt that an adequate balance was achieved between ensuring appropriate safeguards were in place and HMRC being able to act promptly against schemes destined to fail. They also felt that greater transparency, both through detailed guidance and by publishing how the powers have been used, would help provide reassurance that the powers were not being abused.

Government response

5.17. The guidance for the POTAS regime will be updated to provide clarity on governance processes, safeguards and the application of the legislation. HMRC would publish details about the stop notice, including the reason that it was used, to aid transparency on the use of this power and the schemes it is used to stop. The POTAS regime has strong governance processes and safeguards which will continue to apply.

Conduct notice threshold condition amendments

Overview

5.18. The consultation proposed that the POTAS threshold condition that covers a failure to disclose under DOTAS is amended to include DOTAS disclosure failures of any nature. The proposals would also amend the POTAS threshold condition that covers information powers, so that failure to comply with information notices issued under DOTAS and other disclosure regimes' information powers would be included.

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

5.19. A couple of respondents were concerned that advisers would inadvertently fail to comply with DOTAS reporting requirements, and wanted strong safeguards. Another respondent was concerned about the inclusion of a DOTAS requirement

that requires users to provide to HMRC information passed to them by the promoter of the scheme, given that POTAS focuses on promoters.

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)?

5.20. There were no responses to question 24.

Government response

5.21. The POTAS regime has strong and proportionate governance processes. Any person can be rapidly removed from the POTAS regime where it is demonstrated that they should not be subject to it. Existing safeguards mean that a person who gives advice will not be considered to have contributed to the design of an arrangement, and so be considered a promoter so that they would fall within the scope of the regime, where that person does not provide tax advice or could not reasonably be aware that the arrangements were an avoidance scheme.

5.22. The proposed amendment of the DOTAS and DASVOIT threshold conditions include a condition where the requirement falls on the user. This condition will be removed from the proposed legislation. The government agrees that it is not appropriate for this to be a condition as POTAS challenges should focus on promoters' actions and not failures that are as a consequence of taxpayers' actions.

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

Information powers

Overview

6.1. The proposed changes to the legislation would allow HMRC to obtain relevant information from potential enablers at the earliest possible moment to consider whether they have enabled tax avoidance and therefore potentially liable for an enabler penalty. This would put beyond doubt that HMRC can use the information powers in Schedule 36 Finance Act 2008, in the same way as they are able to use these powers in a compliance intervention: to check whether a person is, or may become, liable to enablers penalties. HMRC would be able to use the information powers without the need for there first to have been a defeat of the arrangements concerned.

6.2. HMRC would be able to obtain information from persons they reasonably suspect of being enablers. As a minimum HMRC would need to identify tax arrangements that they think may be abusive, based on the GAAR 'double reasonableness' test, and at least one individual or business who had enabled its use. Tax professionals who adhere to professional standards, and those who provide clients with services in respect of genuine commercial arrangements, would not be affected by the proposals.

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?

6.3. The majority of respondents were supportive of the proposed changes, considering them to be sensible. The proposals would ensure that the enablers legislation can work in the same way as the information powers in Schedule 36 Finance Act 2008. This change would better reflect the original intention of the legislation and would enable HMRC to engage with potential enablers to obtain the required information without first requiring a scheme to have been defeated.

6.4. One respondent commented*:*

"This change would certainly better reflect the original intention of the legislation and with that in mind [ ] supports the proposals."

6.5. One concern that was expressed by a number or respondents was the need to protect client confidentiality. There was a concern that an adviser may have to hand over client sensitive information, perhaps where there was no substantive evidence of abusive arrangements and this could damage trust between the adviser and the client.

6.6. Comments included:

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

"A robust approach from HMRC, to monitoring implementation of the revised powers, will be required."

6.7. There was a recognition from respondents that the changes would work effectively against promoters of schemes, but respondents also asked HMRC to ensure that minor players would not be pursued too early, before HMRC was certain it has established a strong substantive case that there was an avoidance scheme in existence.

Government response

6.8. The government agrees that it is right for HMRC to engage with potential enablers at the earliest practical opportunity to disrupt the activity of those enabling tax avoidance and put them on notice that they will be liable to a penalty if and when the arrangements are defeated. At the same time, in the event that genuine advisers had become involved unintentionally in the arrangements HMRC would be able to quickly resolve the position, and the advisers would have the information to avoid further involvement in similar cases. The changes are not intended to impact client confidentiality; HMRC would only issue an information notice where they had evidence of tax avoidance arrangements that they suspect are abusive arrangements, and there is evidence that the recipient has enabled those arrangements. The information notice will ensure that client confidentiality is maintained, and will not impact LPP. HMRC will update guidance to make this clear.

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?

6.9. Respondents thought that secondary enablers or those only tangentially involved would struggle to provide any useful information to HMRC. One respondent also believed that matters might be structured to deny enablers access to detail of other enablers to get around the objective of this proposed change.

6.10. One respondent commented:

"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. Merit in clear guidance setting out expectations clearly."

Government response

6.11. The government recognises that enablers within the supply chain are likely to have only limited information of other potential enablers involved with those arrangements. The main aim of this change is to obtain information from promoters on other enabling participants. This would allow HMRC to contact these enablers and advise them of their involvement and potential liability to an enablers penalty, thereby disrupting the sale of avoidance schemes. HMRC would make this approach clear in guidance.

The multi-user scheme percentage condition

Overview

6.12. The aim of the proposals for abusive tax arrangements which have been used by multiple taxpayers (referred to as “multi-use”), is for HMRC to issue enabler penalties at an earlier point than they can now, while maintaining adequate safeguards that ensure penalties may only be assessed once there are good reasons to conclude the scheme involves abusive tax avoidance that does not work. First, HMRC would be able to assess enablers penalties following a judicial ruling in relation to any taxpayer who has used that scheme. Therefore, the current rule for multi-use arrangements, which sets a percentage of the number of scheme users whom HMRC has to have defeated, would be removed once one taxpayer who had used the scheme in question had been defeated in a tribunal or court and there was a GAAR Advisory Panel opinion that considers the tax arrangements are abusive. HMRC would also be able to issue an enabler penalty on the enabler in relation to all subsequent defeats of arrangements implementing the scheme.

6.13. The proposal also amends the tiered approach to determining when HMRC can issue penalties to an enabler. These tiers would apply where there is no final judicial defeat, for example because taxpayers agreed to settle their enquiries with HMRC:

- for schemes used by 20 taxpayers or fewer, where HMRC had defeated 50% or more of the cases in which a taxpayer had used the scheme (as applies currently),
- for schemes used by between 21 and 43 taxpayers, where HMRC had defeated a minimum of 11 of the cases where a taxpayer had used the scheme,
- for schemes used by 44 or more taxpayers but fewer than 200, where HMRC had defeated 25% or more of known cases where a taxpayer had used the scheme, or
- for schemes used by 200 taxpayers or more, where HMRC had defeated 50 or more cases.

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?

6.14. One respondent believed that the purpose of the measures generally should be to change behaviour rather than to issue penalties. Respondents broadly agreed that penalties should apply when a scheme had been defeated and it was deemed to be abusive. But a number of respondents were keen to ensure that safeguards were put in place so that the defeat was appropriate for the purpose of charging penalties. One respondent thought that where the arrangement was defeated by a targeted anti-avoidance rule (TAAR) that it would not be appropriate to charge a penalty where there was a final judicial ruling in respect of only one taxpayer. Another believed that penalties should not be raised before there was a final judicial ruling in place and any right of appeal had run its course.

6.15. Comments included:

“[ ] very much agrees that penalties should apply whenever a scheme is deemed abusive.”

"Penalties should certainly not be raised before there is a final judicial ruling in place. If there is still a right of appeal at hand, then this should be allowed to run its course before any penalties are raised."

Government response

6.16. The government agrees that the aim of the enablers penalty regime is to change the behaviours of those enabling abusive arrangements. But where someone has enabled an abusive tax avoidance scheme that is later defeated it is right that they receive an enablers penalty. A judicial ruling that defeats that scheme will provide certainty that the arrangements do not work: this is the same whether the scheme is defeated by a TAAR or some other technical argument. Nevertheless, before HMRC can issue an enablers penalty they are required under the current rules to have a GAAR Advisory Panel opinion that considers the tax arrangements are abusive. This ensures that HMRC will only issue penalties where an authorised officer has good reason to consider there are abusive tax arrangements.

6.17. The government will proceed with the proposals to enable HMRC to issue penalties once there is a judicial ruling in the case. Penalties would only be issued where there was a GAAR Advisory Panel opinion that considers there are abusive tax arrangements.

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?

6.18. Respondents recognised that the current 50% threshold test involves a comparison between successful defeats and known scheme usage, and that asymmetry can be used to frustrate the assessment of penalties. All respondents agreed that the proposed tiered threshold percentages for multi-user schemes provided a suitable balance between ensuring that penalties can be issued promptly to an enabler while providing sufficient time for enough defeats to confirm that the scheme is likely to fail.

6.19. Comments included:

"The proposal provides a suitable balance."

"Agree that the tiered approach provides 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."

"We believe these percentages represent a significant proportion of 'defeats', and so strike the balance between fairness to taxpayers and improved powers for HMRC."

Government response

6.20. The government welcomes the views of respondents and believes that proposals for a tier of threshold percentages for multi-user schemes provides a balance between issuing enabler penalties promptly and providing time for sufficient defeats to confirm that the scheme is likely to fail. The government will therefore

introduce legislation for the new tiered threshold percentages for multi-user schemes.

Naming enablers

Overview

6.21. The changes proposed here would remove the restriction that, for a multi-user scheme, HMRC cannot publish information about an enabler until HMRC has defeated all cases in which that scheme has been used. The enabler will still have to receive either 50 penalties or penalties exceeding £25,000 in any one year before HMRC can publish information about that enabler.

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

6.22. Overall respondents considered that the proposed changes provided a suitable balance: a large number of penalties are needed before HMRC may publish details of the enabler, and the provisions are likely to only apply to promoters repeatedly marketing schemes.

6.23. One respondent believed that there was a difference between naming where there was a judicial defeat resulting in penalties, and naming where penalties were simply imposed because enough taxpayers had settled. They considered that there should be a requirement for a GAAR Advisory Panel opinion that considers whether the tax arrangements are abusive before HMRC can name an enabler when there has not been a court case to defeat the scheme.

6.24. Another respondent was not sure how helpful it would be to taxpayers for enablers to be named and were worried about compliant advisers who would be concerned about being named and may withdraw their services with the consequence that taxpayers are not able to obtain appropriate tax advice. They therefore believed there should be the maximum safeguards before an enabler is named, and that all cases need to be defeated before consideration can be given to naming the enabler.

6.25. Comments included:

"These thresholds seem suitable, as they are significant in both number of failures and value of penalties. These are unlikely to be applicable to anyone but promoters repeatedly marketing very aggressive schemes."

Government response

6.26. The government welcomes the views of respondents and believes that the proposed threshold provides a suitable balance: HMRC would be able to publish details of enablers who repeatedly market avoidance schemes while those enablers receiving a low number of penalties would not be named. The government notes the concerns. Only enablers that have received an enablers penalty may be named under these proposals, and those providing appropriate tax advice are very unlikely to receive an enablers penalty. The proposals for naming require a high number of penalties or high value penalties to be received,

meaning that only those heavily involved in enabling avoidance are likely to be named.

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?

6.27. One respondent agreed that the existing procedural safeguards should continue to provide an appropriate amount of internal scrutiny. Another respondent considered that the requirement before penalties can be issued of a GAAR Advisory Panel opinion that there was an abusive arrangement was a strong safeguard.

Government response

6.28. The government welcomes the views of respondents and agrees that the existing safeguards will continue to apply under the proposed changes.

Commencement

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?

6.29. Some respondents understood why HMRC were considering applying this part of the proposals retrospectively given the aim to tackle the behaviour of promoters. But there was universal opposition to any retrospective application of the measure.

"[ ] has great sympathy with HMRC's desire to apply these measures retrospectively from the introduction of the penalty regime in 2017, not least because the type of behaviour that it is seeking to penalise is abhorrent and wholly without justification and frustrates the original intention of the legislation."

"we consider that retrospectivity would be concerning and on balance we are not in favour of it."

"retrospective measures are widely perceived as unfair, and should only apply in the most serious situations. We do not believe this is one of them."

Government response

6.30. The government has decided that the enablers changes should apply from Royal Assent.

7. Maintaining the General Anti Abuse Rule

Overview

7.1. The consultation outlined that the current GAAR legislation makes no specific mention of partnerships or any particular steps needed to apply the GAAR regime to partners or partnerships who enter into abusive arrangements.

7.2. The GAAR legislation only refers to the person who received the tax advantage whereas in a case involving a partnership, under the framework for HMRC enquiries, the enquiry is made into the partnership return. Any adjustments arising as a result of amendments into the partnership return are agreed at partnership level and individual partners are subsequently notified of any relevant adjustments required to their personal tax returns.

7.3. Therefore, the consultation proposed a change to the GAAR legislative framework to allow HMRC to deploy the GAAR at partnership level, with counteraction taking place via the partnership statement and then carried through to each relevant partner. If enacted, the proposals would mean that GAAR notices could be issued to the representative partner in a partnership, mirroring the way partnership enquiries are conducted under the Income Tax Self-Assessment regime.

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

7.4. Respondents supported the proposed changes to the legislation and agreed that the changes would make it clearer as to how the GAAR procedure applies to partnerships.

7.5. One respondent said that the changes should only apply where the arrangements have been implemented by the partnership itself and as a result of that would end up amending the share of the profits allocated to the partners.

Government response

7.6. The government has noted these views and will proceed on the basis outlined in the consultation. Where one or more partners implement arrangements that do not affect the partnership profit allocation, any GAAR action would remain at the individual partner level as any enquiry would be against their personal tax return.

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

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

7.7. Respondents agreed that the GAAR framework provides for many safeguards such as rights to make representations, appeal rights and the role of the

independent GAAR Advisory Panel. The representative partner will have all of these rights on behalf of the partnership and so respondents were reassured that the existing safeguards are suitable for cases involving a partnership.

7.8. One respondent made the point that it was important that partners would be aware that GAAR proceedings had commenced against the partnership and that they had an opportunity to exit the arrangements. They added that there should be provisions that enable partners to take corrective action with regard to their own tax return and exit the avoidance, even if other partners in the partnership continued to dispute that the arrangements were abusive.

Government response

7.9. The government has noted these views and agrees with the concept of allowing individual partners to take corrective action in respect of their own returns. The government will look to amend the draft legislation to allow any one, or more, of the partners to take corrective action in relation to their own liability. This would mean that the individual partner was no longer liable to GAAR counteraction or a GAAR penalty. This amendment will allow the legislation to operate more fairly for taxpayers.

7.10. However, in line with all other partnership enquiries, it will continue to be for the representative partner to notify the partners of any action HMRC is pursuing under the GAAR.

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

7.11. One respondent called for an additional protective measure that would allow a partner who is not the representative to have a role in the GAAR process.

Government response

7.12. Continuing with existing and well-established processes the government's view is that only the representative partner, rather than each partner, should be in a position to make representations on behalf of the partnership. This is in line with the general approach taken in respect of partnership returns.

Further Changes

7.13. The government also proposes some further minor technical amendments to the GAAR legislation, which will remove any ambiguity in the legislation:

- The intention of the current legislation was that a taxpayer should be able to take corrective action within 30 days of receiving both a pooling notice (where arrangements are substantially the same as other arrangements) or a binding notice (where arrangements are equivalent to already counteracted arrangements). They should not then be able to make GAAR-related adjustments before a notice of final decision is issued. However, the current legislation only achieves this for pooling notices, so the amended legislation would apply this to binding notices;

- There are two incorrect cross-references in the legislation in the section providing for the calculation of the penalty. The legislation will be amended to correct these cross-references.

Annexe A: List of stakeholders consulted

The following organisations contributed to the consultation:

Association of Accounting Technicians (AAT)

Association of Taxation Technicians (ATT)

Chartered Institute of Taxation (CIOT)

The Institute of Chartered Accountants in England and Wales (ICAEW)

The Institute of Chartered Accountants of Scotland (ICAS)

Deloitte

Institute of Certified Bookkeepers

Law Society of Scotland

Law Society (UK)

PricewaterhouseCoopers (PwC)

Saffery Champness.

Five individuals, including chartered tax advisers, also contributed to the consultation.