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YOUR REF:

OUR REF: R/S/AQM

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By Special Delivery and Email (Action.FST@hmtreasury.gsi.gov.uk)

CC:

Priti Patel MP
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

By Special Delivery and Email (Action.XSI@hmtreasury.gsi.gov.uk)

15 July 2014

Dear David

TACKLING MARKETED TAX AVOIDANCE: FOLLOWER NOTICES AND JUDICIAL RULINGS

1. INTRODUCTION

1.1

I write on behalf of the Independent Members of the Tax Professionals Forum about our concerns on the draft follower notices' legislation in Finance Bill 2014 (the "Finance Bill"). This letter has been sent in draft to all of the Independent Members and all but one has responded to say that they agree with the views expressed in it. Malcolm first raised these concerns with [REDACTED] and then [REDACTED] of HM Revenue & Customs ("HMRC").

1.2

Our particular concern is that the Government has not addressed a fundamental issue that was raised during HMRC's consultation on *Tackling marketed tax avoidance* (published on 24 January 2014) (the "Consultation") relating to follower notices and judicial rulings, despite the fact that the Government promised to address the issue in the Consultation's summary of responses (published in March 2014 (the "Summary of Responses")).

2. BACKGROUND

2.1 The Consultation draft of the Finance Bill provided, inter alia, that:

"A judicial ruling is 'relevant' to the applied arrangements if the principles laid down in the ruling would, if applied to the applied arrangements, deny the asserted advantage, or a part of that advantage."

(Schedule 1, Part 1, paragraph 4(3)(b), Consultation Draft Legislation) (emphasis added)

2.2

One of the main concerns raised during the Consultation was that use of the term 'principles' is too broad and could catch a wider range of disputes than the Government intends. (see further Summary of Responses, chapter 3.5). This concern is addressed at Chapter 3.7 of the Summary of Responses:

"The Government accepts some of the concerns raised about reliance solely on the term 'principles'. Some respondents saw this approach as being capable of applying a judgement that, for example, an item of expenditure was not incurred 'wholly and exclusively for the purposes of the trade' to any case where that was the point in dispute. This is not the Government's intention. The proposal aims to focus on the tribunal's or court's reasoning behind the decision. The Government will make changes to the proposed legislation to make this aspect clearer."

(emphasis added)

2.3

The Finance Bill (as amended) now provides that a judicial ruling is relevant if, inter alia, *"the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage"*

(Finance Bill, section 198(3)) (emphasis added)

3. OUR CONCERNS

3.1 It is our view that the amendment to the provision has done anything but clarify the Government's intentions.

3.2 Introduction of the phrase 'or reasoning given' has undoubtedly widened the scope of the provision. As amended, a judicial ruling is a 'relevant' judicial ruling if either:

3.2.1 The principles laid down in the ruling; or

3.2.2 The reasoning given in the ruling.

would, if applied, deny the asserted tax advantage. Simply put, if a judicial ruling can be relied upon either for the principles it lays down or for the reasoning it gives, the category of ruling that may be relevant and the reasons why it may be relevant has been extended.

3.3

Not only has the amendment widened the scope of the provision, the amended provision appears to entirely ignore the central concern that was raised during the Consultation and that the Government promised to address. Indeed the provision still refers to 'principles'. The Summary of Responses states that the Government's intention is not to have so wide a provision as to catch all

cases where the same point is in dispute. By continuing to refer to 'principles' – and to further widen the provision by introducing the phrase 'the reasoning given' – the provision is therefore at odds with governmental policy.

3.4 The Summary of Responses clearly sets out the Government's policy behind the provision in accordance with Stage 2 of the Process. The amendment to the provision and the continued use of 'principles' in no way reflects this – on the contrary it shows a substantial change in policy. To renege on a concluded policy is wholly unsatisfactory and completely undermines the policy process. This is of particular importance in relation to provisions such as these which afford broad discretionary – indeed near judicial – powers to HMRC.

3.5 As I noted at the beginning of this letter, Malcolm raised this issue with [REDACTED] and has corresponded on it with [REDACTED]. We have reviewed that correspondence and have not found [REDACTED]'s explanation satisfactory. [REDACTED] did point out that:

"the Government amendments to the appeal provisions should provide reassurance that a follower penalty can be overturned on appeal if a Tribunal finds that the ruling specified in the notice was not relevant to the taxpayer's circumstances, or that it was reasonable for the taxpayer not to have taken corrective action following receipt of a notice. Thus, if the Tribunal finds that the decision was not 'relevant' the original Follower Notice itself and any associated Accelerated Payment Notice would therefore be cancelled"

We are bound to note, however, that if the legislation is defective, any appeal right is valueless. The Tribunal can only apply the law as it finds it. On such an important matter, this cannot be acceptable.

4. OUR PROPOSAL

4.1 We submit that the position could be remedied by removing the reference to 'principles' in Finance Bill, section 198(3), as follows:

"(b) the reasoning given in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage"

4.2 We think that it would be appropriate to announce that the provision will be applied by HMRC as if it had been altered as set out above and seek to alter it to reflect this amendment as and when this is reasonably possible.

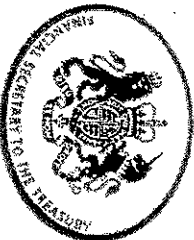
4.3 We look forward to hearing from you as to the steps the Government proposes to remedy the position.

Yours sincerely



Richard Stratton

On behalf of the Independent Members of the Tax Professionals Forum



HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

Richard Stratton
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29 July 2014

Dear Richard

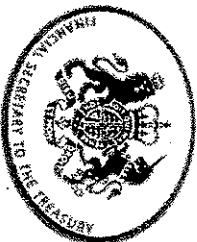
**TACKLING MARKETED TAX AVOIDANCE: FOLLOWER NOTICES
AND JUDICIAL RULINGS**

Thank you for your letter of 15 July to Priti Patel and me on behalf of the Independent Members of the Tax Professionals Forum on marketed tax avoidance. I am replying as the Minister responsible for this policy area.

I welcome the Forum's continued dialogue on this matter. The measures around our policy aims were debated considerably in Parliament by the Public Bill Committee and at Report Stage. The record of the Committee's proceedings can be found at these links:

www.publications.parliament.uk/pa/cm201415/cmpublic/finance/140617/am/140617s01.htm, and

www.publications.parliament.uk/pa/cm201415/cmpublic/finance/140617/pm/140617s01.htm.



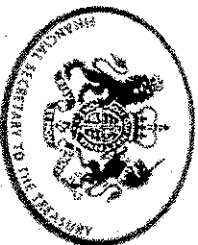
The legislation was amended at Report Stage to clarify taxpayers' rights of appeal against a follower notice penalty, and setting out specific grounds for the Tribunal to dismiss the penalty. If the Tribunal upholds an appeal against the penalty on the grounds that the original conditions for a follower notice were not met, this will result in the original follower notice and any associated accelerated payment notice being cancelled.

The important point to emphasise throughout is that this measure does not change anyone's underlying liability to tax. It requires taxpayers to pay over the money they would have had to pay at the outset if they had not tried to avoid paying tax. Taxpayers will still have full appeal rights to the tribunal and courts about their tax liability, and if they succeed the tax will be repaid with interest.

The Finance Act has now received Royal Assent. A copy of the legislation can be found here: http://www.legislation.gov.uk/ukpga/2014/26/pdfs/ukpga_20140026_en.pdf

HMRC has also published guidance about the operation of the new rules on follower notices and accelerated payments. This includes information about how representations may be made, and other actions that an individual should take on receiving a notice, including details of how to contact HMRC.

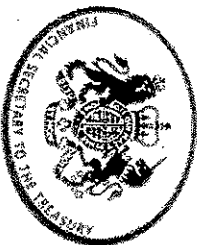
<http://www.hmrc.gov.uk/specialist/acc-pymts-f-notices.pdf>



These new measures continue our work to tackle tax avoidance – dealing with schemes that have been put together with the aim of paying less tax than Parliament intended, often a great deal less. In a large number of these cases the Exchequer has waited a long time for this tax, and in the meantime the vast majority of people have been paying their tax upfront, for example through PAYE. The Government therefore believes it is time to apply the general tax approach of 'pay now dispute later' to tax avoidance schemes, bearing in mind that HMRC already withholds repayments in disputed tax cases.

I can assure you that the representations made on the follower measures and First Tier Tribunal decisions were given due consideration before we took the decision to maintain the consulted position.

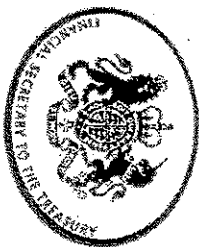
However, I agree that the Government's response document should set out why it decides not to amend proposals on an issue on which it receives significant representations to help consultees understand the reason behind that decision. Our response in March 2014 to the "Tackling marketed tax avoidance" consultation document set out our decision not to alter the proposal concerning the use of a First Tier Tribunal as the basis for a follower notice. However, a more detailed explanation prior to this was set out in our response document in January 2014 to the "Raising the stakes on tax avoidance" policy



consultation: <https://www.gov.uk/government/consultations/raising-the-stakes-on-tax-avoidance>

May I also take the opportunity to respond to the point about updating the Protocol on Unscheduled Announcements/retrospection which you raised in your draft report, and which we discussed briefly at our meeting in June.

I recognise that taxpayers will want as much clarity as possible in this area. However, it is difficult to specify comprehensively the circumstances in which fully retrospective legislation (i.e. legislation which has effect earlier than the date of announcement) may be appropriate, though the factors highlighted by the Forum will certainly be relevant. The Government has made it clear that retrospection would only be used in wholly exceptional circumstances. It has made only a very small number of uses of this power since 2010, and has set out clearly on those occasions the reasons for taking this exceptional step. We will continue to do so, should future occasions for such a step arise.



We do not see a case for changing the Protocol at the present time, but invite the Forum to continue to monitor the Government's use of retrospective powers.

Yours ever

A handwritten signature in dark ink, appearing to read "David".

David Gauke MP

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and 22/8

12 August 2014

Dear David

RE: TACKLING MARKETED TAX AVOIDANCE: FOLLOWER NOTICES AND JUDICIAL RULINGS

Thank you for your letter of 29 July. Your letter addresses two issues. The first relates to follower notices, as raised in our letter of 15 July, and the second relates to updating the Protocol on 'Unscheduled' Announcements/retrospection, as raised in our draft report. This letter responds only to the first issue and we will write separately on the second issue.

In relation to follower notices, the independent members are rather baffled by your response because it fails to address the issue we raised. Your letter addresses the issue of reliance on First-tier Tribunal decisions for issuing follower notices. This, however, was not even mentioned in our letter.

Your letter refers to the appropriateness of Government response documents explaining why the Government has decided against particular representations so that consultees can understand why their points have not been taken up. We entirely agree.

The point we raised, however, drew attention to an instance where the Government's response document had accepted a particular representation and had promised to amend the legislation to give effect to it, but where the legislation was not amended to achieve that end.

We are sure that you will agree that it is as important to give effect to the Government's intentions in legislation where it has accepted consultees' representations as it is to explain why Government has chosen not to accept the representations it has received.

TRAVERS SMITH

12 AUGUST 2014

We look forward to your response to our letter of 15 July. I enclose a further copy for ease of reference.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Richard', written in a cursive style.

Richard Stratton

On behalf of the Independent Members of the Tax Professionals Forum



HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

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Your ref: RJS/AQM

22 SEP 2014

Dear Richard

Thank you for your further letter of 12 August about marketed tax avoidance.

I am sorry that my previous reply of 29 July did not address the issue that the Forum raised on follower notices and hope that my reply here will do so in clarifying the Government's position on this.

Our intention behind the amendment was to include the term 'reasoning' to emphasise in the legislation how the new rules were to be applied. That is, the specific reason for reaching a decision should be considered. However, we also concluded that to require both 'principles' and 'reasoning' to be satisfied would limit the application of the legislation to a point where it would become extremely difficult to apply.

The intention is that, taking the revised wording as a whole, the addition of 'reasoning' makes the legislation clearer. In particular, 'reasoning' looks for a more definitive link to why the taxpayer's scheme failed to achieve the intended tax advantage, and not simply the fact that it did fail to do so. As I mentioned in my previous letter, HM Revenue & Customs (HMRC) has now published guidance on this point, including examples that are intended to illustrate how the legislation will be applied. This is available at: www.hmrc.gov.uk/specialist/acc-pymts-f-notices.pdf.

I do, of course, welcome continued engagement with the professions on these matters, and I am sure that HMRC would value continued dialogue on the guidance and examples.

Thank you for raising this issue, and again I apologise that my earlier reply did not deal with the point.

Yours ever
David

DAVID GAUKE