PENALTIES FOR ENABLERS OF DEFEATED TAX AVOIDANCE

DRAFT FINANCE BILL 2017 LEGISLATION: CLAUSE 92 AND SCHEDULE 20

ICAEW welcomes the opportunity to comment on the draft Finance Bill 2017 legislation published by HMRC on 5 December 2016.

This response of 1 February 2017 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world.

We attended a number of meetings with the relevant HMRC staff to discuss these provisions.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

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Clause 92 and Schedule 20: Penalties for enablers of defeated tax avoidance

General comments

1 We welcome the opportunity to comment on these provisions. We appreciate and support the policy purpose behind these provisions, namely to discourage those who help facilitate tax avoidance schemes from doing so in the future by levying a penalty on them when a scheme has been defeated.

Targeting of the proposals

2 As noted above we support the principle behind these proposals. The original proposals were far too widely targeted but, following extensive and helpful consultation with the HMRC team, we believe that the draft provisions are now much better focussed on the intended target. In particular, we support linking the penalty to the GAAR provisions and the 'double reasonableness' test.

Our concern

3 While we believe that the proposals are now much better targeted, we remain concerned as to whether the proposed penalty will be effective in changing behaviours. The targets of these provisions are likely to operate outside of any oversight mechanism, for example by a professional body, and may also be located offshore. It is reasonable for this activity to be targeted, but whether the measure will be effective remains to be seen and they may merely impose more compliance burdens and costs on reputable advisers.

Our recommendation

4 The Government should keep the effectiveness of the measure under review and ensure that unreasonable burdens are not placed on the vast majority of advisers who do not engage in this type of activity.

Publication of guidance

5 We welcome the intention to publish guidance on the provisions and we look forward to participating in that process.

Our concerns

6 We remain concerned that guidance is not binding and can be changed at any time. This is a particular problem given that any arrangements may have been entered into many years earlier, so that what might have been regarded as reasonable planning at the time may not be so regarded at a later date. We recognise that para 2(6) of the draft clauses contains a valuable 'accepted practice' safeguard but it would be helpful for this to be clarified further

7 There is also no direct cross reference to the need to take account of the existing GAAR guidance under the FA 2013.

Our recommendations

8 We suggest that the requirement in the existing legislation (s 211(2) FA 2013) that the court must take into account any GAAR guidance should also be included in these provisions.

9 HMRC should make it clear in any guidance that the enablers provisions will be applied by reference to what would have been reasonable at the time the transactions were entered into.

Automatic referral to the GAAR panel

10 The equivalent GAAR provisions provide that any case is automatically referred to the GAAR panel for an opinion.

Our concern

11 We believe that this is an important safeguard and given that the provision now mirrors the approach adopted by the GAAR we believe that for consistency the same approach should be adopted.

Our recommendation

12 The GAAR provisions provide for an automatic referral to the GAAR panel (Sch 43 FA 2013) should be included in the draft clauses. If this is not done then the guidance should make it clear that on request cases will be referred to the panel for an opinion.

Cross reference to the Professional Conduct in Relation to Taxation

13 These provisions are not aimed at reputable advisers such as those who are members of a professional body that has subscribed to the Professional Conduct in Relation to Taxation (PCRT). We welcome in principle the announcement in para 4.9 of the summary of responses (published on 5 December 2016) that an adviser acting wholly within the spirit of the PCRT should not be affected by these proposals. This is a very valuable statement which should help to clarify that the vast majority or reputable advisers should not have to be concerned about this provision when providing normal tax advice.

Our concern

14 We are concerned that this valuable and helpful statement will be lost unless it is formally published and embedded into the operation of these provisions.

Our recommendations

15 This statement should be included in the proposed guidance when it is published and it should be an integral part to the operation of this provision.

Specific comments

Para 2, meaning of abusive arrangements

16 Given that the trigger for this provision is now by reference to the GAAR, we welcome the potential referral of cases to the GAAR panel for an opinion as to whether or not the arrangements were abusive.

Our concerns

17 However, the precise approach and operation of this provision are left entirely to regulations that have yet to be published. We think these need to be published at least in draft in advance of the Bill beginning its Parliamentary stages.

Our recommendation

18 We would welcome confirmation that the GAAR panel is content with this extension of its role and the necessary procedures are in place to support it. We also think any opinions of the panel should be published, even if anonymised.

Para 4, meaning of 'defeat' for these purposes?

19 Under para 4, a 'defeat' can include a case where the taxpayer, while disagreeing with HMRC's position, nevertheless decides to settle and agree to an adjustment. HMRC's existing policy is to encourage taxpayers to settle such cases, but as drafted the provision might have the opposite effect and provide incentives for advisers to recommend to their clients not to settle.

20 The reason for this is because the application of a penalty creates the possibility of a conflict of interest between what might be the best course of action for the taxpayer and what might be the best course of action for the adviser. While a reputable adviser should always put a client's interests first, this may not be the case with the type of 'adviser' at whom this provision is aimed. Such an adviser may therefore encourage the taxpayer to fight the case and generally delay proceedings to defer a possible 'defeat' for the purposes of the enablers provisions. If a taxpayer agrees to settle a case, the adviser could be put in a very difficult situation.

Our concerns

21 The trigger point for applying a penalty is too wide. While the approach may be reasonable for addressing the problems presented by this target group, there is a danger that otherwise reputable advisers might get caught in the margins. Even assuming that legal professional privilege is not applicable or is waived by the client. how will the adviser demonstrate on any appeal against the penalty that they took a reasonable position? The substantive issue may need litigating and this might be difficult without the client's voluntary co-operation. The adviser may not have been involved in that settlement, for example because the client has gone elsewhere.

22 We also believe that consideration also needs to be given to providing that taxpayers who decide to settle for 'health and other personal/domestic reasons' rather than because they consider they have a weak case.

Our recommendations

23 The operation of this aspect will need to be reviewed in the light of practical experience in order to ensure that the measure does not discourage taxpayers and their advisers from coming forward to settle matters.

24 Taxpayers who agree to settle for health or other personal/domestic reasons should not be regarded as a 'defeat' for these purposes.

Clause 12, Excluded persons

25 This provision excludes the taxpayer and any group company from being an enabler.

Our concerns

26 We have mentioned in our meetings that tax return preparers and auditors should be excluded from the definition of an enabler. We accept that under the definition of enabler as now adopted, it is not likely that either of these activities would be so regarded but, given the potentially draconian nature of this provision, we think that this should be put beyond doubt.

Our recommendation

27 That the definition of excluded person is extended to include an auditor or a person who prepares a tax return and undertakes no other activity of a type that might meet any of the conditions set out in para 6.

Clause 13, Powers to add categories of enabler and to provide exceptions

28 This provision allows HM Treasury by way of regulations to add further categories of persons who could be regarded as enablers and also to add further exceptions.

Our concern

29 We believe it is wrong in principle that HM Treasury by way of regulations could add further categories of persons who might be regarded as enablers. This is a wide-ranging power and needs to be subject to proper Parliamentary scrutiny and we believe that any extension of the categories of enabler should be in primary legislation.

Our recommendation

30 Delete para 13(1).

Clause 19, Mitigation of penalty

31 We support the mitigation of penalties in appropriate circumstances.

Our concern

32 We think that the power to mitigate should be wider than drafted.

Our recommendations

33 Consideration could also be given to including a power to suspend penalties for a period where an enabler agrees to abide by an agreement designed to improve their behaviour. While suspension is unlikely to be appropriate for most enablers, there may be cases at the margins where suspension would be an appropriate response, eg where the involvement may have been small as compared to the rest of the firm's reputable tax activity and it agrees to put in place measures to prevent it recurring.

Clause 32, Publishing details of penalties

34 We note that the Government has not decided upon the level of penalty which would trigger the publication provisions.

Our concern

35 We have no strong views on this but, in a similar manner to our comments on clause 19 above, we think that HMRC should have wider powers to address marginal cases.

Our recommendation

36 Consideration should be given to giving power to suspend publication, for example where the majority of the firm's activity is not within these provisions and the firm undertakes to put in place remedial measures to prevent it recurring.