HMRC CONSULTATION ON THE DRAFT GUIDANCE RE: THE PENALTIES FOR ENABLERS OF DEFEATED TAX AVOIDANCE

ICAEW welcomes the opportunity to comment on the draft guidance Penalties for enablers of defeated tax avoidance published by HMRC on 20 October 2017.

This response of 30 November 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. Appendix 2 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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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ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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GENERAL COMMENTS

1. The members who have commented welcome the revised version of the Guidance which takes into account the majority of the points that were made on the earlier draft that was circulated informally during the summer. We have reproduced in Appendix 1 the points made on behalf of ICAEW in relation to that earlier draft.

2. In the comments below references to "section " or "paragraph " are references to sections or paragraphs in the draft guidance.

3. One suggestion from one of our members is that it would be helpful if the guidance also describes how HMRC intends to approach cases in practice. HMRC will be considering potential sanctions under this legislation many years after the avoidance arrangement is designed and implemented and after the taxpayer's position is defeated. By this time the adviser may no longer be in contact with the taxpayer, the staff involved may no longer be at the firm, people's memories fade over time and records may no longer be available.

SPECIFIC POINTS

4. Section 3.2 – We suggest that a new point is added to this section to reflect the contents of para 3(4) Schedule 16 of the Finance (No 2) Act 2017 (i.e. where tax arrangements form part of other arrangements then regard must also be had to those other arrangements).

5. Section 3.3 - We suggest that a new point is added to this section to reflect the contents of para 3(6) (i.e. the fact that HMRC previously indicated their acceptance of the practice is something which may indicate the arrangements are not abusive).

6. Paragraph 3.3.3. – The legislation contains a double reasonableness test at para 3(2): an action must be "reasonably regarded" as a "reasonable course of action". The bullet points at 3.3.3 suggests that it is only the "reasonable course of action" test which applies to "having regard to all the circumstances" whereas it is both the tests. We suggest that the guidance makes this clear.

7. Paragraph 4.5.2 – This paragraph in the draft guidance sets out ways in which a counteraction may occur if a document (e.g. a tax return) was given to HMRC. In some circumstances an assessment or determination may still be issued (e.g. if HMRC does not issue an enquiry but instead seeks to counteract the tax advantage via a discovery assessment, against which the taxpayer may appeal). The counteraction in this case may be the assessment itself or the withdrawal/failure of an appeal against it. This is currently missing from the examples in this paragraph. Please consider adding it in, not least so that it is clear that assessments may arise when tax returns/documents are submitted (condition A) as well as when they are not (condition B).

8. Section 5 – This section frequently uses the word 'implemented'. Please define in the guidance what actions HMRC considers as comprising implementation. Does it, for example, include entering details of the arrangement and its tax effect on a tax return? Similarly, if advice is sought from Counsel as to what needs to be put on a tax return (including disclosure in the additional information box) is this advice on the arrangements which may trigger a sanction as an enabler?

9. Paragraph 5.2.4.2 – What is the relevance of "the cab rank rule"? If this phrase adds nothing to the example, we suggest it is deleted as not all readers will understand what is meant by "cab rank rule".

10. The example at paragraph 5.2.5.4 should refer to accounting advice. An auditor would not normally provide advice in the way described here as part of an audit. Additionally, for some businesses, it is permissible for the tax advisers and auditors/those providing

accounting advice to be within the same firm (it is only larger businesses which require different firms to act for them). We therefore suggest the phrase "a firm independent of the tax advisers" is not relevant to the answer given.

11. Paragraph 5.2.5.6 – please explain with examples the types of evidence which HMRC may consider in forming the view that the lawyer "could not reasonably be expected to have known that their advice would form part of the design…". Would HMRC want to review the engagement letter and all correspondence relating to the advice, for example?

12. Paragraph 5.2.5.7 – the last sentence does not make sense of itself or in the context of tax avoidance. Tax avoidance is not fraud and therefore would not trigger a suspicion of money laundering in the absence of other factors. Please consider redrafting this sentence.

13. Section 5.2. –it seems more appropriate for tax return examples to be inserted in this part of the guidance rather than in section 5.3, which relates to organising and managing the arrangements. Also rather than the example set out at paragraph 5.3.1.6 it would be useful to have two examples: one in which the tax return preparer uses the information provided by the promoter (which the promoter or client gives to him) to complete tax return boxes without commenting on or amending the entries. The second example should cover the situation in which the tax return preparer either has to decide what needs to go on the return (as the promoter does not provide the entries and/or the taxpayer does not give them to the return preparer) or the tax return preparer alters the entries the promoter suggests. Please also note what is written in paragraphs 3.23, 3.24, 3.6 and 4.49 of the ICAEW Professional Conduct in relation to taxation (PRCT) which is also policy for other professional Institutes.

14. Paragraphs 5.3.2.4 – we do not believe that references to a "dispute resolution specialist" are appropriate as any tax adviser with suitable experience can help a client settle their prior year tax position, not just those who are dispute resolution specialists. All references to a 'dispute resolution specialist' should be replaced by 'tax adviser'.

15. Paragraph 6.4.1 – It would be helpful if more explanation and examples are provided as to the factors which HMRC will take into account when exercising its discretion to reduce or cancel a penalty etc. What does HMRC consider to be 'exceptional circumstances'?

16. It would be helpful to have examples of what would considered to be a "material inaccuracy" in 7.3.3.2.

17. Paragraph 8.2.3 uses the phrase "compliance check". This is an HMRC term and is not used or defined in legislation (either in the Finance Act or otherwise). It would be helpful if the Guidance provided a simple description of what is a "compliance check".

18. Paragraph 12.5.2 – It would be helpful to have more explanation, and examples, of the sorts of situations which may constitute representations which would, and would not, be sufficient to prevent, in HMRC's view, the publishing of the enabler's details.

APPENDIX 1

Draft Guidance - Penalties for enablers of defeated tax avoidance
Comments by Ian Young – Tax Manager ICAEW Tax Faculty
Paragraph 5.2.1.7

I think that the advice that is the subject of the example is accounting advice. A company's auditor would not be working with a promoter in the way described here. An auditor does have a statutory obligation to give an opinion as to the appropriateness of an accounting treatment but that should not make them an enabler.

Paragraph 5.2.4.1
In line 2 "advice" needs to be changed to "adviser".

Paragraph 5.2.4.4
I would suggest that if the advice is such:
"that the adviser considers that the resulting arrangements are ~~highly~~ likely to be regarded as abusive tax arrangements"
then that should be sufficient to take the adviser out of the enablers' legislation ie I do not believe that "highly" is necessary to qualify "likely".

Paragraph 5.2.4.5
In the second paragraph rather than:
"there is a very high probability that any tax advantages arising under each could be successfully counteracted by HMRC"
I suggest the wording should be:
"*it is likely that any tax advantage arising under each could be successfully counteracted".*

Paragraph 5.3.2.4
I suggest that after the first mention of "dispute resolution firm" you add "(specialist)" and just refer to specialist for the rest of that paragraph.

Paragraph 5.5.1.4
Examples would be very useful in response to the question in the guidance.

Paragraph 5.7.3.1
Again examples would be very useful in response to the question in the guidance.

Paragraph 5.9
I think it would be helpful to have a more explicit endorsement of PCRT which is designed to ensure that members of the professional bodies who are parties to PCRT do not engage in tax planning of the sort which is going to fall within the enablers' legislation.

Paragraph 5.9.3
I suggest the wording is changed somewhat in the run up to the quote to state:
The PCRT was revised with effect from 1 March 2017 and sets out a number of tax planning standards to which the members must adhere of which the standard in relation to tax planning arrangements states:

Paragraph 5.9.4
This states that if advisers are complying with the PCRT it is likely that the knowledge condition will apply which will ensure that they are not an enabler.
The knowledge condition is set out in paragraph 5.2.5.2 as:

> "The knowledge condition is met if, at the time the advice is provided, the person providing it knew, or could reasonably be expected to have known, that the advice would be, or was likely to be, used in the design of abusive tax arrangements or a proposal for abusive arrangements. "

I think it would be simpler to state that any advice given is unlikely to be regarded as in relation to an abusive tax arrangement in the first place as a result of adherence to the PCRT.
The knowledge condition makes a separate point that if you know that your advice is going to be used to design abusive tax arrangements you are within the enablers legislation.
That has the feel of a double negative and makes the guidance more difficult to understand and interpret.

Paragraph 5.9.6
The link is to the Banks' Code of Conduct whereas it should be to the PCRT of the professional bodies http://www.icaew.com/-/media/corporate/files/technical/tax/tax-faculty/29-10-16-professional-conduct-in-relation-to-tax.ashx

Paragraph 6.1.2 and 6.1.3
If consideration is contingent on future events occurring how would such contingent consideration affect the calculation of the penalty.
It would be helpful if the guidance could also cover this point.

Paragraph 6.4
It would be helpful to have some indication on the potential grounds for, and extent of, mitigation.

Paragraph 12.5.2
It would be helpful to have some idea as to the sorts of representation which the Commissioners would consider, and which they would not, to dissuade them from authorising publication of the Enablers' details.

Ian Young
Technical Manager, ICAEW Tax Faculty
23 August 2017

APPENDIX 2

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.

4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see http://www.icaew.com/-/media/corporate/files/technical/tax/tax-news/taxguides/taxguide-0499.ashx).