



TOUGHER CONSEQUENCES FOR PROMOTERS OF TAX AVOIDANCE

Issued 12 September 2023

ICAEW welcomes the opportunity to comment on draft legislation implementing the proposals in “Tougher consequences for promoters of tax avoidance” published by HMRC on 27 April 2023, a copy of which is available from this [link](#). The draft legislation can be found [here](#).

For questions on this response, please contact the ICAEW Tax Faculty at taxfac@icaew.com quoting REP 93/23.

This response of 12 September 2023 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 166,000 chartered accountant members in over 146 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

© ICAEW 2023

All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and ICAEW reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

ICAEW

Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
icaew.com

The Institute of Chartered Accountants in England and Wales (ICAEW) incorporated by Royal Charter (RC000246)
Registered office: Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK

KEY POINTS

1. We support measures that enhance HMRC's powers to tackle the promotion of marketed tax avoidance arrangements in the UK.
2. However, we are concerned that HMRC has not had sufficient time to consider the representations received by representative bodies and other stakeholders, given that the consultation on the proposals closed on 22 June 2023 and the draft legislation was published less than a month later.
3. In particular, we note that persons could be found guilty of the proposed criminal offence even where the stop notice is subsequently overturned. We suggest safeguards below that would help to prevent this outcome.
4. We also recommend that a more thorough and transparent process is completed for stop notices to be issued if failure to comply with the notice could result in a criminal conviction.
5. The government may wish to include a sunset clause for the criminal offence measure such that its effectiveness and necessity must be assessed in the future. It could also be the subject of independent parliamentary scrutiny after several years.
6. We believe that a safeguard should be introduced to the director disqualification measure to allow directors to demonstrate that they had no knowledge of the promoter activities of the company concerned

A CRIMINAL OFFENCE FOR PROMOTERS FOR FAILING TO COMPLY WITH A STOP NOTICE

THE MEASURE

7. The first measure creates a new criminal offence. This will affect promoters of tax avoidance schemes who continue to promote avoidance schemes after receiving a "Stop Notice" requiring them to stop promoting schemes described in that Notice. It will sit alongside the existing civil sanctions that HMRC has available to encourage promoters to comply with stop notices.

OUR CONCERNS

8. HMRC already has a process for issuing stop notices. However, it remains possible that misunderstandings may occur as to the nature of the arrangements. It is important that compliant advisers do not fall foul of the proposed criminal offence simply because a piece of advice turns out not to be correct. Consequently, we suggest safeguards are included in the legislation.
9. In particular, the proposed offence is scoped in a way that could result in a person being successfully prosecuted for failing to comply with a stop notice despite it being struck down by the tax tribunal. We don't believe that a person should be convicted of an offence for not dealing with a notice that should never have been issued in the first place.
10. A suitable safeguard could be that the criminal offence case is referred to the crown prosecution service when the person doesn't comply with the stop notice, but if the person wins their appeal against the notice, then the criminal case is not taken to court.
11. An alternative would be to extend the proposed s227A (3) to specifically state that a person has a reasonable excuse if they successfully appeal against the stop notice. Then that person knows that if they lose their appeal against the stop notice the offence is still relevant, so it would still have potential deterrent effect.

12. HMRC could also look to provide the promoter with a more meaningful opportunity to demonstrate that it has a reasonable excuse for failing to comply with the stop notice which again could be provided for in s227A (3). Inspiration could be taken from the corporate criminal offence rules which allows an organisation to plead a defence that it has put in place measures, procedures and safeguards to prevent facilitation of tax evasion. Perhaps the person could demonstrate that they are taking measures to wind down the promotion activity that is the subject of the notice, for example.
13. We also believe that if a criminal offence is introduced for non-compliance with a stop notice, such notices should be issued through a decision taken at a higher level of seniority within HMRC than it is at present. For example, it could be added to the list of responsibilities of HMRC's Tax Dispute Resolution Board (or the Tax Assurance Commissioners). This would require amendments to s236A FA 2014.

OUR RECOMMENDATIONS

14. We recommend that the proposed s227B is amended by inserting an additional subsection which reads as follows:

“The offence under section 277A (1) of FA 2014 (as inserted by subsection (1)) does not apply unless the stop notice it relates to has not been appealed by the deadline for doing so or, if it has been so appealed, it has been upheld by a court of tribunal.”
15. Alternatively, s227A (3) could be amended to include an additional subsection which reads as follows:

“A person has a reasonable excuse for this purpose if they appeal the stop notice concerned and the appeal is upheld by a court of tribunal”.
16. We also recommend a further addition to s277A (3) as follows:

“A person also has a reasonable excuse for this purpose if the recipient of the stop notice (R) demonstrates that it has taken reasonable steps to advise employees of and persons associated with R to comply with the stop notice.”
17. Finally, we recommend that s236A (1) FA 2014 is amended as follows:

“HMRC's Tax Dispute Resolution Board may give a person a notice (a “stop notice”) if the Board suspects that the recipient promotes, or has promoted, arrangements of a description specified in the notice or proposals for such arrangements.”

EXPEDITING THE DISQUALIFICATION OF DIRECTORS OF COMPANIES INVOLVED IN TAX AVOIDANCE

THE MEASURE

18. The second measure would apply to directors and other individuals who have control or exercise influence over a company that is involved in promoting tax avoidance and operating against the public interest on or after Royal Assent of Finance Bill 2023-24. HMRC may consider information available to it, including any activity by the company, the directors and other individuals prior to Royal Assent when deciding whether to apply for a disqualification order to the court.

OUR CONCERNS

19. We welcome HMRC's assurance at paragraph 3.27 of the consultation document that the proposals should not have any impact on directors of companies not involved in tax avoidance. However, we believe that this should go further with the inclusion of a safeguard

to allow directors to demonstrate that they had no knowledge of the promoter activities of the company concerned.

20. We are also concerned that these provisions could be used to disqualify individuals who were directors of shell companies which go on to be used for tax avoidance promotion purposes.

OUR RECOMMENDATION

21. We believe that disqualification should only apply to individuals who were directors of the company concerned at the time that tax avoidance promotion activity was carried out and who had knowledge of this activity.
22. This could be achieved by amending the proposed s8ZF (1) so that it reads as follows:
“(1) The court must make a disqualification order against a person if, on an application under this section, it is satisfied—
 - (a) that the person was a director or manager of a company at any time at which the company was a relevant body within the meaning of section 85(4) of the Finance Act 2022 (winding up of promoters of tax avoidance schemes),
 - (b) that person was such a director or manager at the time that the business referred to in s85(4) was or is carried on
 - (c) the person was aware of that business at the time it was carried on; and
 - (d) that the court has made a winding-up order in respect of the company under section 85(3) of that Act (whether while the person was a director or manager or subsequently).”

APPENDIX 1

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 <https://goo.gl/x6UjJ5>).