Putting a stop to tax fraud – but how?

Mala Kapacee discusses the ins and outs of the joint APPG/Taxwatch proposal on the way HMRC treats promoters of tax avoidance schemes

In October 2022, I was invited to an All Party Parliamentary Group (APPG) discussion on a paper written by the APPG and Taxwatch, called 'Putting a Stop to the Tax Fraud Game' (the 'Paper').

Taxwatch and the APPG are suggesting that HMRC should be more proactive in prosecuting promoters of tax avoidance arrangements, or at least considering more cases for prosecution. The point of the event was to discuss the Paper and hopefully provide some constructive critique and how to take the ideas forward.

We note that the Paper refers to tax avoidance; however, we understand that this refers to aggressive tax avoidance schemes, rather than the more 'acceptable' bespoke arrangements.

The Paper started by highlighting that tax fraud "is prosecuted under criminal offence of 'cheating the public revenue' and, at the heart of that offence, lies the question of whether the defendant was being dishonest in their actions". The question of whether a person was dishonest is for a jury to decide (as this is a criminal charge) and what needs to be considered therefore is whether a jury, when considering the case of tax avoidance schemes, would consider there to have been 'dishonest conduct' by those involved in the implementation and promotion of the arrangements.

The Paper goes on to suggest that HMRC do not litigate relevant cases under criminal law because it is the department's policy to litigate civilly to recover tax lost. This statement is at odds with the aim of the paper. HMRC do not litigate against promoters of tax avoidance schemes at all and do not take steps to recover tax from them.

Legally, the tax owed to HMRC is the responsibility of the taxpayer (as HMRC keep reminding us) and there is currently no legislation available to recover from the promoter tax owed by the taxpayer – the full list of powers available to HMRC against promoters is here: https://tinyurl.com/46kt8fux

HMRC's modus operandi is therefore to go after the taxpayer who has taken part in the arrangements and recover the tax directly from them.

I accept the point that many promoters of such schemes may have had (more than) an inkling that the arrangements would be subject to challenge by HMRC and ultimately may not work. This is very different to those continuing to sell arrangements such as remuneration via third parties to reduce income tax for self-employed individuals, where the arrangements have already been shown not to work.

For these arrangements, the intention to defraud (HMRC or the taxpayer) by the promoters of such schemes should be easy to prove and I agree that anyone promoting such arrangements since the 2017 Supreme Court decision should be criminally prosecuted.

Where arrangements have not yet been shown not to work, arguably they could work and if they do, there is no fraud. Take the case of Altrad Services Ltd and Robert Wiseman and Sons Ltd v HMRC [2022] UKUT 185 (TCC). Here, HMRC used the Ramsay argument to assert that the series of artificial transactions should be ignored and the end result was that the taxpayers were not eligible for allowances claimed. The arrangements had been disclosed under the DOTAS rules, but the court found that the Ramsay argument nonetheless failed and the taxpayer's appeal was allowed.

I have no doubt that HMRC will continue to litigate through the courts as it is unlikely to want to permit a tax avoidance scheme to be seen to "work". Nonetheless, the arrangements had been disclosed and the

courts agree the arrangements work. Therefore, on what basis would a criminal prosecution for promoters of this scheme work? It is difficult to prove an intent to defraud when no fraud actually took place.

One of the flaws in the Paper is that it looks at what a jury would consider to be criminal – i.e. dishonest. The problem with this approach to tax is that:

- dishonesty is incredibly difficult to prove – any promoter worth their salt would say they entirely believed the arrangements worked otherwise they would not have sold them; and
- the promoters all obtained legal opinions and therefore had a reason to believe the arrangements worked. Any layperson receiving the opinion of a legal professional would be unlikely to look elsewhere to displace it.

That said, the minute a promoter comes up in front of a jury in relation to tax might be at a disadvantage because tax is such a 'bad word'.

As a tax investigations specialist, I routinely unwind tax avoidance arrangements and have come across a number of professional, regulated accountants who entered the same arrangements they promoted to their clients on the basis of a (mistaken) belief that the arrangements worked. It is highly unlikely that those promoters/facilitators would be found guilty of a criminal offence. Further, if professionals believed the arrangements worked and there was a barrister's opinion in place, then what would be the basis of a criminal investigation against them?

The point has been made by HMRC that only a minority of regulated advisers are promoting tax avoidance schemes. The remainder are not professional advisers and no doubt their defence would be a reliance on the opinion provided by counsel on the arrangements.

Ultimately, whether or not the promoter is found guilty is likely to depend upon their credibility as witness at trial. Without suggesting whether the promoters should be found guilty or not, we note that in a number of cases, significant time has passed and the promoter has defended the arrangements so many times that regardless of the initial intent, they may be convinced now that the arrangements worked at the time. If a person is convinced of their perspective, it is much easier to convince someone else and I'm not sure the CPS or HMRC are willing to risk a trial on this basis.

Another point the Paper doesn't seem to consider at all is that when complex tax avoidance schemes were first widely promoted and used, aggressive tax avoidance wasn't a 'thing'. It is only in the last decade or two that the Duke of Westminster perspective has been discarded. This in my view is largely as a result of the 2008 recession, the need to find a scapegoat for the lack of funds and at the same time the need to find money fast. As aggressive and artificial tax avoidance became more widely publicised, HMRC were given powers in 2014 to issue accelerated payment notices and follower notices to users of arrangements that had already been defeated in court.

I consider that anyone promoting a scheme after it has been found not to work should be prosecuted. The tricky bit is where new arrangements are being designed that are found to work despite appearing artificial; this makes it very difficult for genuine dishonesty to be determined.

HMRC's job is to collect money from the UK taxpaying public and to uphold the tax legislation. In my view giving HMRC the responsibility of deciding whether to criminally prosecute promoters will be over burdening an already under-resourced department and may take away from helping taxpayers. Perhaps a change in the tax code requiring promoters to indemnify taxpayers who take part in the arrangements (but be careful of catching 'acceptable planning')? The problem is that legislation drawn up about promotion or facilitation has to be very tightly drafted, otherwise bona fide tax advisers can get caught out. The last thing we want is tax advisers hamstrung by already stringent regulations.

Which brings me to the next point. At the round table event, it was suggested that more regulation of the tax advisory profession needs to be undertaken. I would argue that since it has been acknowledged that only a minority of promoters are professional advisers, further regulation would achieve nothing tangible.

Further, those that want to take advantage of others are unlikely to adhere to regulation. I have discussed this point further in an article for Taxation magazine.

The Paper also points out that "in the 11 years between 2009 and 2019, the government prosecuted 23 times more people for benefits crime (86,000 prosecutions) than tax crime (3,600 prosecutions). This vast disparity was not driven by a greater propensity of benefits claimants to commit fraud, but by government policy which refers all benefits fraud cases worth more than £5,000 to the prosecuting authorities." It suggests that on the basis of 'fairness', "HMRC officers should be required by law to consider for separate investigation and potential prosecution the promoters and enablers involved in tax avoidance arrangement[s]".

The difference, I suggest, is that given the level of UK benefits, if someone does over-claim by £5,000 they are unlikely to do so by accident – albeit we heard from members of the panel that some of the benefit forms are incredibly complex and mistakes can be made. Tax is another level of complexity altogether. Just because someone promotes a scheme doesn't mean they understand it (whether or not they should is a different matter). If an estate agent sells a house with poor foundations and recommends a surveyor who says that providing the house is used in a certain way, it won't fall down, whose fault is it when the property collapses?

We also note that if HMRC should be considering all the promoters for fraud, then is it right to go after the taxpayers who in effect have also been defrauded – by paying huge fees to promoters where the arrangements haven't worked – and who cannot afford to pay tax that HMRC is now claiming. The criminal investigations policy being suggested may not sit well with HMRC's aim of maximising revenues.

The Paper suggests that even if tax avoidance schemes are found to work in the Tax Tribunal, the promoters should still be criminally prosecuted presumably on the basis that there was dishonesty and intent to defraud regardless of what the end result of the fraud was. I suppose the basis of prosecution would be conspiracy/intent to defraud but with the standard of proof "beyond reasonable doubt" the bar is incredibly high; proving intent in some of these cases would be very difficult and arguably a waste of taxpayer resources. It appeared from discussions during the round table that some would consider removing mens rea from the equation altogether. A dangerous idea.

The main reason for suggesting HMRC should consider all cases involving promoters for criminal prosecution was to use the legislation as a deterrent. This is a good idea – draconian rules to deal with those exploiting others. I can't help feeling though that tax avoidance schemes have now pretty much run their course and this idea is too little too late. Except in the case of those promoting schemes that have already been found not to work – this is fraud without a doubt and we look forward to HMRC and the CPS working together to protect vulnerable taxpayers.

As the cost of living increases, no doubt those needing to save money in the short term will take whatever opportunity is presented and I really hope HMRC works quickly to protect rather than penalise them.

• *Mala Kapacee, CTA Director. Email* mala@londontaxnetwork.co.uk