Is HMRC really closing in on promoters?

Mala Kapacee runs the rule over HMRC's latest move to tackle tax avoidance. So will it really tackle the deep-lying issues?

HMRC has (finally) had enough of promoters of tax avoidance schemes (TAS) and has issued a new consultation entitled 'Closing in on promoters of tax avoidance'.

The consultation suggests a range of ways to extend HMRC's powers so that the department is better able to deal with Promoters of TAS . The consultation is over 60 pages long, so rather than address each point in detail in this article I will discuss a few points and the general feel of it. The full document can be found here : **https://tinyurl.com/zscnmkkd**

Like many, I am somewhat sceptical when it comes to giving HMRC more powers, mainly due to seeing how they use existing powers on a day-to-day basis. This, coupled with the retirement of expertise from HMRC and the government's proposal to cut more civil service jobs, means that when reviewing consultations about HMRC powers we must consider not just how they are intended to be used but also how they may actually be used.

The suggested powers include:

- expanding the scope of the Disclosure of Tax Avoidance Schemes (DOTAS) regime to include:
  - ◯ creating a specific hallmark to identify disguised remuneration schemes;
  - ◯ making it a criminal offence where notifiable arrangements are not disclosed under DOTAS and where there is no reasonable excuse for the failure to notify; and
  - – updating civil penalties so that they can be issued by HMRC instead of HMRC having to go to Tribunal.
- introducing a Universal Stop Notice (USN) and Promoter Action Notice (PAN);
  - ◯ USNs are to prevent the promotion of the same or similar arrangements to those outlined in the USN; and
  - ◯ the PAN is to prevent organisations who are unknowingly providing services to Promoters from continuing to do so. This includes financial intermediaries and social media companies amongst others.
- stronger information powers including the power to issue first and third-party information notices to and in respect of 'relevant persons' (anyone connected to the promtion of TAS) to enable it to more effectively deploy its anti-avoidance powers.
- options to tackle legal professionals designing or contributing to the promotion of avoidance schemes including the possibility of removing Legal Professional Privilege in certain circumstances.

In relation to information notices, the consultation also considers extending the definition of persons treated as a Promoter.

Why HMRC needs more powers

In 2014, the Promoters of Tax Avoidance Schemes (POTAS) legislation was brought in "to change the future behaviour of a small and persistent minority of promoters of avoidance arrangements who exhibit high risk behaviours… [and] to deter the development and use of avoidance arrangements by influencing the behaviour of promoters, their intermediaries and clients" . The legislation brought in Stop Notices, Conduct Notices, Monitoring Notices and additional information powers as well as penalties for failing to comply.

A criminal sanction for non-compliance with a Stop Notice (a requirement to stop promoting the named arrangements), was brought in in Finance Act 2024, but so far there have not been any prosecutions.

According to the government, tax avoidance is still rife. It clear that even after the draconian loan charge, schemes are still being marketed. HMRC's response to the failure to address the promotion of such arrangements is to suggest that the department needs more powers.

The idea behind the proposals is that HMRC is (still) trying to prevent promoters continuing to market TAS and from setting up new entities to market schemes when their previous businesses are shut down. HMRC's difficulties include the fact that the person setting up the businesses, and/or designing the schemes, are so far removed from the taxpayer that HMRC is unable to 'catch' them or in some cases even identify them. HMRC believes current sanctions are not a sufficient deterrent and given the continuing sale of TAS, this is a reasonable belief.

The current anti-promoter legislation is clearly not working and the response is therefore to give HMRC more powers. Is this however the right approach? As with all proposed additions to HMRC's powers, we need to consider what is being suggested and the possible future ramifications.

The raft of proposals includes criminal sanctions for not complying with HMRC notices and the waiving of Legal Professional Privilege in relation to advice given on tax avoidance structures.

How soon before all tax structuring advice is deemed tax avoidance and HMRC attempt to apply these rules to bona fide tax advisers and lawyers?

Or how long before these proposals (particularly those relating to information notices) are simply added to HMRC's powers in relation to normal enquiries and investigations. It is imperative to consider whether there is an alternative to issuing more powers and if the powers are issued, then whether safeguards provided are sufficient, not just for promoters but also to everyone else should HMRC decide to extend the powers.

Information notices

One of the proposals is that HMRC would be able to issue a Connected Parties Information notice (CPIN), "which would compel persons that HMRC suspects to be [sic] connected to the promotion of a marketed tax avoidance scheme to provide relevant information and documents. It is proposed there would be strong sanctions for non-compliance."

The consultation mentions that there are "a small but persistent group of individuals" who promote the majority of TAS. On the basis of this wording, it seems that HMRC knows who these individuals are but is unable to do anything about it.

The suggestion that HMRC should be able to issue information notices to those it 'suspects' are connected with promotion of TAS is not sufficient to justify a CPIN. If HMRC is permitted to operate based on 'suspicion' alone, then further down the line this power could be extended. Take, for example, company directors. HMRC has recently pushed for the power to issue information notice to directors when an enquiry is open into a company and if a 'suspicion' alone is sufficient to do this then taxpayers are in trouble.

HMRC should therefore have at least a 'reason to suspect' (i.e. an evidence-based suspicion) that a person is a promoter and the department likely to already have this evidence.

Taxpayers investigated by HMRC in relation to TAS or those who were caught by the Loan Charge are generally only too happy to confirm who promoted the arrangements. Further, the Government has confirmed that HMRC will provide financial incentives to whistleblowers of tax evasion. Given that the promoters are defrauding the public, perhaps incentives can be provided to middlemen to name the 'controlling mind'.

Under Sch36, FA2008, HMRC can request information that (broadly speaking) is reasonably required for checking a person's tax position and is in that person's possession or power to obtain. The suggested additional power would require a person to comply with the CPIN "for the deployment, monitoring and enforcement of its anti-avoidance powers" and not for checking anyone's tax position.

Again, how long before 'anti-avoidance' is removed from the legislation and everyone is required to comply with an information notice whether or not the information assists HMRC to check a person's tax position?

The consultation states that there would be strong sanctions – civil and criminal – for non-compliance with the CPIN. However, it then goes on to state that criminal sanctions would only be used in the most egregious cases of non-compliance. This highlights the problem we have been having with HMRC for the past 20 years – there seems to be a lack of appetite for criminal prosecution.

The bar for criminal prosecution is much higher – beyond reasonable doubt – than for applying civil penalties and this generates a major mismatch between the public's understanding of TAS and tax evasion. If no one is prosecuted for defrauding the public (via TAS), then is it less serious than stealing?

Given the level of information HMRC believes it needs to go after controlling minds, should HMRC have a dedicated department (employing investigative journalists and criminal investigators) to specifically build a case and go after them? The powers that the investigators have would be enough and the department should be sufficiently separate from HMRC to mean that HMRC does not need more powers to bring the promoters to justice.

At the end of the day, none of the powers issued so far (DOTAS, Stop Notices, etc.) have worked to stop the active marketing of TAS and it is clear that unless the controlling minds and anyone who benefits from the schemes are publicly prosecuted, the selling of schemes will not stop; sales are too lucrative and HMRC is too tame to stop this. Especially since some controlling minds are extremely wealthy, ex-UK individuals and HMRC is already short of resources.

Safeguards

The consultation highlights multiple times that the powers – publication of details, issue, extension or withdrawal of a PFIN – would only be used with the approval of an 'Authorised Officer' (AO). Additional safeguards referred to include those that are already available under the existing regimes.

We have already discussed the fact that HMRC's lack of resources means the likelihood of holding anyone to account is slim. Similarly, with the limited resources, one wonders how much experience the Authorised Officers have and how much information is reviewed before the AO approves the actions to be taken.

Regardless of any of this, an HMRC AO should not replace any Tribunal authorisation (of, for example, third party information notices) for fear that this approach may extend to normal enquiries.

Universal Stop Notices

The idea behind these is that once HMRC becomes aware of a set of arrangements, they can issue a stop notice to prevent any same or similar arrangements being marketed, regardless of by whom.

The theory is good as it means HMRC does not then have to approach each promoter and review the arrangements. The onus would be on the Promoter to determine whether the USN applies.

The consultation states that "the main vehicle for issuing USNs would be publishing them on a page on the **GOV.UK** website. However, the government will also explore additional methods for publishing a USN to optimise the coverage and raise awareness of it. This could include sending copies of the USN to known promoters and sharing with appropriate representative bodies so they could ensure their members are aware."

Since the Promoters are making money from people using the arrangements, they are unlikely to concede that the USN applies and are perhaps more likely to find reasons that the description in the USN does not apply to them.

If the issue of USN's depends on the people they are aimed at going out of their way to check the website and the webpage being easy to find, then Promoters would have every incentive to either not check the website or to feign ignorance of it until the notice was sent to them.

The idea of USNs is very good, particularly if failure to comply is criminal and the consultation states that in some cases it would be.

Removal of Legal Professional Privilege

This is the start of a very slippery slope. Absolutely report these individuals to the SRA and hope that the professional body will deal with them appropriately, but do not remove one of the fundamental tenets of the British justice system.

Conclusion

Whilst on the face of it any attempt to curb the tax avoidance industry is laudable, not least because it should (hopefully) prevent repeat legislation like the Loan Charge, there is a shadow lurking behind it all.

Then there is always the concern that non-promoters may be caught by the wide net and lack of pragmatism in the department. The cost (financial, mental and career related) of defending a wrongly issued notice is high and the government needs to ensure that the proposals are drafted clearly enough that there is no room for misinterpretation.

A comment online suggested that tax avoidance now seems to attract more penalties than evasion and that therefore an individual might be better off committing tax fraud. An important distinction between scheme promotion and tax fraud is that the sale of artificial avoidance schemes is fraud by the promoter and not the taxpayer and yet in both cases, it is the taxpayer that is held to account.

It is time the government holds the Promoters to account for defrauding the public. Criminal sanctions for those who promote schemes knowing that the arrangements are likely to be challenged by HMRC and who rely on HMRC's lack of resources and timely intervention to make their money should absolutely be held to account. The key is to ensure that the proposals are drafted in such a way as to ensure only Promoters are caught and not bona fide advisers.

Finally, rather than issuing HMRC with more powers, would it be simpler to shift the tax liability of anyone who took part in a 'DOTAS-able' scheme to the promoters. That way HMRC will be focused on promoters rather than taxpayers and the promoters might think twice before promoting schemes.

All in all, I do not envy HMRC's task of preventing schemes being marketed. After all, where there are taxes, people will do what they can to minimise them. Having conducted informal surveys of clients caught in such arrangements, the catalysts for entering into schemes tend to be wanting a better quality of life (and enough to pay the mortgage) combined with dissatisfaction as to how their taxes are being spent and the unfairness of the tax system.

It seems the problem is much more fundamental than people simply not wanting to pay and perhaps a rethink of UK taxes would do more to reduce the tax gap than issuing HMRC with more powers.

• Mala Kapacee, CTA Director