A legislative ?ood

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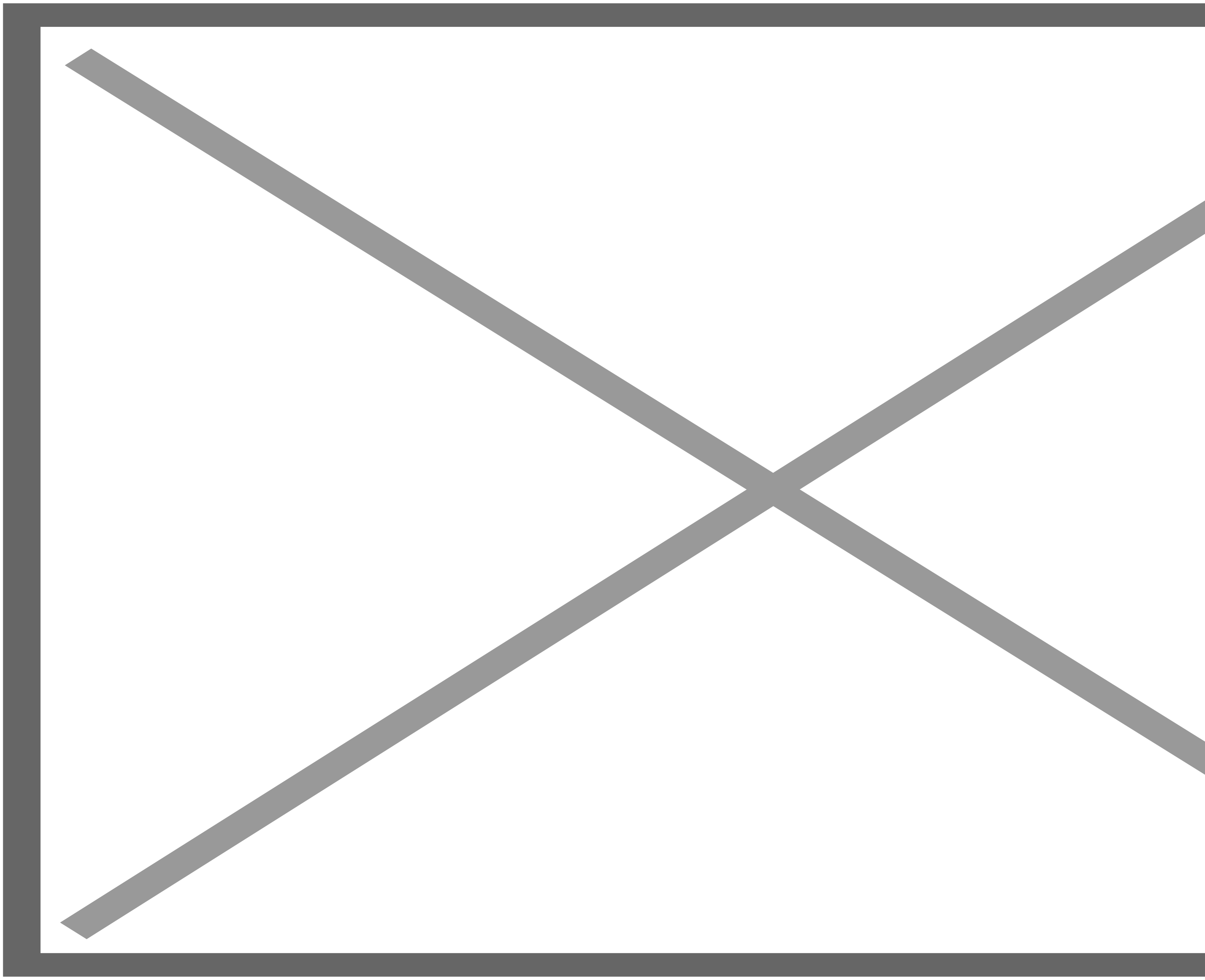

01 April 2020

Helen McGhee asks whether the deluge of new legislation designed to prevent tax avoidance has really been necessary

Key Points

What’s the issue?

An ever increasing deluge of ink on the statute books is dedicated to quashing any perceived tax avoidance before it even sees the light of day. Over time, legislation has also been drafted to increase HMRC’s powers and attempt to streamline the process of tax collection.

What can I take away?

The legislation and case law are unambiguous, and it is commendable that in practice we have come such a long way towards closing the loopholes in tax law. But in analysing the rafts of new legislation, one must question whether it has all been necessary.

What does it mean to me?

There has been a seismic shift in the field of tax avoidance. Government resources now ought properly to be directed at policing and enforcement.

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The introduction of the DOTAS rules in Finance Act 2004, under which a scheme promoter or user is required to disclose the main elements of any avoidance scheme to HMRC, was groundbreaking.

The government consultation ‘Raising the stakes on tax avoidance’ was published in August 2014, setting a clear pathway. In February 2016, the criteria for the DOTAS rules were broadened substantially. The legislation in Finance Act 2014 and 2015 complemented DOTAS in relation to tackling any promoters of tax avoidance schemes with the ability for HMRC to monitor promoters and issue conduct notices. The introduction of the GAAR from July 2013 to invalidate any abuse also sent a very clear message.

Sir Amyas Morse published his independent review of the controversial loan charge on 20 December 2019. Part of his remit was to consider whether the original 2016 policy was both necessary and proportionate. His report expressed deep concern that since the new legislation was introduced, there have been well over 20,000 new loan charge schemes, 8,000 of which have emerged since the start of the 2019/20 tax year. Sir Amyas concluded that the loan charge was a necessary piece of legislation, although he did not accept it was proportionate for it to go back for 20 years. He had a specific recommendation for promoters:

‘The government must improve the market in tax advice and tackle the people who continue to promote the use of loan schemes, including by clarifying how taxpayers can challenge promoters and advisers that may be mis-selling loan schemes. The government should publish a new strategy within six months, addressing how the government will establish a more effective system of oversight, which may include formal regulation, for tax advisers.’

Over time, legislation has also been drafted to increase HMRC’s powers and attempt to streamline the process of tax collection. Finance Act 2014 introduced follower notices (FNs) and accelerated payment notices (APNs) which essentially require a taxpayer to remove any tax advantage claimed and for any tax in dispute to sit with the Exchequer whilst a resolution is found. With only three months to act, the consequences of receiving a notice are very serious. Penalties for non-compliance are hefty and can easily amount to up to 50% of the value of the denied tax advantage.

More recently with a shift towards global tax transparency, cross border exchange of information and the Common Reporting Standard, the focus moved to offshore evasion.

Finance Act (No2) 2017 introduced the Requirement to Correct, requiring taxpayers with overseas assets to regularise their historic UK tax position. Non-compliance after 30 September 2018 triggers severe penalties of up to 200% of the potential lost revenue and potential naming and shaming. The legislation has become very robust and the penalties for non-compliance send a clear message.

Evolving precedent

In the past few years, we have also seen numerous cases occupying court and tribunal time to ensure that any perceived or actual abuse of the tax rules is simply no longer conceivable.

Elaborate or circular schemes, complete with a 'pre-ordained series of transactions into which there are inserted steps that have no commercial purpose except the avoidance of a liability to tax' (IRC v Burmah Oil Co Ltd 1982 STC 30) will not be tolerated; and anyone party to or promoting such arrangements will be punished harshly and rightly so. In many circumstances (notably in relation to FA 2003 s 75A), a tax avoidance motive is not even necessary to be deemed to have suppressed a scheme, as the Supreme Court set out in Project Blue Limited v HMRC [2018] UKSC 30.

It is abundantly clear (from WT Ramsay Ltd v IRC [1982] AC 300, UBS AG v HMRC [2016] UKSC 13 and Hancock and another v HMRC [2019] UKSC 24, to name but a few) that when it comes to analysing any potential exploitation of the legislation, there can no longer be a blinkered approach to the facts.

It is well established that the 'ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically' (Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46).

The view from the profession

The legislation and case law are unambiguous, and it is commendable that in practice we have come a long way since the days of dubious tax professionals marketing and implementing schemes to exploit loopholes in tax law against what must have been Parliamentary intent. Credit must be given to the 2017 edition of 'Professional conduct in relation to taxation' for ensuring that the tax profession takes the lead in upholding high ethical standards in relation to any potential facilitation of tax avoidance.

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In analysing the rafts of new legislation, one must question whether it has all been necessary. Arguably yes, but could Taxes Management Act 1970 s 55 (recovery of tax not postponed) have been used instead of the hundreds of pages of new statue introducing complex rules regarding FNs and APNs? And take Finance Act 2019 Sch 4 in relation to profit fragmentation arrangements.

The legislation is designed to counter avoidance where UK traders and professionals arrange for their UK-taxable business profits to accrue to entities resident in territories where significantly lower tax is paid than in the UK. Does this not smack of the transfer of assets abroad rules with a hint of the transfer pricing and controlled foreign company rules thrown in?

Did we need Finance Act (No.2) 2017 Sch 16 in relation to enablers? Will the additional legislation really influence and promote behavioural change beyond which has already been achieved? Or did we need FA 2007 Sch 24 paras 3A and 3B, introducing a presumption of carelessness in avoidance cases and the concept of guilty until proven innocent?

Legislation that will never need to be employed is not helpful. Many commentators have questioned the potential superfluous nature of the GAAR sitting alongside the many TAARs. In the first GAAR ruling, the panel decided that a complex employee benefits trust scheme involving payment in gold bullion or platinum sponge was not a reasonable course of action. Even the most optimistic taxpayer having read the Rangers case (RFC 2012 Plc (in liquidation) v AG for Scotland [2017] UKSC 45) would have struggled to see how HMRC could possibly have lost the legal argument at tribunal so was a GAAR referral necessary? The vast majority of GAAR referrals have centred around employment taxes, and more specifically marketed schemes, so the role of the GAAR panel is significant in that the opinions will be of useful broader application.

The GAAR Advisory Panel opinion of 7 August 2019 is potentially of wider interest. The specific issue concerned the extraction of value from a company by its directors and shareholders through the use of employee shareholder shares. The opinion recorded that the use of employee shareholder shares by existing shareholders was reasonable in the context of the legislation and additionally that a reorganisation of activities to ensure the legislative requirements were met was also reasonable. However, the specific terms of the shares used meant that value flowed out of existing taxable shares into new exempt shares, which was not considered reasonable. The panel gives credence to its role in plugging a gap where the legislative draftsman had not considered or anticipated the potential value shift. The opinion expressed the view that it was never the intention of Parliament for the law to be applied in the given manner. As a concept this works, as the GAAR is primary legislation; perhaps, though, one could rightly be concerned that it may make the draftsman less fastidious if he knows that he has a safety net in the GAAR panel. This will not aid our quest to make the legislation clear, unambiguous and all encompassing.

Direction of travel

We must acknowledge that there has been a seismic shift in the field of tax avoidance. Even simple structuring advice to clients is starting to require contingent counterarguments if anything is ever challenged. So, what next? Government resources now ought properly to be directed at policing and enforcement.

What we need now is to be sensible and we need fiscal honesty. When we analyse the tax gap figures, in 2019 the tax gap is estimated to be £35 million or 5.6% of tax liabilities. 37% of this is from income tax, NICs and capital gains tax. The biggest offenders are small businesses, which account for 40% of liabilities; individuals account for only 11%. Failure to take care and legal interpretation accounts for 18% of the gap, and evasion for 15%, while avoidance is a reassuring 5% (£1.8 billion). Non-payment is 11%. We need to focus on restoring public faith and be assured that the door has been closed on tax avoidance behaviours via legislation, judicial view and professional practices.