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Management of taxes

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The CIOT recently responded to four HMRC consultations on measures to tackle offshore tax evasion.

Our comments can be found on the CIOT website. HMRC published their responses to each consultation document on 9 December 2015, together with draft clauses for inclusion in Finance Bill 2016. Each one is considered separately below. If you have any comments on these measures please send them to mcurran@ciot.org.uk. The government also recently consulted on introducing legislation to extend HMRC's data-gathering powers to obtain data from business intermediaries and electronic payment providers in order assist in tackling the hidden economy – a note on this is inluded below. Finally, the second HMRC consultation of 2015 on tackling 'serial avoiders', 'serial promoters' and how to introduce specific penalties where the General Anti-Abuse Rule (GAAR) applies was issued and our response is detailed below.

Tackling Offshore Tax Evasion – CIOT Comments On Proposals

A new strict liability criminal offence for offshore evaders

While the CIOT strongly supports HMRC's efforts to tackle tax evasion and agrees that the government should be putting resources into combatting and investigating it, it is opposed in principle to the creation of a new strict liability offence for offshore tax evasion which will require no proof that the taxpayer deliberately intended to evade tax. It cannot be right that an individual who simply makes a mistake in their tax affairs, without any intention to act wrongly, should be charged with, and possibly convicted of a criminal offence. In addition, we question whether a new offence is necessary at all since HMRC already have wide criminal investigatory

powers at their disposal.

In view of the concerns raised during the first consultation on the introduction of this new offence, we think it is right that HMRC have focussed on ensuring that the offence is targeted at only the most serious evaders. In our view, however, the statutory minimum threshold of tax evaded of £5,000, which was proposed in the consultation document, is not high enough for complex cases – we suggested that a threshold of £25,000 would be a more appropriate level.

We also suggested limiting the scope of the new offence to jurisdictions which will not be exchanging information with HMRC under the CRS. In our view, it is likely that the offence will only be considered to be proportionate for EU law purposes if it applies in respect of jurisdictions and income and gains where HMRC has no right to obtain information (or only very limited, non-automatic rights).

The proposed statutory defence of reasonable care will be vital in limiting the scope of the offence. But, in our view, it would be a stronger safeguard for the taxpayer if the burden of proof was on HMRC to prove that reasonable care had not been taken, rather than being on the taxpayer to prove they took reasonable care.

We were also concerned that this proposal could be counterproductive for HMRC because the fear of prosecution, with no need to prove intention on HMRC's part, could discourage taxpayers from coming forward voluntarily.

In their response document, HMRC have made a number of changes to the draft legislation that was published alongside the consultation document.

Threshold: the statutory minimum threshold of tax evaded has been increased to £25,000, as we suggested it should be in our response. HMRC say that this means the offence could only apply to the top 5% of evaders who are currently pursued through civil penalties. It would mean that a higher rate taxpayer would need between £1.25m and £6.25m savings in a bank account (if the interest rate was between 1% and 5%) before this offence applied. The legislation includes a provision to allow the threshold to be increased in future years.

Immunity and exclusions for certain groups: The Government has decided to exclude income and gains reportable under the CRS from the offence, again as we suggested in our response. They say that this will help to target the offence at areas where HMRC faces the biggest challenges in tackling evasion, and therefore where a

stronger deterrent is needed.

Apportionment of income or gain between UK and overseas: The government has confirmed that it will not be introducing a mechanism for apportionment to simplify the offence and ensure that any prosecution is based on the ability to prove to a criminal standard that tax has been evaded offshore in a relevant jurisdiction.

At paragraphs 2.8 and 2.9, HMRC explain how and when they intend to use the offence:

> *"The Government would like to make clear that it does not have any intention of using this offence to prosecute those who make every effort to ensure that their tax affairs are in order. The use of this offence will follow HMRCs criminal investigations policy. This means that in the majority of cases HMRC will pursue the lost tax through civil means. This offence, like other offences, will be reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate. In these cases the Crown Prosecution Service, the Crown Office and Procurator Fiscal Service and the Public Prosecution Service will consider whether this or one of the existing criminal sanctions available is the most appropriate tool to use."*

The offence will not come into effect before April 2017 at the earliest, meaning that no offence could be committed until after 31 January 2020 (ie the end of the period for correcting a 2017/18 self-assessment tax return). Guidance will be produced in due course closer to the time of introduction of the offence.

A new version of draft primary legislation for inclusion in Finance Bill 2016, together with draft regulations, has been published for technical comment by 3 February 2016 (see p19 onwards of HMRC's response document).

A new corporate criminal offence of failure to prevent the facilitation of evasion

HMRC consulted on proposals relating to the scope and design of a new criminal offence that would be committed by a legal person (for example a corporation) where its agent criminally facilitates another to commit a tax fraud, and the corporate had failed to put in place reasonable procedures to try and prevent such facilitation.

In its response to the consultation, the CIOT called on the government to confirm whether it still intended to go ahead with plans to introduce the proposed new corporate criminal offence of failure to prevent the facilitation of evasion. The CIOT's appeal came after a ministerial statement on 9 September 2015 that proposals to create a new offence of 'failure to prevent economic crime' would not be taken forward, with the Justice Minister, Andrew Selous, saying that there is 'little evidence of corporate economic wrongdoing going unpunished'. Both the offence of 'failure to prevent economic crime' and the proposed corporate criminal evasion offence consider the difficulties of holding corporations to account for the actions of individuals working in or for the organisation.

It is the CIOT's view that these proposals represent a very significant change with extremely wide-ranging implications. If the government believes that criminal sanctions need to be strengthened in this area then we believe that the new offence must not only be phased in gradually to allow businesses time to familiarise themselves with the regime, but it must also be subject to appropriate defences being available. We asked that the government provide more clarity around who is affected and what they need to do to comply.

We also suggested that a threshold size with different obligations for different sized organisations would help make the compliance burden more manageable for smaller entities. We asked for more clarity about the additional compliance obligations that a UK firm would have to meet when referring a client to an adviser located outside the UK in order to protect itself from the risk of a criminal prosecution. Additionally, we recommended that HMRC consult further on a definition of 'agent' to make the proposals workable in practice.

In their response document published on 9 December 2015, HMRC have confirmed that it is still the government's intention to introduce the legislation and that this will be in time for the start of information exchange under the CRS in 2017.

The government says that it recognises the concerns expressed by some stakeholders in relation to the use of the word "agent". The response document therefore refers to the class of persons that a corporation can be liable for failing to prevent from criminally facilitating tax evasion as "representatives" rather than "agents". In the context of the criminal facilitation of tax evasion, a corporation should be liable for all persons who provide services on their behalf. This would exclude those acting entirely independently from the corporation. This would bring

into scope third parties providing services to a client of the entity where that entity has an element of control in the provision of those services. For example where the entity agrees that someone not ordinarily employed by the entity will provide services to its customers on its behalf.

The government says that is also recognises that the corporation will be able to operate greater levels of control and supervision over some categories of representatives (for example those directly employed by the corporation) than over others (for example those ordinarily employed by another entity but providing services on a temporary basis). The reasonableness of procedures should take account of the level of control and supervision the entity is able to exercise over a particular person acting on its behalf.

In order for a corporation to be liable under the proposed new offence, three elements must be satisfied:

Stage one: criminal tax evasion by a UK taxpayer (either a legal or natural person) under the existing law;

Stage two: criminal facilitation of this offence by a representative of the corporation, as defined by the Accessories and Abettors Act 1861;

Stage three: the corporation failed to take reasonable steps to prevent its representative from committing the criminal act outlined at stage two.

The offence will apply to both UK corporations and non-UK corporations. There will be a defence of having put in place reasonable procedures.

The government intends to consult on draft legislation and guidance at the beginning of 2016 to ensure that the new offence strikes the correct balance.

Civil sanctions for enablers of offshore evasion

The CIOT also responded to HMRC’s proposal for civil sanctions for enablers of offshore evasion. In our response, we said that we do not support the proposal because, while we agree that anyone who helps a person deliberately evade tax deserves punishment, we strongly believe that there is already adequate law in this area.

We expressed concern that the definition of 'enabler' has been framed to include those who 'unknowingly' provide services which assist tax evasion. In our view, it is inappropriate to impose sanctions on someone who was not aware that they were facilitating offshore evasion. It should be a requirement for HMRC to prove dishonesty on the part of the enabler. We do not think that what has so far been proposed is proportionate or workable.

In their response document published on 9 December 2015, HMRC state that it is still their intention to introduce a new civil penalty for those who deliberately enable offshore tax evasion, linked to the amount of tax which the enabler helped the evader to evade as well as naming provisions.

Draft legislation for inclusion in Finance Bill 2016 has been published for technical comment by 3 February 2016 (see p 34 onwards of HMRC's response document). The draft legislation does not explicitly use the word "deliberate" but instead uses phrases which HMRC say "make it clear that this is the behaviour under consideration".

Strengthening civil deterrents for offshore evaders

In its response to HMRC's consultation document on strengthening civil deterrents for offshore evaders, the CIOT expressed an overarching concern that the current proposals on further strengthening civil sanctions for offshore evaders risk making the civil penalties rules for offshore evasion increasingly confusing and complicated. We questioned whether there must come a point where increasing penalties no longer has any effect in deterring the most serious tax evaders. A period of stability whilst all those affected learn to cope with the recent and forthcoming changes would help inform any future changes.

In their response document published on 9 December 2015, HMRC say that it is the government's view that minimum deliberate and deliberate and concealed penalties for offshore matters should be raised by 10%. Taxpayers will be required to provide 'additional information' about the evasion, such as structures used and enablers/facilitators, if present, to receive maximum penalty reductions, although this will apply only where the penalty is levied for deliberate or deliberate and concealed behaviour.

The proposed asset-based penalty will only be applied in the most serious cases of offshore evasion; where taxpayers have evaded at least £25,000 per annum of UK tax offshore, and the behaviour that lead to the evasion is deliberate. Naming provisions will be introduced and subject to the safeguards in the existing 'deliberate defaulters' legislation in FA 2009 s94.

Draft legislation for inclusion in Finance Bill 2016 has been published for technical comment by 3 February 2016 (see p20 onwards of HMRC's response document). The draft clauses for the asset based penalty will be published in early 2016 for further comment, alongside the regulations outlining what 'additional information' means for the purposes of a full disclosure.

Tackling the hidden economy: Extension of data-gathering powers

Technology in the area of digital payments is developing fast, and HMRC want to be able to keep up with developments by 'future-proofing' their powers so data can be requested from new business models as they emerge. This means that they will need to introduce wide-ranging powers.

HMRC want access to this data to help them tackle the hidden economy by identifying businesses that are receiving income but are not registered for tax, as well as those who are registered but under-declare their income to HMRC. HMRC will not be obtaining data about the individual consumer.

In its response to the consultation document, the CIOT has said that legislation will need to be effective but also proportionate, and recommends that it is based on the 'merchant acquirer' data-gathering powers in Finance Act 2011 Sch 23. We also expect that there will be a compliance impact on business intermediaries and payment providers so we suggest that HMRC consider introducing some de minimis exemptions in the legislation, as well as providing sufficient time for affected businesses to put appropriate systems for capturing and reporting information in place. There also needs to be flexibility in application given that some of the data HMRC seek may well be hard to access in bulk for customer data security reasons.

In a consultation response document issued on 9 December 2015, HMRC say that the government is proposing to target the powers to include only those payment

facilitators who operate digital wallets where customers load their virtual wallet with funds from their bank account or payment card, and then use the wallet to transfer funds to a retailer or trader. The legislation will introduce a new category of data-holder with a specific definition to capture the range of activities of intermediaries within FA2011 Sch 23, and will describe the data required in secondary legislation. However, HMRC will keep this under review in case new types of intermediary emerge which fall outside of the new definition.

HMRC say that they will only issue information notices to data-holders where there is a commensurate benefit from the value of the data that will be obtained and will consider the administrative burden placed on the data-holder. Before a notice is served, HMRC will work with that data-holder to understand their data, how the data is collated and what format it is in. This will aim to minimise the burden on the data-holder and ensure that the data is useable when it is passed to HMRC. HMRC are not planning to introduce a de-minimis value. This is to ensure that HMRC have visibility of businesses who use several different intermediaries or make several uses of a single intermediary. In some cases, this may lower the burden on data-holders, in that they do not have to sort through or arrange their data before providing it to HMRC.

Draft legislation, adding two new types of data holder to FA2011 Sch 23, and intended for inclusion in Finance Bill 2016 was also published on 9 December 2015. Draft secondary legislation, defining the types of data that can be required from these new data-holders, was published alongside this.

Strengthening sanctions for tax avoidance

This is the second HMRC consultation of 2015 on tackling ‘serial avoiders’, ‘serial promoters’, and how to introduce specific penalties where the General Anti-Abuse Rule (GAAR) applies.

In its response to the consultation document, the CIOT agrees that the government and HMRC should be taking action to stop abusive tax avoidance. However, we are not convinced that further legislation is justified or necessary at present. Where we have commented on the details, this is intended only to improve the administration of the proposals and help reduce the costs to taxpayers and advisers who may be affected.

Before further legislation is introduced, we would like to see firm evidence, ideally in a post-implementation review, that the avoidance legislation in Finance Act 2014 is not working as intended. In addition, changes to the Disclosure of Tax Avoidance Scheme (DOTAS) rules introduced in Finance Act 2015, which are intended to tighten up the reporting of schemes, are still in the process of being introduced, and should be given time to take effect.

We agree that the model proposed for 'serial avoiders' is appropriate, subject to our broader concerns above, but we recommend that consideration is given to how the additional 'annual certification' reporting burden on taxpayers who entered into schemes many years ago (but who have already changed their behaviour) could be mitigated. We think that HMRC should approach publishing names with caution, and we do not support the proposal to restrict access to reliefs when they have been exploited by a serial avoider as part of a defeated avoidance scheme.

On 'serial promoters' we suggest that the new threshold condition should only apply for new schemes entered into after the legislation takes effect. This would avoid the problem of retrospection and ensure the condition was targeted only at promoters who continue to engage in high risk behaviour going forward.

We think it is premature to introduce a specific GAAR penalty. The GAAR has only been in place for just over two years, and as far as we are aware no cases have yet been considered by the GAAR panel and no opinions issued. A key concern about a specific GAAR penalty is the uncertainty around what will be caught. The vast majority of professional advisers will take care to ensure they do not provide advice that would be caught by the GAAR, but the lack of cases to date means that there is uncertainty as to where the line is drawn and what 'reasonably regarded as a reasonable course of action' will mean in practice. We note in this context that, on balance, the Aaronson report concluded that penalties were inappropriate. In our view, the level of the proposed GAAR penalty (of 60% of the tax counteracted under the GAAR) is far too high, particularly compared to the level of other behavioural based penalties in Finance Act 2007 Sch 24.

In a consultation response document issued on 9 December 2015, HMRC say that they believe the proposed 'serial avoider' model is an appropriate response to deter serial tax avoiders, who remain a high-risk group. The proposed additional threshold condition for 'serial promoters' will also be introduced. HMRC say that allowing this threshold condition to apply to schemes that were promoted in the past will provide

an effective incentive to change promoter behaviour in relation to the types of scheme they might consider promoting going forwards.

As expected, a GAAR penalty of 60% will be introduced, because the Government considers that “a GAAR-specific penalty will further discourage participation in abusive forms of tax avoidance, thereby strengthening the GAAR’s deterrent effect”.

Draft legislation on these measures for inclusion in Finance Bill 2016 was published on 9 December 2015.