Strengthening measures

Management of taxes

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Bill Dodwell considers recent measures taken to reduce tax avoidance and their impact on advisers

It has been clear for some time that there is political and public concern about tax avoidance by high-income individuals and multinational companies. In autumn 2012, the Public Accounts Committee, chaired by Margaret Hodge, held evidence sessions with multinationals, several promoters of tax-based investment schemes and (in January 2013) with representatives of the Big 4. The PAC hearings – perhaps more than anything else – brought the issue of tax avoidance to public notice. However, concern over avoidance had been growing for a decade before those hearings, as it became evident to tax authorities and finance ministries globally that the tax system wasn’t always achieving the desired outcomes.

Part of the solution is coordinated international change, where the UK is playing a leading role, including being an early implementer. In November 2012, the G20 announced that it had asked the OECD to look at Base Erosion and Profit Shifting with a view to making major changes to international corporate tax. These changes will take effect globally from 2015–2020 (and in the UK, from 2015–2018).

However, in the UK, new obligations for promoters of tax avoidance were developed. The 2004 Tax Disclosure rules require the promoters of certain tax planning to notify HMRC within five days of making it available to prospective customers. Those rules have been extended to more taxes and additional ‘hallmarks’ have been added. The rules now require that promoters give details of scheme users, so that HMRC can ensure centrally that appropriate challenge is made.

Perhaps the most significant change came in 2014, with the introduction of accelerated payment notices. These allow HMRC to collect tax from participants in schemes disclosed under the Tax Disclosure rules, even though enquiries into the arrangements are still continuing. There is no appeal against a payment notice. The aim was to remove the cash flow advantage of entering into a scheme, with the tax only being refunded should the courts ultimately find in favour of the taxpayer. HMRC estimated that they could collect up to £7 billion from over 30,000 individuals and companies. What wasn’t immediately spotted was that the law applies to anyone entering into a new scheme – so that there shouldn’t be a cash flow advantage for a scheme entered into today.

A further 2014 change was the introduction of the POTAS regime which makes additional requirements of certain promoters of tax avoidance schemes. Essentially, promoters of failed tax schemes may be required to notify their customers that they are within the POTAS rules and they may be named publicly by HMRC. The objective is to change the behaviour of what HMRC describes as a small number of promoters of aggressive avoidance schemes – although the potential breadth of the law means it could potentially apply to a wider group.

It is with this background in mind that we should consider the latest consultation – on new financial penalties for ‘enablers of tax avoidance’. Enablers are described as not only those who devise tax-based planning but also those who contribute by marketing the arrangements, as well as providing facilities such as the incorporation of entities, management services and offering financial facilities. It is the intent that enablers do not include those who simply provide tax return preparation services, or other ‘benign’ work.

The objective is to change behaviour by adding a penalty (as well as publicity) for ‘enabling’ schemes which are struck down by the tribunals and courts (or where claims are withdrawn before reaching the tribunal). The penalty put forward is up to 100% of the tax at stake – which doesn’t seem to marry up to HMRC’s five principles for penalties. Penalties are there ‘…primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues’. The proposals are not consistent with these principles, as a tax-based penalty could be quite disproportionate to enablers, since fees for advice or marketing are typically a small fraction of the tax saving. Australia has had a promoter penalty scheme since April 2006 and its first two cases were referred to the Tribunal in 2011. The maximum penalty in Australia is related to the fees involved, being the higher of twice the fee received or about A$900,000. It must be hoped that the UK will adopt the Australian approach of a penalty related to fees.

The types of arrangement potentially within scope are those where the Tax Disclosure rules apply, or where the GAAR applies. These are reasonably clear tests, even though the Tax Disclosure rules are broader than many appreciate. However, it is also proposed that avoidance should include cases where a TAAR or unallowable purpose applies. Given that there are over 270 TAARs in UK legislation, this test seems far too wide.

The Financial Secretary’s introduction refers to ‘…proposals to bear down on this shrinking but persistent minority’. The challenge here is to make sure that any new penalty system does achieve that aim. It would be damaging if tax advisers could no longer advise on the potential application of complex and uncertain law to commercial scenarios, due to the threat of very large penalties for what ultimately turned out to be incorrect advice.