Who will dare to design, market or facilitate tax avoidance arrangements?

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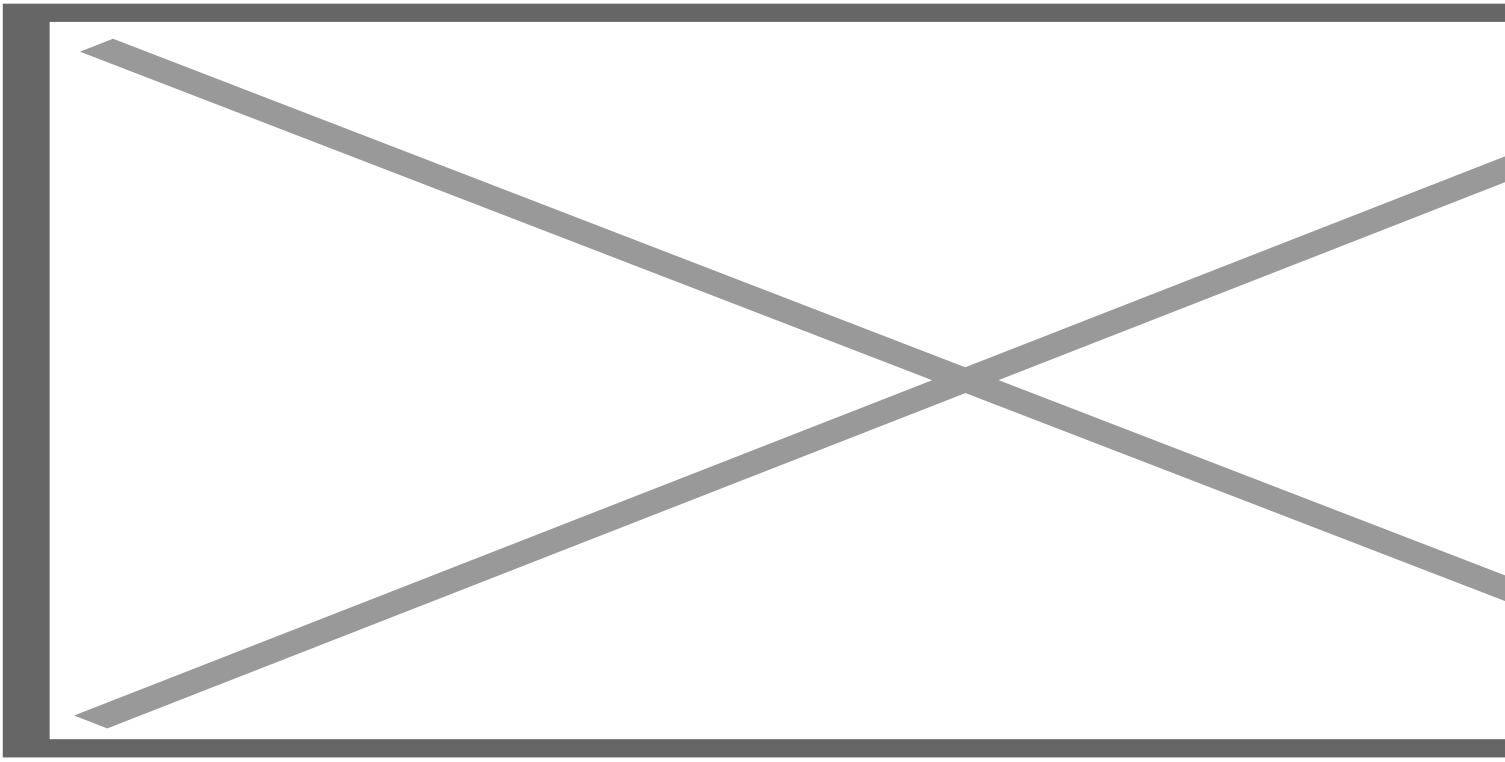

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Rosemary Blundell considers some practical issues of the recent consultation document for enablers of tax avoidance

The publication by HMRC of the consultation document on 17 August 2016 setting out new sanctions for those who design, market or facilitate the use of tax avoidance arrangements that are ultimately found to be unsuccessful contains much for the tax profession to ponder with some fundamental changes. It is proposed that there should be a new penalty for those who '**enable**' tax avoidance and changes to the existing penalty legislation that will apply to those who **use** avoidance structures that are "defeated". The objective is clear: to cut out tax avoidance by creating financial and other disincentives for **all** those involved in defeated tax avoidance. The approach is in contrast to the general approach taken to date which has been to target the end users, or the high risk promoters.

Whilst it may be assumed that draft legislation will be available shortly after the Autumn Statement it is to be hoped that the proposals are not rushed through. Much has already been done – over 40 legislative changes in the last parliament and further changes to date in this: the intention here is to ramp up the stakes, broadly in line with the established HMRC approach to penalties as set out in HMRC's 2015 penalties discussion document.

Enabling and the enablers

The condoc notes that there is a whole supply chain of advice and intermediation between those who develop tax avoidance schemes and the scheme users, and that those who introduce or facilitate the development of schemes currently face limited downside if the arrangements are ultimately defeated. Quite simply, the term ‘enablers’ encompasses anyone involved in the supply chain who benefits financially from an end user implementing tax avoidance arrangements. The condoc cites the following as non-exhaustive examples of enablers:

- those who develop, or advise/assist those developing, such arrangements and schemes;
- Independent Financial Advisers, accountants and others who earn fees and commissions in connection with marketing such arrangements, whether or not their activities amount to the promotion of arrangements; and
- company formation agents, banks, trustees, accountants, lawyers and others who are intrinsic in, and necessary to, the machinery or implementation of, the avoidance.

Some comfort can be drawn from the fact that it is noted that to ensure that the proposed sanctions operate effectively, the government needs to define an avoidance enabler clearly. Whilst the focus is to be on those who benefit financially from enabling others to implement tax avoidance arrangements, the proposal is to develop a definition based on the broad criteria used for the offshore evasion measures appropriately tailored to tax avoidance. It may therefore extend to:

- Acting as a “middleman”– arranging access and providing introductions to others who may provide services relevant to [avoidance]
- Providing planning and bespoke advice
- Delivery of infrastructure
- Maintenance of infrastructure – providing professional trustee or company director services including nominee services; providing virtual offices, IT structures, legal services and documentation
- Financial assistance
- Non-reporting – not fulfilling their reporting, regulatory or legal obligations, which in itself helps to hide the activities of the [avoider] from HMRC

The definition would not, however, extend to those who are **unwittingly** parties to enabling tax avoidance, and this is likely to be based on the definitions within the DOTAS regime for excluding certain persons from being ‘promoters’. Nevertheless, the list is very broad and if these proposals go ahead, advisers will need to increase their levels of due diligence to protect themselves, and this may be out of all proportion to the fee involved.

Defeated tax avoidance arrangements

The sanctions will apply where there is a ‘relevant defeat’, but the meaning of this is very wide. Not only does the definition include arrangements counteracted by the GAAR and Follower Notices, it also covers any notifiable schemes under a disclosure regime and arrangements subject to a targeted anti-avoidance rule (TAAR) or unallowable purpose test. Firstly not all arrangements notifiable under DOTAS are abusive, given how widely the rules are cast, so simply because arrangements are notifiable is not a good indicator of the sort of avoidance HMRC wishes to prevent. Secondly, there is often genuine uncertainty in commercial transactions about whether a given TAAR or unallowable purpose rule may apply. This could give rise to circumstances in which advisers are reluctant to advise on large transactions even though it is necessary to opine on these provisions, as the risk is simply too great. The definition of ‘relevant defeat’ therefore needs to be narrowed and, given that deliberate structuring around a TAAR would bring arrangements into GAAR territory, that separate reference to

arrangements subject to a TAAR or unallowable purpose test should be removed.

Furthermore, as they stand, the proposals do not provide any detail about commencement rules. The consultation document refers to the proposed penalties being to 'influence behaviour and discourage the design, marketing and facilitation of avoidance generally'. If that is the case, then it needs to be made clear that any sanctions will only apply entirely prospectively i.e. to advice given after the commencement date, otherwise enablers could now find themselves sanctioned where 'relevant defeats' arise post commencement in relation to advice given years ago.

It would be more proportionate to confine the measures to 'abusive' planning counteracted by the GAAR: perhaps there should be a safeguard similar to that provided by the GAAR Advisory Panel? Given the potential implications for advisers of these proposals, it is essential that adequate safeguards exist. It may also be time for a more radical rethink of the DOTAS regime, as this was created to give HMRC early warning of tax planning, but is now being used as the foundation for other measures for which it was never intended.

Penalties for enablers

The level of the potential penalty is considered and, interestingly, it is proposed to use the "defeat" as the trigger but that each "enabler" of that avoidance arrangement would then be subject to penalties in their own right, irrespective of the final penalty position of the user of the arrangements. Enablers would be charged penalties in relation to **each user** they enabled to implement the defeated arrangements. Either the penalty might be based on the benefits enjoyed by the enablers (typically fees) or as a percentage of the amount of tax understated by all of the end users. Thus, promoters who may have sold the same scheme to many end users could face very significant penalties – as would, say lawyers or tax advisers, who have given opinions on the planning. There may be a cap on the amount of penalties suffered by individual enablers so that it is proportionate to their level of involvement. This is an extremely blunt instrument aimed at creating significant financial risk for all those who get involved in any way in tax avoidance arrangements. There will be a need to look further and HMRC recognise that they are likely to require new information powers to ensure they identify all enablers involved in defeated tax avoidance. Furthermore, the possibility of naming enablers who have been subject to these penalties is raised.

Reasonable care

The condoc also proposes changes to what constitutes 'reasonable care' by a taxpayer, and shifting the burden of proof to the taxpayer. So, for example, a taxpayer will not have taken reasonable care if they have relied on general advice on the arrangements in question which are not tailored to the individual taxpayer's specific circumstances and use of the scheme, and instead, say, relied on marketing material produced by the promoter. If the taxpayer chooses to obtain specific advice from another adviser, then, as it stands, that adviser could also potentially become an enabler, as the condoc states that the term 'enabler' 'includes anyone in the supply chain who benefits from an end user implementing tax avoidance arrangements and without whom the arrangements as designed could not be implemented'. No independent adviser would wish to give advice in these circumstances, when they could be subject to the proposed sanctions. This gives rise to an unhealthy result all round. The taxpayer would not be able to demonstrate they had taken reasonable care. Advisers would be reluctant to give advice where there is a hint of tax avoidance arrangements (including, as it stands, merely advising on a TAAR or unallowable purpose test). Furthermore, it is in HMRC's interests too that taxpayers contemplating entering into tax avoidance arrangements should take independent advice from reputable advisers. They would then be made aware, as appropriate, of the risks that the planning does/might not work on a technical level, and that HMRC will view the planning as aggressive, as well as making them aware of the potential consequences of

implementing aggressive planning. These warnings would be sufficient to put off many taxpayers – surely that is not something HMRC would wish to stop?

Does it catch the intended targets anyway?

Finally, these broad based proposals are not going to deter those who are intent on making money out of selling aggressive tax avoidance schemes. What is to stop such promoters simply setting up one company to sell schemes, and then closing them down and setting up a different company (phoenixing) when things get difficult with HMRC? What will prevent such promoters simply moving offshore?

Conclusions

There can be no doubting that tax avoidance remains a high priority for the government, but these proposals should be narrowed to ensure that they are confined to egregious tax planning arrangements. Advisers will need to be on high alert when asked to opine on the tax or other aspects of aggressive tax planning. In particular, the 'smell test' will need to be rigorously applied, not only by tax departments but any other departments giving advice contributing to tax avoidance arrangements. If these proposals go ahead, the financial and reputational risks for advisers are significant and the 'unwitting' party safeguard is not going to help those advisers who ought to have questioned what they were getting involved in – and who may otherwise get a very nasty surprise when advice given years ago comes back to bite them on the back of a court decision. Without doubt, the heat has been turned up on tax avoidance, and these latest proposals are likely to prompt aggressive scheme promoters to relocate outside the UK – so the main risk is likely to be faced by the advisers used by these promoters.