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UK Proposals For Tackling High Risk Promoters

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The UK Government's crackdown on tax avoidance continues apace. The "Raising the stakes on tax avoidance" consultation was launched on August 12, 2012 and one of its main limbs was tackling high risk tax promoters. Draft legislation was published on January 24, 2014. The closing date for consultation on the draft legislation was February 24, 2014.

The main thrust of the changes is that people perceived as posing a high risk of promoting tax avoidance schemes can be served with a conduct notice and/or a monitoring notice, which results in increased compliance obligations for promoters, intermediaries and users of schemes that are promoted by that promoter. One of HMRC's stated aims is to encourage users of avoidance schemes to obtain independent advice. However, the draft legislation seems at odds with this aim. Anyone who is asked to advise on a scheme is at risk of becoming a promoter, and hence becoming subject to a conduct or monitoring notice, if they examine a scheme and suggest any potential changes or improvements. This begs the question of why would an independent advisor be minded to offer their view at all? Hence, independent advisors may in practice be discouraged from providing advice to potential scheme users by the new rules.

The definition of "promoter" is borrowed from the DOTAS rules, and is therefore very wide, as it includes anyone who is "*to any extent responsible for the design*" of arrangements designed to avoid tax. There are certain threshold conditions that must be met for a conduct notice to be served. These include[1] those who in the previous three years have:

- been deliberate tax defaulters – that is, promoters whose details have been disclosed under the deliberate tax defaulters scheme;
- had their names published in the Banking Code of Practice annual report;
- been charged with a criminal offense relating to financial fraud, unless they are acquitted or charges dropped;
- had a scheme referred to the GAAR advisory panel and at least two members of the panel determine that the arrangement was not a reasonable course of action;
- been found guilty of misconduct by a professional body, such as the SRA (for any reason other than a falling out between the individual and the professional body (for example over fees)); or

- failed to comply with a tax avoidance stop notice (which will also be introduced in the Finance Act 2014).

Some of these seem intuitive, such as committing a financial criminal offense. Others are much less so and provide HMRC with an extremely wide ambit for issuing notices. For example, where a scheme is simply referred to the GAAR advisory panel. The threshold is potentially breached even where the GAAR panel rules in favor of the taxpayer if at least two members of the panel rule against the scheme. If a matter is referred to the GAAR panel and they rule against it, this is grounds for the immediate issue of a monitoring notice. Importantly, there is no right of appeal to the issue of a conduct notice.

Where a threshold condition is met, HMRC must decide whether meeting the threshold condition is significant (on the collection of tax). This is a very loose concept and HMRC have a wide discretion to decide whether this condition is met. Once a conduct notice is issued, it will be in place for at least two years unless HMRC sets an earlier termination date or withdraws the notice early. Again, a promoter issued with a conduct notice will find themselves very much at the mercy of HMRC. HMRC will provide conditions in the conduct notice which must be reasonable, and they must notify the promoter of the conditions and take these into account, but ultimately there is no right of appeal against the terms or issue of a conduct notice.

If a promoter fails to comply with the terms of a conduct notice then HMRC can issue a further notice that the activities of the promoter are to be monitored. A monitoring notice will explain what the breach of the conduct notice is, the terms of the notice and the promoter's right of appeal. The promoter may also request withdrawal of the monitoring notice (after thirteen months), which would otherwise appear to be in issue for an unlimited term.

HMRC also has the right to publish details (name, address, and any other information HMRC sees fit to publish) of those promoters who have been issued with monitoring notices (unless an appeal is outstanding). It is not clear where or how HMRC intends to publish such information, but they have a wide discretion to publish it in such a manner as they see fit. Perhaps more damagingly, a promoter who has been issued a monitoring notice must inform their clients that they are a monitored promoter, and which of the conditions of their conduct notice they failed to comply with. A monitored promoter will also be given a reference number which they must give to their client and (astonishingly) their clients must then provide the reference number to anyone who they "*might reasonably be expected to know is, or is likely to be, at that time a client*" of the promoter. It is unlikely that many clients would be aware of this obligation and the sanctions for a failure to comply with it are unclear. The client must then provide HMRC with the reference number if it obtains a tax advantage from using a promoter's scheme.

Many have joked about perceived tax avoiders being put in the stocks when they have appeared before the Public Accounts Committee. What is proposed appears to be a modern day version of branding for promoters.

If the proposals become law, "mainstream" tax advisors will want to avoid being monitored at all costs. This will inevitably make them think twice before advising clients on schemes that have been offered to them.

Endnotes

[1] The full list can be found in schedule 1 of the draft legislation.