

Gammie, Malcolm

**Research Report**

## Strengthening tax avoidance sanctions and deterrents: A discussion document - response to consultation October 2016

IFS Report, No. R122

**Provided in Cooperation with:**

Institute for Fiscal Studies (IFS), London

*Suggested Citation:* Gammie, Malcolm (2016) : Strengthening tax avoidance sanctions and deterrents: A discussion document - response to consultation October 2016, IFS Report, No. R122, Institute for Fiscal Studies (IFS), London, <https://doi.org/10.1920/re.ifs.2016.0122>

This Version is available at:

<https://hdl.handle.net/10419/171986>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*

# Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document

Response to Consultation  
October 2016

Tax Law Review  
Committee

Nalina Arora  
HM Revenue and Customs  
Room 3/41  
100 Parliament Street  
London  
SW1A 2BQ

Director: Paul Johnson  
Research Directors:  
Professor Orazio Attanasio  
Professor Rachel Griffith CBE  
Limited by Guarantee,  
Registered in England: 954616  
Registered Charity: 258815  
VAT no: GB 394 5830 17

## Strengthening Tax Avoidance Sanctions and Deterrents

*Response to the consultation document of 17 August 2016 by the Tax Law Review Committee of the Institute for Fiscal Studies<sup>1</sup>*

### Introduction

- (1) The Consultation Document sets out two main proposals: a penalty for “enablers of tax avoidance” and a change to the penalty rules for taxpayers.
- (2) The first of these identifies the target of the proposal as “*a persistent minority of promoters, advisers and other intermediaries*” who devise, facilitate or enable tax avoidance arrangements that “*do not deliver the tax results they promise*”. This persistent minority are referred to as “*enablers of tax avoidance*”.
- (3) Briefly, the Committee considers that in its current form the proposal aimed at “enablers of tax avoidance” goes well beyond its purported target of “a persistent minority” and does not represent an appropriate or satisfactory additional measure for targeting tax avoidance. The proposals, if adopted in anything approximating their current form, carry a real risk of a wholesale reduction in the numbers of onshore tax professionals who presently provide responsible and accurate professional advice to taxpayers.
- (4) The Committee does not doubt that popular sentiment has expressed considerable objection to many of the tax avoidance arrangements indulged in by the “persistent minority”. It recalls, however, that a swathe of measures have been enacted in recent years designed to identify, discourage, shame and penalise tax avoiders and those who promote and market tax avoidance arrangements. These measures are not all fully operational yet, and there has been no sensible opportunity to assess their longer term impact on the tax avoidance industry, in particular the type of avoidance indulged in by “the persistent minority” supposedly targeted by these proposals. The need for further measures is therefore untested and unproven. The current

---

<sup>1</sup> The Tax Law Review Committee was set up by the IFS in autumn 1994 to ask whether the tax system was working as intended, efficiently and without imposing unnecessary burdens. Its role is to keep under review the state and operation of tax law in the UK. It does not seek to question Government policy as such but to look at whether existing arrangements or particular proposals achieve the policy in a satisfactory and efficient way. The current membership of the TLRC is annexed to this submission.

measures in particular are unjustified by any evidence of an on-going widespread problem necessitating far reaching, untargeted and potentially damaging measures such as those currently proposed.

- (5) In particular, the Consultative Document fails to consider and identify adequately (or indeed at all) the type of behaviour and the nature of the avoidance in which “the persistent minority” engage, which is the supposed target of the proposal. It therefore fails to distinguish “the persistent minority” from the vast majority of responsible tax professionals without whom the tax system, commercial business activity and the organisation of individual financial affairs could not function satisfactorily. In effect, all are inappropriately tarred with the same brush.
- (6) We do not imagine that the issues to which we draw attention in this submission are intended by government or HMRC. In the Committee’s view, however, they would be an inevitable outcome of the proposal if enacted in its current form. In short, the scope of the proposal and the targeting of the issues created by “the persistent minority” require a more considered, careful and targeted approach than is evidenced by the Consultative Document.

### **The scope and potential effects of the current proposals**

- (7) As appears from these comments, the central problem is that the proposal in its current form does not target “a persistent minority” at all. It brings within its scope the ordinary and legitimate activities of the great majority of tax professionals, together with those of a large number of other professional service providers in related or ancillary areas. As a result, the proposal in its current form has the potential to create a significant number of unintended and detrimental effects for the administration of justice and the tax system, for overall taxpayer compliance and for the ability of taxpayers to seek and receive responsible advice on their tax affairs.
- (8) The following are among the issues raised by the current proposals:
  - a. The proposed trigger points for imposing penalties on enablers of tax avoidance are not limited by any sensible notion of tax avoidance as engaged in by the “persistent minority”. Broadly speaking, any action (and therefore any advice that such action may lawfully be taken) to reduce tax liabilities below their maximum is characterised as avoidance for these purposes.
  - b. The trigger point for penalties (“failed tax avoidance”) can encompass later events that are impossible to identify at the time at which the advice on tax liabilities is given. As a result an enabler of tax avoidance cannot know that they are at risk of a penalty at the time at which they give advice. It is akin to driving along a road where the speed limit will only be set after the event.
  - c. The proposed tax-geared penalties may be completely disproportionate to any benefit derived by the adviser concerned. In effect it represents punishment not just deterrence. It may also represent an uninsurable risk that prevents a tax professional from continuing their tax advisory business and that prevents any professional service provider in a related or ancillary area from rendering any services on any arrangement that includes a tax element.
  - d. The proposed safeguards are likely to be of little or no value without the removal of legal professional privilege and client confidentiality, changes in the rules of professional conduct of barristers and solicitors and others and the enactment of rules entitling professional advisers to oblige their clients to give evidence and to produce documents on behalf of their advisers. The scope of what would be required for any safeguard to be effective needs only to be stated to appreciate the

unacceptable nature of what is involved. In particular, legal professional privilege is the client's fundamental right and should not be overridden.

(9) If the proposal were to be adopted in its current form it seems to the Committee that the following would be among its potential detrimental and unwanted effects:

- a. A large proportion of the current part time tax judiciary who remain in tax practice as well as sit as judges is likely to fall within the definition of "enablers of tax avoidance", giving rise to issues of judicial representation in hearing tax avoidance cases.
- b. We also observe in passing that given his former position as a tax partner in a City law firm, the current Executive Chair and Permanent Secretary of HMRC, and the former Tax Assurance Commissioner responsible for large tax settlements, would be characterised as an enabler of tax avoidance, i.e. one of the "persistent minority" supposedly targeted by these proposals.
- c. The proposed trigger points for penalties may mean that taxpayers are unable to obtain responsible and reliable advice on the application and operation of certain anti-avoidance rules (including the GAAR) given the significant risk of a penalty that may attach to advising on such rules.
- d. The proposal is likely to give rise to conflicts of interest between taxpayers and their advisers.
- e. The proposal may lead to the litigation of issues that might otherwise be settled by agreement.
- f. If enacted in its present form it could lead to a wholesale reduction in the numbers of tax professionals who presently provide responsible and accurate professional advice to taxpayers.
- g. This reduction could well have a significant detrimental impact on the beneficial culture of accurate and voluntary compliance by the vast majority of taxpayers to which the tax professions currently make a significant and positive contribution.
- h. This reduction could have a dampening effect on inward investment to the UK because foreign investors will be unable to obtain responsible and reliable professional advice on the taxation of their UK investments.
- i. The proposal may drive elements of the tax advisory business offshore and beyond the reach of the proposed penalties. In particular, the proposal in any form may lead to the persistent minority conducting their activities from offshore and the proposal in its current form may inhibit the provision of second opinions by responsible and reliable tax advisers who remain onshore.
- j. The proposal in its current form is directly contrary to the stated objective of the second proposal, which aims to encourage taxpayers to seek responsible tax advice and a second opinion on any tax avoidance arrangements: there will be no incentive for any tax professional to offer a second opinion and in doing so assume the risk of penalties.

(10) Put shortly, as Mr Justice Walton remarked of the Inland Revenue's action in another context, the proposal in its current form "*is not merely a case of taking a sledge hammer to crack a nut; it effectively ensures that the nut itself, and a good deal more, will wholly disappear in the operation*".

- (11) The present proposals require fundamental reconsideration to identify properly their need, their target and their potential effects. The following paragraphs elaborate some of the issues raised by the current proposals.

## **The Enablers of Tax Avoidance proposal**

### ***The scope of the proposal***

- (12) Identifying adequately in legislation the “persistent minority” that HMRC wish to target presents a significant definitional challenge. This is not a matter that can conveniently be dealt with through published Revenue policy, practice or guidance: professional advisers must be able to rely upon clear legislative definition and proper legislative safeguards. They will not be prepared on such a fundamental issue as penalties to leave themselves at risk under far reaching and uncertain legislation of a change in administrative policy, practice or guidance. Those who act and advise responsibly and reliably must know that they cannot be subject to penalties just because HMRC disagree with their view of the law now or at some time in the future.
- (13) This definitional challenge is one that the Consultation Document entirely fails to address adequately. Instead, the Consultation Document effectively identifies as enablers of tax avoidance everyone and anyone engaged in the provision of tax advice, and many other associated professionals and service providers as well. It puts them at risk of tax-geared penalties in conducting their ordinary lawful professional and business activities.
- (14) No doubt many people think it objectionable that tax advisers should be allowed to put forward any arrangement designed to reduce a particular taxpayer’s tax liabilities. Ultimately, however, advisers have a professional duty to advise clients on their understanding of the law and this cannot be overlaid by some undefined and uncertain moral code as to what is or may be an acceptable course of action.
- (15) The risks of ill-considered and poorly targeted legislation – i.e. legislation that brings within its scope everything and everyone in tax advisory and related businesses and not just the persistent minority who are the stated target – are very significant. This is not just a risk to the lawful conduct of tax advisory and related businesses and the right of taxpayers to seek advice on their tax liabilities but to the Government and HMRC itself. It will be counterproductive, for example,
- a. If its effect is to discourage those who would otherwise give responsible and reliable professional advice from advising on tax arrangements because in doing so they are unavoidably at risk of potentially uninsurable penalties should their view of the law not ultimately prevail.
  - b. If as a result it reduces the willingness of professional advisers to advise taxpayers to settle tax disputes rather than to litigate them (notwithstanding the obvious conflict of interest that could be involved in so advising).
  - c. If it has even a small number of the other consequences to which we draw attention in paragraph (9) above.
- (16) Disputes between taxpayers and the Revenue as to the meaning, interpretation and application of tax legislation are commonplace and an everyday feature of the operation of a lengthy and complex tax code such as the UK’s tax code. It is why the tax code makes provision for taxpayers to appeal such disputes to the Tribunals and Courts.

- (17) Commercial life, and the arrangement of taxpayers' personal financial affairs, could not continue satisfactorily without the regular provision of professional advice on the tax consequences of particular actions and the arrangement of commercial and personal affairs. This is particular so as more and more complex and wide-ranging anti-avoidance rules have been adopted annually: taxpayers need to know whether and to what extent these rules impinge upon their ordinary commercial and financial affairs. Professional conduct rules and the adviser's duty to their client require that this includes the provision of advice as to the ways in which both businesses' and individual taxpayers' tax liabilities may be reduced. The failure to provide such advice may give rise to a negligence claim against the adviser concerned.
- (18) Taxpayers seek advice on their tax liabilities because it is a specialist subject that is all too frequently extremely complicated. Tax advice is routinely given by a wide range of professional advisers – accountants, solicitors, barristers, Chartered Tax Advisers – precisely because the law is often unclear and is capable of more than one interpretation, and because its application may depend upon a variety of factual circumstances and taxpayer intentions, purposes or motivations. As a result views as to the meaning of the law and its application to particular cases frequently differ – not just as between advisers and the Revenue but as between different advisers. The Tribunals and courts are there to resolve such disputes.
- (19) The right of taxpayers to seek and be given advice on their tax liabilities **under the law** is a fundamental right. It is absolutely essential, therefore, that any legislative proposals that emerge from this Consultation Document do not have the potential to penalise the giving of tax advice based on a legitimate and reasonably held view of the law merely because that view of the law is ultimately not sustained (whether as a result of litigation or because a dispute is settled without litigation).
- (20) In this regard, the Revenue claim to have an 80 per cent success rate in recent tax avoidance cases. This figure has been disputed but even if it is correct (and we express no view on the statistic) it still means that the Revenue's view of the law applicable to those cases has been found to be **wrong** on one in five occasions.
- (21) Furthermore, the fact that the Revenue claim to have won 80 per cent of recent tax avoidance cases does not mean that the taxpayer was improperly advised and had no justification for challenging the Revenue's interpretation of the law. The Revenue may succeed for a variety of reasons unrelated to the advice given: for example, unforeseen implementation issues; the facts not being as envisaged; the unavailability of contemporaneous evidence or the death of a key witness.
- (22) Furthermore, the Revenue may only succeed at a later stage of an appeal (having failed to persuade a lower Tribunal of their view of the law). Even if the taxpayer loses at the initial stage of his appeal, permission for a further appeal is only given if the Tribunal is satisfied that the taxpayer's view of the law has a reasonable prospect of success on appeal, in other words that the taxpayer has an arguable case.
- (23) As these points illustrate, the characterisation of an arrangement as "*ineffective avoidance*" merely because the taxpayer's view of the law does not ultimately prevail tells one nothing about the nature and character of the advice on which the taxpayer's arrangements were based or the legitimacy of the taxpayer's (defeated) claim to have reduced his tax liabilities.

#### ***"Tax Avoidance"***

- (24) The Consultative Document fails entirely to address what should, in the context of a proposed penalty regime, be characterised as "tax avoidance". This is a serious defect in the proposals.

As it stands, it appears that everything and anything that involves some reduction in the taxpayer's tax liabilities is characterised as avoidance for these purposes.

- (25) The only limiting factor is that it must be unsuccessful tax avoidance (or “defeated tax avoidance”). The concept of “defeated tax avoidance” indicates that arrangements that *do* deliver the tax results they promise (in contrast to those that do not) are not within the scope of the proposals, however objectionable they may appear to be to some people. Any suggestion, however, that the giving of *correct* advice on the law or its application in the taxpayer's case should be penalised would be wholly offensive to any notion of the rule of law. A tax professional's obligation is to advise their client as to their liabilities under the law, not to advise their client by reference some indeterminate moral code of what is or may be acceptable to public opinion or the Revenue now or at some time in the future.
- (26) Rationally, however, even in the case of advice that ultimately is not agreed to by HMRC, or which results in an unsuccessful appeal, the proposals cannot seriously seek to characterise as tax avoidance *any* action by which taxpayers are advised that there are grounds for seeking to reduce their tax liabilities in circumstances where there is a degree of uncertainty as to the correct interpretation of the law or its application to their case.
- (27) The uncertainties of interpretation and application and complexity embedded in the ever growing tax code, as Parliament has year by year added hundreds of pages to the code, are enormous. Those uncertainties and the complexity dictate both the need for taxpayers to seek professional advice and for their advisers, in the absence of a generally available Revenue clearance system on every arrangement, to exercise their judgment as to the meaning, effect and application of the legislation. This does not alter just because the interpretation and application of the law adopted by the taxpayer in such a case disagrees with HMRC's stated view of the law or its application.
- (28) The fundamental problem that underlies the definition of “tax avoidance” in this context is that the proposals purport to penalise the behaviour indulged in by a minority by reference to action - the giving of tax advice on a person's tax liabilities including their mitigation – that is the ordinary and lawful business of the majority.
- (29) This is in stark contrast to the concept of enabling tax evasion – the deliberate concealment or evasion of *known* tax liabilities. That is fraudulent and criminal activity, which can ordinarily be identified as such and which must then be dealt with as such.
- (30) In the present case,
- a. the failure to identify (or even attempt to identify) the type of behaviour indulged in by a persistent minority against which the proposed measures are supposedly designed to operate, and
  - b. the determination of the penalty solely by reference to the outcome rather than the behaviour in question,

ensure that the proposals go far beyond their intended target.

### ***Defeated tax avoidance***

- (31) The fact that a tax avoidance arrangement “*does not deliver the tax results that they promise*” does no more than create a category of case within which there may be comprised a small number of cases that were so clearly bound to fail that they may merit the imposition of a penalty on those who so recklessly advised on or otherwise enabled the adoption of the arrangements in question. The Consultative Document offers no satisfactory suggestion as to how that small minority of cases should be identified.



- (32) Each of the four categories of case identified by section 4 of the Consultative Document as giving rise to a “*relevant defeat*” are profoundly unsatisfactory and give rise to significant unfairness or unintended effects:
- a. If counteraction by the GAAR is a criterion for attracting an enabler’s penalty it will be virtually impossible for any taxpayer to obtain advice on the potential application of the GAAR. In relation to a provision that is among the least certain and most judgmental area of the tax code, in respect of which there is currently no judicial guidance at all, why should any professional person be prepared to offer advice that may later be characterised as enabling the arrangement and opening that person to a potentially uninsurable penalty should their view of the non-application of the GAAR not prevail?
  - b. The issue of a Follower Notice plainly offers no indication that the advice given in relation to the matter was inappropriate advice or, indeed, involved anything that could be characterised as avoidance. A Follower Notice will inevitably only be issued long after the advice in question has been given, so that an adviser is at risk of a penalty by reference to later events rather than by reference to the standards that apply at the time at which he advised. That is profoundly objectionable.
  - c. The use of a DoTAS notification is also thoroughly unsatisfactory and entirely muddles the different policy objectives of a wide-ranging disclosure provision and a penalty regime supposedly targeted as a persistent minority (see further below).
  - d. The use of TAARs or unallowable purpose tests create the same problem as the GAAR; the widespread use of these provisions throughout the tax code now make it impossible for taxpayers to conduct their ordinary commercial and personal financial affairs without some professional advice on the possible application of such provisions. Like the GAAR, these are among the least certain and most judgmental areas of the tax code: why should any professional person offer advice that may later be characterised as enabling the arrangement and opening that person to a potentially uninsurable penalty should their view of the non-application of a TAAR or unallowable purpose rule not prevail?
- (33) The definition of a “notifiable arrangement” under the Disclosure of Tax Avoidance Scheme rules is in Part 7 of the Finance Act 2004. The primary objective of the DoTAS rules is to provide HMRC with early notification of particular (especially novel) tax planning arrangements to enable HMRC to consider the planning and decide whether a legislative amendment is needed. The relevant definitions for identifying a “notifiable arrangement” are therefore broadly drawn with that policy objective in mind. They are not drawn with the intention of identifying “*the persistent minority of promoters, advisers and other intermediaries*” who develop, market or facilitate arrangements that do not deliver the tax results they promise.
- (34) It may be anticipated or hoped that any unsuccessful arrangements devised by that minority will have been caught by the DoTAS rules. That, however, merely identifies a category of case within which the target may be found: it cannot be sensible to target that whole category merely to deal with a small minority of cases that may fall within it.
- (35) The definition of “relevant arrangements” under the Promoters of Tax Avoidance Schemes in section 234 of the Finance Act 2014 is also extremely broadly drawn: many would say too broadly drawn. The measures are, however, tempered to a degree by the definition of the term “promoter” and, more particularly, by the nature of the conditions attaching to these rules and the sanctions that may be adopted to deal with those who trip those conditions.

- (36) There needs to be some clear definition of the nature of the arrangement or its character that the taxpayer has, on advice, pursued that identifies it as something that only a persistent minority of taxpayers and their enablers engage in which, if unsuccessful, may open them to the possibility of penalties for their behaviour.
- (37) The definition must also be rooted in present time, i.e. the time at which the arrangement is entered into. Experience clearly indicates that what is accepted as unexceptional tax planning at one time is frequently characterised as unacceptable tax avoidance at a later time (often associated with the growth in use of particular planning and the government's decision to change the law and justify the change by characterising particular actions as "avoidance").
- (38) It is wholly objectionable for today's actions to be judged by reference to tomorrow's standards.

### ***An alternative approach***

- (39) As just indicated, the nature of the sanctions now being proposed requires a clear identification of the type of behaviour that they are designed to penalise. If some form of penalty is to be implemented, we consider that the real target should be those who profit from marketing arrangements that are presented as avoiding tax but which no adviser at the time could reasonably have believed would succeed in delivering the tax results claimed for the arrangement.
- (40) The concept of marketing is not necessarily easy because an adviser who is aware of particular arrangements that may serve his client's purposes is bound to advise the client of them. A test that is aimed at deriving profit from the marketing of schemes such as those just described in paragraph (39), rather than the giving of advice, should protect the vast majority of tax advisers who strive to advise taxpayers responsibly and correctly on the actions they may lawfully take to reduce their tax liabilities.
- (41) Even with a more targeted test, extending its application beyond those who profit from marketing arrangements may not be straightforward. For example:
- a. Is an adviser potentially liable both for a claim for negligence by his client and a penalty from the Revenue if he genuinely believes that an arrangement is effective to reduce the taxpayer's liabilities but overlooks a particular anti-avoidance provision that negates the tax benefit? Can the person marketing the arrangement rely on negligent advice to avoid any penalty?
  - b. Is an adviser potentially liable both for a claim for negligence by his client and a penalty from the Revenue if he advises (quite correctly) that an arrangement is effective to reduce the taxpayer's liabilities but the arrangement is then not implemented correctly (e.g. overlooking some general legal rule of which the tax adviser is unaware)?
  - c. Is an adviser at risk of a penalty if he advises by reference to various assumptions which may or may not in fact be borne out in implementation? How will this be shown?
  - d. Is an adviser at risk of a penalty if he advises against the arrangement but also advises, as he is bound to do, on how he believes the taxpayer might best achieve his objective?
- (42) In every case an adviser faced with the imposition of a penalty will face a difficult evidential burden to defend himself (although we consider that the evidential burden must rest with the Revenue). Paragraph 2.8 of the Consultation Document says this (emphasis added):

“To ensure that the sanctions proposed in this chapter operate effectively, the government needs to define an avoidance enabler clearly and to provide safeguards for those who are within that definition but were unaware that the services they provided were connected to wider tax avoidance arrangements. A tax agent who, in the circumstances discussed in paragraph 2.30 does no more than prepare a client’s tax return for submission is not the focus of this measure.”

(43) Paragraph 2.30 says this (emphasis added):

“For example, an agent who provides general accounting and taxation services may submit a return for a client, which is later found to be incorrect as a result of avoidance arrangements being defeated. If the agent could show that they advised their client not to implement the arrangements, or that their client had not discussed the issue with them before implementing the arrangements, we would not want a penalty as long as they could show that all appropriate disclosures were made when that return was submitted.”

(44) These are likely to be impossible requirements to meet. Unless the legislation proposes to override legal professional privilege and client/adviser confidentiality, the agent is unlikely to be able to guarantee being able to show what advice they gave to their client or what was discussed with their client. Even if the client is co-operative the evidential burden to satisfy these tests is likely to be enormous.

### **Changes to taxpayer penalties**

(45) The discussion in the Consultative Document of changes to taxpayer penalties is tainted by many of the deficiencies exhibited in the discussion of enabler penalties: for example, the failure to identify an appropriate definition of “tax avoidance” for these purposes; the inadequacies in identifying what amounts to “defeated tax avoidance”.

(46) The Case Studies 3.1 and 3.2 appear incomplete and therefore difficult to evaluate. Case study 3.1 says no more than that HMRC’s view is that the scheme is ineffective but does not explain why or how it is concluded to be defeated tax avoidance. Case Study 3.2 refers to the scheme being “nearly identical” to one it has already defeated but (consistent with our comment in paragraph (32)b above) that may be irrelevant if it post-dates Mr Jones’ adoption of the arrangement. Neither Case Study (so far as they can be understood) appears to us to support the suggested changes to the current penalty regime.

(47) As we understand the thrust of paragraphs 3.22 to 3.26, the aim is to encourage taxpayers to take their own advice on any tax avoidance arrangements. We have already noted that the proposed enablers’ penalties are directly contrary to this objective by removing the incentive for tax advisers to offer second opinions on tax avoidance arrangements. As the Consultative Document indicates, the aim is to extend ideas underlying the serial avoiders and POTAS legislation to taxpayers more generally, apparently before any proper evaluation can have been made as to the operation and effectiveness of those proposals. This seems to us to be premature and unjustified by reference to the issues outlined in the Consultative Document.

(48) We reach the same conclusion on the proposal to place the burden of proving reasonable care on the taxpayer rather than (as is now the case) the Revenue. No doubt such a change would be convenient for the Revenue but we do not think that it is justified by reference to what little is said on the matter in the Consultative Document.

### **Further ways to discourage avoidance**

- (49) Chapter 5 of the Consultative Document puts forward a range of suggestions aimed at further shrinking the avoidance market. However, as we noted in paragraph (4) above, there have been a plethora of recent administrative measures, the impact of many of which on any on-going issue of avoidance cannot yet have been fully and properly evaluated.
- (50) The greater risk may now be of legislative overkill, as the enablers' proposal illustrates, and of imposing unnecessary and invasive compliance burdens that impact a large number of taxpayers and tax advisers when, as the Revenue are quick to note, the vast majority of taxpayers are compliant and the great majority of advisers act responsibly.
- (51) We therefore see no reason to add yet more administrative measures at this time without proper evaluation of the impact of existing measures and careful targeting of any new measures at whatever residual problems are demonstrated to exist.

### **Our Answers to the Consultative Questions**

#### ***Qu1 – How far do the descriptions of enablers of offshore tax evasion also represent those who enable tax avoidance? What changes to these definitions would be needed to tailor them to tax avoidance***

- (52) Evasion can generally be identified because it involves a deliberate failure to satisfy a known tax liability or some other deliberate disregard of a person's tax obligations. As such it amounts to fraudulent and criminal activity. The definition of an enabler in the context of evasion can therefore be assessed by reference to the knowledge or direct involvement of someone in an identifiable fraudulent and criminal act.
- (53) By comparison tax avoidance is neither fraudulent nor unlawful even if the particular arrangement is eventually shown on an appeal not to achieve the desired reduction in tax liabilities. Any action undertaken to enable the arrangement at the time it is entered into is entirely lawful and directed to a lawful end, even if the Revenue or others disapprove of the end that is sought after.
- (54) It is unhelpful to confuse evasion with avoidance in designing these measures, especially when no satisfactory definition of avoidance is offered beyond the suggestion that it can encompass any reduction in tax liabilities. The measure as a whole needs to be far more carefully targeted.

#### ***Qu2 – Are there other classes or groups of person who should be included in, or specifically excluded from, the definition of enabler?***

- (55) In short, it appears likely that anyone and everything involved in implementing any arrangement that operates to reduce a tax liability will be dragged in as an enabler. For the reasons articulated elsewhere in this response we regard this as untargeted and liable to have unintended effects on the willingness of non-tax specialists to provide advice or services on anything that has a tax aspect to it.

#### ***Qu3 – The Government welcomes views on whether this approach is the right scope for a penalty on those who enable tax avoidance which HMRC defeats***

- (56) No, it is not. For the reasons given, the proposal is untargeted and far too broad.

***Qu4 – The Government welcomes views on whether a tax-geared penalty is an appropriate approach***

(57) No, it is not. Any penalty should be benefit based. A tax-geared penalty is likely to be completely disproportionate punishment even with a properly targeted definition of “enabler”.

***Qu5 – How should the penalty regime apply where a scheme has been widely marketed? What safeguards might apply in these circumstances?***

(58) See Qu 4.

***Qu6 – Views are welcome on whether Schedule 36 would provide an appropriate mechanism to identify enablers of tax avoidance or whether a stand-alone information power would be more appropriate.***

(59) The Consultative Document fails to recognise or address the issues involved in this respect (e.g. legal professional privilege and client confidentiality) and this requires consideration before particular proposals are advanced.

(60) The scope of any power must in any event be tailored to the final proposal and as explained we do not regard the proposal in its current form as a practical or sensible one.

***Qu7 – Would safeguards similar to those in Schedule 24 to the FA 2007 be appropriate?***

(61) See the answer to question 6, which is equally applicable here.

***Qu8 – To what extent would the approach taken in DOTAS be appropriate to exclude those who unwittingly enable tax avoidance from this new penalty? And, what steps should an agent take to show that they had advised their client appropriately?***

(62) DOTAS is directed to a different policy objective and does not provide a satisfactory template for the current proposal. The safeguards proposed are inadequate in the context of the scope of the proposal in its current form.

(63) The “non-adviser” test is likely to be practically impossible to apply in many cases. We also tend to think that the suggestion that it is possible to provide “*advice that goes no further than explaining the interpretation of words used in the tax legislation*” is meaningless. The essence of most tax advice is that the words can have more than one meaning. More importantly, even if the words are clear (in which case advice on their interpretation may not be required) it is usually advice on the application of those words to particular cases and circumstances that matters. In this regard there is a professional obligation to give best advice and to propose solutions for the client; not just “*advice that goes no further than explaining the interpretation of words used in the tax legislation*”.

(64) This discussion, however, also overlooks entirely the broader practical issue of how, faced with a penalty, any adviser will be able to demonstrate the nature and scope of his advice in such cases.

***Qu9 – We welcome views on whether these safeguards are appropriate, and what, if any, other safeguards might be needed.***

(65) The suitability of the safeguards will depend upon the final form of any proposal adopted. At present they are wholly inadequate.

***Qu10 – To what extent would defining what does not constitute reasonable care enable HMRCV to more effectively ensure that those engaging in tax avoidance schemes that it defeats face appropriate financial penalties***

(66) These proposals suffer from similar flaws as the enablers’ proposal, in failing to define tax avoidance or to identify satisfactorily “defeated tax avoidance”. Furthermore, what HMRC

appears to want to achieve through this proposal is flatly contradicted by the likely effects of the enabler's proposal.

(67) We do not believe that the case for change has been made.

***Qu11 – We welcome views on the extent to which placing the burden on the taxpayer to demonstrate they have taken reasonable care would ensure that appropriate penalties are charged in cases of avoidance which is defeated by HMRC?***

(68) We do not believe that the case for change has been made.

***Qu12 – To what extent will these changes better ensure that those engaging in tax avoidance which is defeated by HMRC face financial penalties?***

(69) The current proposals are untargeted and inappropriate.

***Qu13 – Do you agree that this approach to identifying defeats of arrangements to which this measure should apply is appropriate?***

(70) No.

***Qu14 – Do you agree that more ‘real-time’ interventions, targeted at particular decision points, could sharpen enablers’ and users’ perceptions of the consequences of offering/entering into tax avoidance arrangements?***

(71) Before further administrative measures are put forward the impact of existing measures should be properly evaluated. Any new administrative measures need to be carefully targeted to resolving any problems that are shown to remain notwithstanding the plethora of administrative anti-avoidance measures introduced in recent years. The current proposals illustrate the issues and likely unintended effects of untargeted proposals and the risks of overkill.

***Qu15 – Could any of the options above create effective, proportionate incentives for users and enablers to change behaviour? Are there other, better ways to achieve the behavioural change government is looking for?***

(72) See the answer to Question 14.

## THE TAX LAW REVIEW COMMITTEE

### **Chairman**

Malcolm Gammie CBE QC

### **Members** Sharon

Baynham

Colin Bishopp\*

Steve Bousher

Tracey Bowler

Bill Dodwell

Sarah Falk

Professor Lady Judith Freedman

Edward Hellier

Paul Johnson

Sara Luder

Graeme Macdonald

Brian Mace

David Martin

Sam Mitha

Jane Moore

Paul Morton

Dr Christiana HJI Pannayi

John Preston

Christopher Sanger

Chris Tailby CBE

John Whiting CBE

Tax Director, Policy Group, KPMG LLP

President, Tax Chamber of the First-tier

Tribunal

Barrister, Joseph Hage Aaronson LLP;

*formerly* HMRC Solicitor's Office

TLRC Research Director

Partner, Head of Tax Policy Group, Deloitte

LLP

Consultant (*formerly* tax partner), Freshfields

Bruckhaus Deringer

Pinsent Masons Professor of Tax Law,

University of Oxford

TLRC Tax Researcher

Director, Institute for Fiscal Studies

Partner, Head of Tax, Slaughter and May

*formerly* University of Kent

*formerly* Policy Director, Inland Revenue,

1990-2004

*formerly* Senior Tax Partner, Herbert Smith

Tax consultant and lecturer; *formerly* Deputy

Director HMRC Central Tax Policy Group

Low Incomes Tax Reform Group, ICAEW

Tax Faculty

Tax Director, Reed Elsevier plc

TLRC Tax Researcher; Queen Mary

University of London

*formerly* Partner, Global Head of Tax Policy,

PricewaterhouseCoopers LLP

Partner, Global Head of Tax Policy, Ernst &

Young LLP

Formerly Director of Tax Practice, HM

Customs & Excise, 2002-04; Director, Anti-

Avoidance Group, HMRC, 2004-09

Tax Director, Office of Tax Simplification

\*Colin Bishopp was not involved in writing or commenting on drafts of this report.