



The Law Society

Consultation on High Risk Avoidance Schemes

Comments of the Tax Law Committee of the Law Society of England and Wales

Introduction

1. The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession and lobbies regulators, the Government and others.
2. This response has been prepared on behalf of the Law Society by the members of the Tax Law Committee. The Committee is made up of senior and specialist tax lawyers from across the country.

General comments

3. We support the Government's strategic approach to tackling tax avoidance as set out in the June 2010 consultation document "Tax policy making – a new approach" and developed in the March 2011 document "Tackling tax avoidance".
4. We agree with the three core elements of new anti-avoidance strategy: prevention, detection and counteraction.
5. However, we do not believe that the new regime proposed in the consultation document for high risk avoidance schemes is necessary or desirable. In our view existing legislation provides the protection the proposed new regime is intended to give. If there are concerns that existing provisions do not go far enough, we would suggest that they should be amended rather than a new regime introduced.

Why the new regime is neither necessary nor desirable

6. The stated aim of the proposed new regime is to remove the cash flow advantage obtained by users of high risk schemes. In our view, however, current provisions for interest on overdue tax should be sufficient to counter any cash flow advantage from using avoidance schemes which are found (possibly after litigation) to have been ineffective. If there are some tax regimes where interest does not run from the date that tax should have been paid but only from the date HMRC proves that a tax avoidance scheme has failed (per paragraph 2.4 "Tackling Tax Avoidance"), then this should be addressed by amending the provisions which impose the interest liability. If it is thought that the rate of interest charged on overdue tax is too low, the rate should be reviewed.

7. It seems to us that the proposals for the new regime have two apparent objectives (apart from the stated objective of removing a cash flow advantage):
 - first, to discourage taxpayers from using schemes which HMRC considers not to be effective, in order to reduce the time and resources HMRC has to employ in disputing tax liabilities arising from the schemes; and
 - secondly, to punish taxpayers who implement schemes which HMRC identify as ineffective and (by implication) egregious.
8. Whilst we can understand HMRC's desire to discourage use of schemes so as to reduce the burden of pursuing disputes with taxpayers, we believe that it is an important taxpayer right to be able to challenge HMRC's interpretation of the law through the courts. Increasing the penalty that attaches to particular schemes if a taxpayer chooses to exercise his or its right to disagree with HMRC would be a deterrent to exercise of that right which we believe is not justified.
9. Regulations would allow Government to describe high risk avoidance schemes in legislation. We are concerned about the way in which "high risk avoidance scheme" is defined in the consultation document. The definition suggested in paragraph 2.18 is:

"a scheme that uses contrived arrangements to seek tax advantages in circumstances where they are not intended to be available and which HMRC believes does not deliver the advertised tax advantages."
10. This definition uses concepts which are uncertain. In particular, the test refers to tax advantages which "are not intended to be available". It is notoriously difficult to ascertain when tax advantages are intended to be available. Inclusion of particular schemes on the list will inevitably be subject to taxpayer challenge.
11. We are also concerned that the process for adding schemes to the list is cumbersome and will not achieve the objective of enabling HMRC to take swift action to discourage the use of schemes that come to its attention. We are particularly concerned about the proposal in paragraph 3.15 of the consultation document for Government to consult informally with the tax profession on proposed additions to the list. First, the commitment is "to consult wherever possible". In practice, we doubt that in practice such consultation would be feasible without delaying the process. Further, informal consultation would involve only a few selected members of the tax profession. This puts those members at an advantage to other tax advisers and may not result in a fully-rounded review of the description suggested for a particular scheme.
12. Further, tax avoidance schemes are often complex, involving a number of steps and transactions. Paragraph 3.11 of the consultation document acknowledges that schemes must be described on the list in terms that are narrowly targeted but not so narrowly targeted that minor changes would take a scheme outside the description. Listed schemes would need to be clearly and accurately described if they are to constitute adequate notice to a taxpayer of the dangers of pursuing a particular scheme. Any description will have to be far more detailed than those currently used in HMRC's "Spotlights" publication.
13. Paragraph 5.7 confirms that the taxpayer's right to appeal against an additional charge imposed on a taxpayer who implemented a scheme but did not pay the disputed tax upfront could be on grounds that the scheme which the taxpayer used was not a listed scheme. We can envisage significant amounts of time being spent by advisers and taxpayers considering whether or not tax planning arrangements are listed schemes, and consequent disputes being conducted with HMRC around this issue.

14. It is clear that the target of the proposals is mass-marketed schemes. The existing DOTAS scheme already brings the use of such schemes to HMRC's attention. The consultation document acknowledges that there would be cases when obligations would arise under both DOTAS and the new listed scheme regime. We would suggest that this overlap would be confusing and would add to the compliance burden.

Specific comments

15. Our general comments answer many of the specific questions raised in the consultation document. We have the following additional comments in relation to specific questions.

Questions 5 and 6

16. We are concerned that the proposed regime would oblige users (rather than promoters) to report use of a listed scheme. Individual taxpayers may not be sufficiently well informed to be aware that they have such an obligation.
17. Furthermore, taxpayers are in any event already effectively obliged to make a note on their return where their return adopts a tax analysis which differs from HMRC's known contrary view. We do not believe that an additional reporting obligation is necessary.

Question 11

18. Given that the effect of the proposals is effectively to impose a penalty for users of listed schemes, it would not be fair to impose the additional charge on taxpayers who implement a scheme before it is listed.

Contact details:

If you have any questions concerning these representations or would like to discuss anything contained in them, please contact the Chair of the Tax Law Committee, Ashley Greenbank (tel: 020 7849 2512, e-mail: ashley.greenbank@macfarlanes.com).