Further written evidence submitted by the Chartered Institute of Taxation (FB21)

Disputes, Avoidance and Evasion (clauses 63, 64, 65 and 67)

Briefing Note from the Chartered Institute of Taxation for Finance Bill 2017-19

Summary

Partial Closure Notices (clause 63 and schedule 15)
We welcome the introduction of a taxpayer right to apply for a Partial Closure Notice, which has ensured this measure is more balanced than the original proposal. Comprehensive and timely guidance for taxpayers is essential.

Errors in taxpayers' documents (clause 64)
We support the Government's aim to clamp down on artificial tax avoidance. However, we believe that this measure risks unfairly penalising taxpayers who consider that they have acted responsibly by taking advice on their tax affairs.

Penalties for enablers of defeated tax avoidance (clause 65 and schedule 16)
This legislation is a measured and balanced approach towards tackling those who enable tax avoidance while ensuring that taxpayers can continue to get access to honest, impartial advice on the law.

Requirement to correct certain offshore tax non-compliance (clause 67 and schedule 18)
While strongly supportive of the Government's aim of clamping down on offshore tax evasion we have concerns about this measure, in particular restrictions being introduced to the availability of a 'reasonable excuse' defence. Also effective communication and publicity by HMRC will be key to the success of the measure.

All three avoidance measures (clauses 64, 65, 67)
We have been assured by HMRC that guidance on the operation of these three measures will be published before the legislation comes into effect (Royal Assent). This is essential to enable taxpayers and advisers to understand the extent of the provisions and how HMRC intend to apply them.

1 Partial Closure Notices (clause 63 and schedule 15)

1.1 This legislation introduces a new power to allow both HMRC and taxpayers to resolve matters during a tax enquiry ahead of a full closure through the issue of a partial closure notice (PCN). It follows a consultation document issued on 18 December 2014 that asked for comments on a proposal to enable HMRC only (without giving the taxpayer a reciprocal right) to refer matters to a Tribunal, with a view to achieving early resolution of one or more aspects of an enquiry into a tax return.[1] The consultation was for a full, thirteen week period and took place during stage 1 of the consultation process.

[1] Tax Enquiries: Closure Rules Consultation document Publication date: 18 December 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389224/141218_Consultation_document_FINAL.pdf

1.2 The CIOT responded to the consultation document on 11 March 2015[2]. We agreed with HMRC that the enquiry rules could be made more effective by allowing resolution of one or more issues without concluding the entire enquiry. However, we did not support the proposals in the consultation document because they were one-sided in favour of HMRC. They proposed to grant HMRC the power to seek early resolution of one or more aspects of an enquiry by making a sole referral to the Tribunal without the consent of the taxpayer, but did not include proposals to enable the taxpayer to make the same application. In order to ensure a fair and level playing field, we said that the taxpayer must be given the same right to seek a PCN without needing the agreement of HMRC. In our view, many of HMRC's arguments for early resolution applied equally to taxpayers.

1.3 On 28 September 2015, and following receipt of nearly 30 written responses and formal consultation meetings (including with the CIOT), HMRC published a summary of responses.[3] Within that document HMRC noted that it needed to develop a number of alternative models and then consult stakeholders again.[4]

1.4 HMRC did not rush to introduce legislation, but continued to consult stakeholders in a constructive manner, making significant changes (ie improvements) to the original proposals, the most significant being that the taxpayer is being given the right to apply to the Tribunal for a direction that HMRC issue a PCN in relation to any matter in the enquiry. The legislation was ultimately included in the Finance Bill published on 20 March 2017[5] and again in the Finance Bill published on 8 September 2017.[6]

1.5 As a result of this lengthy and thorough consultation process, we consider that the legislation is significantly fairer and more workable than if the measure had been implemented in accordance with the original proposals.

1.6 It will be important to monitor how the new PCN mechanism operates in practice, and if any difficulties are encountered by taxpayers wishing to apply for a PCN. We ask that HMRC publish clear and comprehensive guidance and examples as soon as Royal Assent is given in order that taxpayers and advisers can understand how HMRC intend to interpret the legislation.

2 Errors in taxpayers' documents (clause 64)

2.1 This legislation follows a consultation document "Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document" issued on 17 August 2016. The response document issued on 5 December 2016[7] referred to modifying the existing penalty regime for users of tax avoidance, "so that penalties are chargeable when complex tax avoidance arrangements are defeated". HMRC state in the explanatory

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[2] Tax Enquiries Closure Rules – CIOT comments https://www.tax.org.uk/system/files_force/file_uploads/150312%20Tax%20Enquiries%20-%20Closure%20Rules%20-%20CIOT%20comments.pdf?download=1

[3] Tax Enquiries: Closure Rules Summary of Responses 28 September 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/464066/Tax_enquiries_closure_rules_-_summary_of_responses_-_28_september.pdf.

[4] Paragraph 3.3.

[5] As clause 123 and Schedule 26, but dropped from the Finance Bill due to the General Election.

[6] As clause 63 and Schedule 15.

[7] Strengthening Tax Avoidance sanctions and Deterrents Summary of Responses 5 December 2016 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574851/Strengthening_tax_avoidance_sanctions_and_deterrents_-_summary_of_responses.pdf

notes to the legislation that the aim of the clause is to act as a disincentive to entering into tax avoidance.

2.2 Clause 64 provides that, where a person receives 'disqualified' advice in relation to certain tax avoidance 'arrangements' (as defined in new Schedule 24 Finance Act 2007 paragraph 3A and 3B), they will not be able to rely on that advice to demonstrate they have taken reasonable care to avoid an inaccuracy arising from their use of such arrangements. Additionally, the clause reverses the burden of proof so that it is to be presumed that an inaccuracy in a return is careless unless the taxpayer satisfies HMRC (or a Tribunal on appeal) that they took reasonable care to avoid the inaccuracy.

2.3 When the draft legislation was published in December 2016, the CIOT was concerned that the proposals went much further than the policy intention of acting as a disincentive to entering tax avoidance. In our view, left unchanged, it would have applied to many cases which we did not think were within the policy intention. We sent our comments to HMRC on 30 January 2017.[8]

2.4 Amendments have been made to the legislation now in clause 64 which address some of our concerns, but we continue to seek clarification on some matters and still have concerns about the definition of 'disqualified advice'. We sent further comments to HMRC on 11 April 2017.[9]

2.5 As mentioned above, the policy intention of this legislation is to act as a disincentive to entering tax avoidance, and we agree with the broad policy principle behind this. However, in our opinion this measure, by reversing the burden of proof AND restricting the advice on which a taxpayer can rely to show they have a reasonable excuse against the imposition of a penalty for failure to take reasonable care with their tax affairs, is being aimed at the wrong party in the transaction, ie the taxpayer. It may not be obvious to the taxpayer that the person providing tax advice does not have appropriate expertise, for example, especially if they appear to be knowledgeable and experienced in tax matters. Furthermore, the legislation does not make it clear what steps a taxpayer ought reasonably to take to verify that their adviser is competent to give the advice.

2.6 It is important the HMRC publish clear and comprehensive guidance and examples as soon as Royal Assent is given in order that taxpayers and advisers can understand how HMRC intend to apply the legislation and interpret the 'disqualified advice' provision.

2.7 We support the Government's aim to clamp down on artificial tax avoidance. However, we believe that this measure risks unfairly penalising taxpayers who consider that they have acted responsibly by taking advice on their tax affairs. The policy of imposing penalties on taxpayers who have already been disadvantaged through being sold ineffective tax products seems to us to be excessive.

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[8]Errors in Taxpayers' Documents. Consultation on draft clause 91 Finance Bill 2017. Response by the Chartered Institute of Taxation.
https://www.tax.org.uk/system/files_force/file_uploads/170130%20Draft%20Finance%20Bill%202017%20Clause%2091%20Errors%20in%20Taxpayers%27%20Documents%20-%20CIOT%20comments.pdf?download=1

[9]Letter to HMRC from the CIOT dated 11 April 2017 regarding clause 124 Finance Bill 2017 Errors in Taxpayers' Documents
https://www.tax.org.uk/system/files_force/file_uploads/170411%20FB17%20Clause%20124%20Errors%20in%20taxpayers%27%20documents%20-%20CIOT%20comments.pdf?download=1

3 Penalties for enablers of defeated tax avoidance (clause 65 and Schedule 16)

3.1 This measure follows a consultation document "Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document" issued on 17 August 2016. The response document issued on 5 December 2016[10] explained that the legislation will target those who make a profit from enabling abusive arrangements. The new penalty for enablers will:

- Apply to abusive tax arrangements defeated by HMRC;
- Impose a fixed 100% fee based penalty on everyone in the supply chain; and
- Apply to advice provided after Royal Assent to the Finance Bill 2017.

3.2 The CIOT had been concerned that the original proposals had been too widely drawn and could have resulted in some taxpayers and businesses being unable to get expert advice on complicated and often unclear areas of tax law. In its response to the consultation document when announcing that the penalty would apply only to abusive tax arrangements, the Government acknowledged that the vast majority of professionals providing advice on genuine commercial arrangements help their clients to comply with their tax obligations, and went on to say that it wants to ensure they can continue to do so without being concerned that they might be caught by these new penalties.

3.3 In our view, the legislation now in clause 65 and Schedule 16 is a measured and balanced approach towards tackling those who enable abusive tax avoidance while ensuring that taxpayers can continue to get access to honest, impartial advice on the law. By defining 'abusive tax arrangements' around the principles of the General Anti-Abuse Rule (GAAR) – which asks whether entering into or carrying out the tax arrangements could have been a reasonable course of action – the proposals are better focused on the small minority of advisers who profit from devising, marketing and facilitating aggressive tax avoidance schemes.

3.4 We are also encouraged that in proposing these changes, the government has welcomed the progress made by the seven leading tax and accountancy professional bodies, including CIOT, in revising the code of conduct for our members, the Professional Conduct in Relation to Taxation (PCRT). We note that by adhering to and upholding the standards set out in the PCRT, the government does not expect members of these bodies to be affected by this policy.

4 Requirement to correct certain offshore tax non-compliance (clause 67 and Schedule 18)

4.1 This legislation follows a HMRC consultation document "A Requirement to Correct" issued on 17 August 2016. The response document issued on 5 December 2016[11] confirmed that the introduction of the 'Requirement to Correct' (RTC) obligation aims to compel those with offshore interests who have yet to put their UK tax affairs in order to do so by September 2018 ahead of the widespread adoption of the Common Reporting Standard (CRS).

4.2 Failure to carry out the necessary corrections, which could go back many years, by 30 September 2018 will render the taxpayer liable to a new failure to correct (FTC)

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[10] Ibid 1.

[11] Tackling offshore tax evasion: Requirement to Correct Summary of Responses 5 December 2016 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574845/Tackling_offshore_tax_evasion-a_requirement_to_correct_-_summary_of_responses.pdf

penalty which starts at 200% of the offshore potential lost revenue (PLR), and which may not be reduced (for disclosure etc) below 100% of the offshore PLR. Additionally, the FTC penalty does not take into account the seriousness of the cause of the original error/ omission, thus treating technical errors/ cases where reasonable care was taken when a return was submitted in the same way as those where a person deliberately omitted income or gains. Therefore this is a very significant new penalty, reflecting HMRC's tougher approach to offshore noncompliance.

4.3 The RTC requires taxpayers to correct their tax affairs without specific prompting from HMRC, so effective communication of the proposals by the Government and HMRC is absolutely key. There are still taxpayers who have not put their offshore affairs in order not necessarily because they are deliberately trying to evade or not comply with their responsibilities, but because they have not taken care to review their financial affairs recently and do not realise that they are no longer compliant. In other words, there are still many non-compliant taxpayers who simply do not identify themselves as 'tax evaders'. Consequently it has been difficult to find an effective way for HMRC's messages to reach them. Such taxpayers now need to act and HMRC must do all they can to ensure publicity reaches them given the significant penalties facing those who fail to correct.

4.4 Similar to our concerns about clause 64 (above), we are concerned about the restrictions that are being introduced to the availability of the defence of 'reasonable excuse' to a taxpayer who becomes liable to a FTC penalty. Schedule 18 paragraph 23(2)(d) states that 'reliance on advice is to be taken automatically not to be a reasonable excuse if it is disqualified under sub-paragraph 3'. We sent our comments to HMRC on 11 April 2017.[12]

4.5 Many taxpayers with offshore interests will need to seek advice as soon as possible, and indeed the legislation is encouraging them to seek advice in order to assess whether they need to put their affairs in order by 30 September 2018, but it is not clear how these taxpayers are expected to know whether the advice they have taken might be 'disqualified' and what steps they should reasonably be taking to find out whether it is 'disqualified' or not.

4.6 In view of the huge size of FTC penalty that could be levied on a taxpayer, combined with the fact that it could affect undeclared amounts over several tax years (so the penalty is effectively retrospective), restricting the availability of a 'reasonable excuse' defence in this way is concerning.

4.7 Over the last few months, we have continued our engagement with HMRC about the meaning of 'disqualified advice' and what we believe will be its implications in certain situations. This reflects that this is complex legislation. We were pleased to note an amendment was made to the Bill published on 8 September 2017 (an 'established practice' exemption in paragraph 23 (7)) which goes a small way to address our concerns.

4.8 It is important the HMRC publish clear and comprehensive guidance and examples as soon as Royal Assent is given in order that taxpayers and advisers can understand how HMRC intend to apply the legislation and interpret the 'disqualified advice' provision.

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[12]Letter to HMRC from the CIOT dated 11 April 2017
https://www.tax.org.uk/system/files_force/file_uploads/170411%20FB17%20Clause%20128%20Requirement%20to%20Correct%20-%20CIOT%20comments.pdf?download=1

4.9 We strongly support the Government's aim to clamp down on offshore tax evasion and non-compliance. However, we continue to believe that this measure risks unfairly penalising taxpayers who consider that they are acting responsibly by taking advice on their tax affairs.

5 The Chartered Institute of Taxation

5.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 18,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

25 October 2017