DAC BEACHCROFT

HMRC's assault on tax avoidance continues

Published 21 October 2016

We have previously reported on HMRC's campaign to clamp down on tax avoidance by use of accelerated payment notices to recover disputed tax directly from taxpayers, and the knock-on effect that this has had on notifications to insurers relating to tax avoidance schemes (click here).

Now, it seems, that HMRC are setting their sights not only on those who benefit directly from tax avoidance schemes but also those who design, market or facilitate such arrangements. In the Budget 2016, the Government stated that it would explore options to introduce downsides for those who enable tax avoidance. Notwithstanding the recent leadership changes at both Number 10 and the Treasury, HMRC has published a Consultation Document[1] (the "Consultation") which includes a chapter on proposals for penalties for enablers of tax avoidance[2].

Who is being targeted?

According to HMRC, an enabler of tax avoidance is more than those who "design, promote and market avoidance". It includes anyone who "benefits" from tax avoidance arrangements and without whom the arrangements could not be implemented. HMRC published a non-exhaustive list of those individuals or firms who are likely to be classed as enablers depending on the function which they perform. The lists includes: IFAs, accountants, banks, trustees, and lawyers, regardless of whether or not their activities actively promote tax avoidance arrangements.

In July 2015, HMRC published a consultation concerning tackling offshore tax evasion and the civil sanctions for enabling evasion. That consultation provided examples of activities that individuals and firms provide which may enable tax evasion. The list included: acting as a "middleman" (i.e. arranging access and providing introductions); planning and providing bespoke advice; accounting and legal service providers who deliver infrastructure (e.g. setting up companies and other vehicles and providing documentation); the maintenance of infrastructure; providing financial assistance; and non-reporting of regulatory or legal obligations. HMRC proposes, following the Consultation, to develop a definition of "enabler" in line with the criteria included in the offshore tax evasion paper.

What are the proposed penalties?

In September 2015, HMRC published a penalties discussion document which set out five key principles underpinning their approach to penalties. These are:

- *"The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues*
- *Penalties should be proportionate to the failure and may take into account past behaviour*
- *Penalties must be applied fairly, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant*
- *Penalties must provide a credible threat. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner*
- *Customers should see a consistent and standardised approach. Variations will be those necessary to take into account customer behaviours and particular taxes".*

In the Consultation, HMRC has indicated that the Government's favoured approach to the level of penalty imposed for enablers is to be similar to that introduced in the Finance Bill 2016 for offshore evasion. This provides for a penalty of the higher of 100% of the tax evaded, or £3,000, for those who know their actions will, or are likely to, enable a person to carry out offshore evasion or non-compliance (where the evader is charged with a penalty or is criminally prosecuted). Penalties for enablers of tax avoidance arrangements will be triggered by a finding that an avoidance arrangement has been "defeated" by HMRC, regardless of whether or not a penalty is imposed on the user of the tax avoidance arrangement.

The Government also proposes to include the option to "name and shame" enablers, which could lead to significant reputational damage for businesses involved in enabling tax avoidance (see paragraph 2.19 of the Consultation).

Will an accountancy firm's PII cover fines and penalties?

The ICAEW's minimum approved policy wording contains an exclusion common in professional indemnity insurance policies concerning claims for any "fine or penalty" arising out of the conduct of the firm's professional business. There are long-held public policy reasons why individuals and businesses are unable to insure against fines and penalties imposed against them, as the fine is meant to be individual to the wrong-doer and the ability to insure against such a fine would negate deterrence of wrong-doing.

What will happen next?

HMRC intends to publish a response document after the Consultation has closed, following which there may be legislative amendments by way of a future Finance Bill.

[1] "Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document": 17 August 2016. Click here to read.

[2] See Chapter 2 of the Consultation

Authors

Ross Risby

London - Walbrook

rrisby@dacbeachcroft.com

DAC BEACHCROFT