Association of Accounting Technicians response to Strengthening Sanctions for Tax Avoidance – A consultation on Detailed Proposals

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1. Introduction

1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the consultation paper Strengthening Sanctions for Tax Avoidance – A consultation on Detailed Proposals (condoc).

1.2. AAT is submitting this response on behalf of our membership and from the wider public benefit of achieving sound and effective administration of taxes.

1.3. AAT has added comment in order to add value or highlight aspects that need to be considered further.

1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities in implementing the measures outlined.

2. Executive summary

2.1. This consultation follows the earlier consultation "Strengthening Sanctions for Tax Avoidance" (which asked for views on some high-level proposals) to which AAT responded in March 2015 [1] and outlines the detail of these measures to ensure that the changes are appropriately designed.

2.2. It is noted that this consultation runs concurrently with HMRC consultation "Improving large business tax compliance" published on 22 July 2015 (the Large Business Condoc). In paragraphs 3.1 and 3.2 (below) AAT suggest an alignment of legislative proposals in both consultations to reduce legislative overlap.

2.3. This consultation also considers further additional measures that are needed to strengthen the impact of the General Anti-Abuse Rule (GAAR) in tackling marketed avoidance schemes.

2.4. This consultation also outlines the proposed new POTAS threshold condition for the issue of a conduct notice.

2.5. Furthermore, this consultation sets out in greater detail the Chancellor's proposals, announced in the March 2015 Budget, to introduce a surcharge, special reporting requirements for serial avoiders, consider further measures (such as restricting access to certain reliefs) and to introduce a tax-geared penalty for cases where the GAAR applies.

2.6. Responses to the consultation mentioned in paragraph 2.1 (above) are included in Annex B (condoc) and have been used to inform the proposals included in this response document.

[1] AAT response to Strengthening sanctions for tax avoidance

2.7. AAT agrees that surcharges should be imposed to counter any financial delay or avoidance of tax and in paragraph 3.10 (below) AAT expresses a preference for the higher surcharge model with the possibility for reductions, co-operation and disclosure.

2.8. AAT considers the defence of reasonable excuse to be an important safeguard for the reasons explained in paragraphs 3.14 to 3.18 (below).

2.9. AAT agrees with HMRC Serial Avoiders Regime model (outlined in condoc Chapter 2) except for the proposals for naming, for the reasons explained in paragraphs 3.4, 3.22 to 3.27 (below). Although, it should be noted that AAT considers that there should be tribunal approval.

3. AAT response to the consultation paper "Strengthening Sanctions for Tax Avoidance – A consultation on Detailed Proposals."

Question 1. Do you agree with a regime based on this model? If not, please outline the reasons for your view.

3.1. AAT questions the consistency with HMRC's overall approach to compliance of serial defaulters. The Foreword to the HMRC consultation document "Strengthening Sanctions for Tax Avoidance" published on 30 January 2015 (on which this condoc builds) described the 'problem' as a "small but hardened core…who are determined to try to pay less tax at every opportunity." Also HMRC is currently running a consultation released on 22 July 2015 in which paragraph 4.3 of that document describes the problem as "a very small number of large businesses which persist in undertaking persistent and aggressive tax planning and persistently refuse to engage with HMRC in a collaborative and transparent way".

3.2. The Large Business condoc disclosed plans to introduce legislation for a special measures regime which would not be comparable with the 'warning period' regime to which this question relates. HMRC indicate in the Large Business condoc they will ensure that any resultant legislation from the current consultation activity is appropriately aligned. AAT suggests that HMRC should also ensure that unnecessary legislative overlap is avoided.

3.3. AAT agrees with the model outlined in Chapter 2 (condoc) which sets out how the Serial Avoiders Regime should work with the exception of the proposals covering naming, for the reason explained in paragraph 3.4 and 3.22 to 3.27 (below).

3.4. HMRC at Condoc Chapter 3 (Naming Serial Avoiders) propose that "there should be no right of appeal against a decision by HMRC to name a serial avoider" on a comparison with the 'Publishing Details of Deliberate Defaulters' regime. AAT does not agree to this strict comparison. Deliberate defaulters have broken the law by understating their income whereas it is not an offence to engage in tax avoidance. AAT, therefore, considers that naming should be subject to the additional safeguard of approval of the Tribunal.

Question 2. What do you consider would be a suitable length for a warning period?

3.5. AAT agrees that the 'warning period' of 5 years, suggested in Chapter 2 which outlines the proposed design of the Serial Avoiders' regime, would be a suitable length for a warning period, on the basis that this period should be long enough to give the avoider a real incentive to change their behaviour.

Question 3. Would requiring serial avoiders to certify annually that they have not employed avoidance schemes, or to provide details of those they have used help discourage further avoidance?

3.6. AAT considers it reasonable to require serial avoiders to certify annually that they have not employed avoidance schemes as it would provide HMRC with more information to make an accurate assessment of tax risk and of the taxpayer's compliance with the warning notice.

3.7. For the reasons given in 3.9 (below) AAT does not consider it certain that such a requirement would help discourage further avoidance.

3.8. In the Foreword to the HMRC consultation document "Strengthening Sanctions for Tax Avoidance" published on 30 January 2015 the 'problem' was described as a "small but hardened core of tax avoiders who are determined to try to pay less tax at every opportunity." Again, for the reasons given in 3.9 (below) AAT considers it unlikely that an annual certificate will reform this group.

3.9. AAT envisages that this "small but hardened core of tax avoiders" would employ a professional adviser who would be aware of HMRC's concerns and that they will only modify their behaviour to the extent necessary to avoid taxes.

Question 4. Which of these approaches would best meet the five penalty principles?

3.10. AAT considers that, of the two approaches mentioned in Chapter 3 (condoc), the higher surcharge with the possibility for reductions in the rate to reflect co-operation or disclosure by the taxpayer during the tax enquiry would best meet the five penalty principles, described in the Chapter; which are to be applied fairly and consistently but provide a credible threat, be cost effective, designed from the customer perspective to prevent non-compliance, proportionate to the offence and take into account past behaviour.

Question 5. If you believe the surcharge should be set at a high level, what should the taxpayer have to do to earn any reduction in the surcharge?

3.11. AAT considers that in order to earn a reduction in the potential surcharge the taxpayer concerned would have to cooperate with the enquiry, make a full disclosure and follow up with a prompt settlement.

3.12. In contrast taxpayers who continue to submit multiple returns using avoidance schemes which HMRC defeats should face increasing rates of surcharge.

Question 6. What other key features should form part of the surcharge to ensure it meets the five principles?

3.13. As outlined in paragraph 3.10 (above) the higher surcharge approach would meet the five principles.

Question 7. How should a reasonable excuse safeguard be structured to be fair to the taxpayer without undermining the effectiveness of the surcharge? Would excluding advice addressed to third parties, or not made by reference to the taxpayer's circumstances, achieve this aim?

3.14. AAT contend that the defence of reasonable excuse is an important right for all taxpayers and AAT is opposed to legislation which seeks to deny it.

3.15. It is the opinion of AAT that a tribunal would be sufficiently sophisticated as to look through a bland taxpayer claim that they have received a general statement or advice from a scheme promoter that the avoidance scheme works or that a scheme achieves its aim, as the narrative in Chapter 3 (condoc) (Sanctions and definition) states often pre-dating "the taxpayer's involvement with no account of their individual circumstances."

3.16. AAT considers that HMRC should be able to support their penalty or surcharge at the tribunal by exposing what they consider to be sham evidence in order to prevent an avoider automatically relying on the defence of reasonable care just because advice from a promoter exists and has been followed indirectly.

3.17. AAT notes HMRC's proposal in Chapter 3 (condoc) - "Appeals, reasonable excuse and reasonable care" - "that the defence of reasonable excuse in an appeal against a surcharge should specifically exclude cases where the taxpayer has relied on advice that was given to a third party or that was not made by reference to his or her particular circumstances."

3.18. AAT is mindful that FA 2014 Section 276(2) has withdrawn the defence of 'reasonable care' with regards to Promoters and HMRC is currently considering this for large business compliance and is concerned that the withdrawal should not be permitted to widen further into general tax inquiries.

Question 8. If appealing against the surcharge on the grounds of having taken reasonable care, do you agree that putting the onus of proof on the taxpayer to demonstrate reasonable care would remove any incentive to engage in delaying tactics?

3.19. In penalty or surcharge appeals the onus of proof lies with HMRC. Whereas it lies with the taxpayer in appeals against assessments.

3.20. AAT accepts that putting the onus of proof on the taxpayer to demonstrate reasonable care in appeals against the surcharge on the grounds of having taken reasonable care would make it more difficult for the taxpayer to prove their claim. However, AAT is not convinced that this would remove any incentive to engage in delaying tactics**.**

3.21. AAT is of the opinion that serial avoiders engage in delaying tactics to reduce their tax liability and the remedy is to charge interest and penalties. In the special case of the proposed 'warning period' regime the charge to tax on the additional assessment should relate back to the self-assessment payment date.

Question 9. Do you agree that public naming of the most persistent users of tax avoidance schemes which HMRC defeats would be a fair and effective deterrent? How many schemes should be defeated before it is possible to name a serial avoider?

3.22. It should be noted that it is already the case that where an appeal is heard at the tribunal the decision is in the public domain.

3.23. AAT considers that the public naming of the most persistent users of tax avoidance schemes which HMRC defeats may be fair with tribunal approval but we doubt the deterrence value in some of the target cases for the reasons explained in paragraph 3.26 (below).

3.24. AAT believes that listed companies would be sensitive to naming and AAT considers that this would be an effective deterrent for them.

3.25. AAT agrees that public attitude to tax avoidance has hardened in recent years and that being identified as a tax avoider may affect certain businesses' reputations such as companies listed on the stock market or with local reputations.

3.26. Conversely AAT considers there may be a very small number of large private companies or hedge funds who may not be affected by naming for the reasons given in paragraphs 3.8 and 3.9 (above). AAT considers that financial sanctions will be the main deterrent to these businesses because it will cost them more money.

3.27. AAT agrees that the proposal in Chapter 3 (condoc) of four failed schemes before it is possible to name a serial avoider.

Question 10. Do you agree that this would provide sufficient safeguards for naming serial avoiders? If not, what further safeguards do you suggest?

3.28. As stated in paragraph 3.4 above, AAT considers that tribunal approval should be obtained before naming. HMRC could seek this on defeating the fourth case at tribunal.

Question 11. Which of these options would provide the best approach to restricting access to reliefs when they have been exploited by a serial avoider as part of a defeated avoidance scheme?

3.29. AAT does not agree with the proposal to restrict either particular reliefs or categories of reliefs as many classic tax authoritative cases started with disputes on the intention of the legislation.

3.30. Instead it would be more appropriate to impose a penalty on returns of reduced tax by claims earlier shown to be defeated.

Question 12. If you favour restricting the power to restrict reliefs to certain categories, how should those categories be defined?

3.31. See AAT's reply in paragraph 3.29 (above)

Question 13. Would focussing on a definition based on schemes notified or notifiable under DOTAS and VADR be sufficient to deter potential serial avoiders from entering into multiple schemes? If not, what other approach do you favour?

3.32. Whilst the difficulty in persuading the 'small but hardened core' of serial tax avoiders from changing their pattern of behaviour is appreciated AAT agrees that focussing on a definition based on schemes notifiable under Disclosure of tax avoidance scheme regulations (DOTAS) and Disclosure of VAT avoidance scheme (VADR) would assist in deterring potential serial avoiders from entering into multiple schemes.

3.33. AAT agrees that avoidance schemes should be notified either under the wide definitions of (DOTAS) or (VADR) and AAT suggests prosecuting those who fail to comply with the legislation.

Question 14. Should arrangements to which Follower Notice or GAAR have been applied be included in the definition of a scheme for these purposes? If not, please explain why you do not think this would be appropriate.

3.34. AAT agrees that arrangements to which Follower Notice or GAAR have been applied should be included in the definition of a scheme for these purposes.

Question 15. Should a scheme be viewed as 'defeated' once a dispute is settled in HMRC's favour, either by agreement with the taxpayer (or, as the case may be, acceptance of a Follower Notice or GAAR counteraction), or by final litigation being settled in HMRC's favour? If not, what criteria would you apply?

3.35. AAT agrees that a scheme should be viewed as 'defeated' once a dispute is settled in HMRC's favour, either by agreement with the taxpayer, acceptance of a Follower Notice or GAAR counteraction, or by final litigation being settled in HMRC's favour.

Question 16. How do you think a transitional provision should best work to encourage avoiders to withdraw from avoidance schemes they have already employed?

3.36. AAT agrees that a transitional provision should be applied by HMRC writing to this 'small but hardened core' of tax avoiders to encourage avoiders to withdraw from avoidance schemes which they have already employed and explaining the new legislation.

Question 17. Do you agree that the proposed opportunity for taxpayers to correct their tax position is appropriate? Please explain your view.

3.37. AAT agrees that every opportunity should be given to taxpayers to correct their tax position.

3.38. However the current GAAR legislative arrangements were set by Parliament after the study[2] by the group led by Graham Aaronson QC which reported in November 2011 and AAT does not consider that taxpayers should be penalised for awaiting the outcome of a particular GAAR review.

3.39. In AAT's response to question 13 of the earlier consultation "Strengthening Sanctions for Tax Avoidance" (see also para 2.1, above) "To what extent would a GAAR penalty act as an effective deterrent ?", AAT's response was:

"AAT does not concur with adding yet another layer of penalties to Schedule 24 FA 2007. HMRC GAAR Guidance (Approved by the Advisory Panel with effect from 15 April 3013) reminds taxpayers at paragraph B16 that – a taxpayer has a duty to submit a correct return – and B16.3 continues – if it would be reasonable for a taxpayer to believe that he or she has entered into an abusive arrangement that would be counteracted by the GAAR then the self assessment return must make an appropriate adjustment to reflect the fact that the GAAR would be applicable. Failure to do so could leave the taxpayer open to penalties for failing to take reasonable care in completing the tax return"

3.40. AAT, therefore, considers that HMRC should apply the existing penalty legislation in Schedule 24 FA 2007. Failure to adjust the return following a GAAR ruling that the arrangements are abusive and after formal Notices under FA2013, Schedule 43, paragraph 3 (Notice to taxpayers of proposed counteraction of tax advantage) followed by formal Notice under paragraph 12 (Notice of final decision after considering opinion of GAAR Advisory Panel) including Directions of the adjustment required may well be regarded and deliberate with a penalty level of up to 70%.

3.41. Having considered the response to this in Annex B (condoc) AAT has not changed its view that an additional layer of penalties is not required.

Question 18. Do you agree that the proposed rate for the GAAR Penalty is appropriate? If not, what penalty rate would you propose and why?

3.42. Notwithstanding the views expressed in paragraphs 3.40 and 3.41 (above), AAT agrees that the rate of 60% proposed in the condoc is appropriate.

Question 19. Do you agree that this penalty model will act as a fair and proportionate deterrent? Please explain your view.

3.43. AAT agrees that the proposed penalty model will act as a fair and proportionate deterrent because it sends a clear signal outlining the consequences.

[2] GAAR Study

3.44. However, AAT does not accept that a penalty which is charged before the taxpayer is required to amend the return is fair. The GAAR process was intended to be a fair process for determining whether an avoidance scheme was abusive and it is unfair to penalise a taxpayer for redressing the GAAR legislative process.

Question 20. Do you agree that this safeguard would be appropriate for the GAAR Penalty?

3.45. AAT does not consider that the process of S102 Taxes Management Act 1970 is fair because it is applied unilaterally by HMRC with no appeal process.

Question 21. Do you have any views on the development of these measures?

3.46. AAT agrees with the proposed measures considered in Chapter 5 (condoc) - GAAR: next steps, preventing reuse of marketed schemes already ruled upon by the Advisory panel and enabling HMRC to make a protective assessment.

Question 22. Would including the definitions listed above as triggering this threshold condition be sufficient? If not, what other approach do you favour?

3.47. AAT supports the introduction of the new POTAS threshold for promoters whose schemes are regularly defeated as outlined in Chapter 6 (condoc) and agrees with the definitions listed.

Question 23. What are your views on the options for the trigger for the threshold condition? Please explain your reasoning.

3.48. AAT strongly agrees that the public should be protected by the promotion of schemes that do not work and is pleased that a further threshold is being devised to counter this.

Question 24. **At what point should a scheme that has high numbers of users count as having been defeated?**

3.49. AAT suggests that a scheme that has high numbers of users should count as having been defeated at the earliest point of a user admitting that the scheme does not work, where a follower notice is accepted or the scheme is defeated in litigation.

Question 25. What are your views on the proposed methods of counting defeated schemes that will trigger this threshold condition? Do you think that a rule regarding proportions of cases defeated would be appropriate?

3.50. Please see 3.49 (above) for AAT's response to the first part of the question.

3.51. AAT does agree that a rule regarding proportions of cases defeated would be appropriate.

Question 26. Do you agree that a period of up to 9 years provides sufficient time to accurately establish regularity of behaviour for this threshold condition? What are your views on the furthest date in the past the authorised officer should consider?

3.52. AAT agrees that a period of up to 9 years provides sufficient time to accurately establish regularity of behaviour for this threshold condition.

3.53. AAT acknowledged that 9 years is a long time but agrees with the timetable outlined in condoc Chapter 6 "New POTAS threshold condition for promoters whose schemes are regularly defeated…Time periods for considering defeated schemes under the new threshold conditions".

3.54. AAT agrees that the application of the significance test allows HMRC to use common sense in applying the proposed new threshold.

Question 27. What provisions should be made for cases that are already in the courts but have not yet concluded?

3.55. AAT can envisage that litigation which can take years to settle should not allow the proposed time periods referred to in paragraph 3.52 (above) to elapse.

3.56. AAT considers rogue promoters to be a serious matter and would support legislation for a promoter to be put on provisional notice where the significance test deems this appropriate and where a suspect case going through the courts would hold up the timetable.

4. Conclusion

4.1. Looking back to the conclusion to AAT's response in March 2015 to the earlier consultation "Strengthening Sanctions for Tax Avoidance", referred to in 2.1 (above), this affirmed that "AAT shares HMRC's abhorrence of the tax delaying tactics serial avoiders aided by promoters who quickly devise schemes that do not necessarily work but aid delay tactics"

4.2. AAT agrees that surcharges should be imposed to counter any financial delay or avoidance of tax and in paragraph 3.10 (above) AAT expresses preference for the higher surcharge model with the possibility for reductions, co-operation and disclosure.

4.3. However, AAT suggest in paragraphs 3.1 and 3.2 (above) alignment of legislative proposals in this condoc with the consultation on Improving Large Business Compliance to reduce legislative overlap.

4.4. In paragraphs 3.14 to 3.18 (above) AAT expresses the importance of reasonable excuse as a defence and concern of mission creep to erode this defence in normal enquiries.

4.5. In paragraph 3.3 (above) AAT agrees with HMRC Serial Avoiders Regime model except for the proposals for naming, on the basis explained in paragraphs 3.4, 3.22 to 3.27 (above)

4.6. For the reasons given in paragraph 3.4 (above), AAT considers that there should be tribunal approval.

4.7. AAT expresses opposition to restricting reliefs in 3.29 (above).

4.8. Paragraph 3.40 (above) explains AAT's view on the adequacy of the current penalty regime to counter delays in complying with GAAR Notices, but if the Government do proceed with an additional penalty AAT agreed in paragraph 3.42 that 60% was suitable.

4.9. In paragraphs 3.47 and 3.48 (above) AAT supported the protection of the public from the promotion of schemes that do not work and strongly supports the new POTAS threshold.

5. About AAT

5.1. AAT is a professional accountancy body with over 49,500 full and fellow members and 82,400[3] student and affiliate members worldwide. Of the full and fellow members, there are over 4,200 Members in Practice who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.

5.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

6. Further information

If you have any questions or would like to discuss any of the points in more detail then please contact AAT at:

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[3] Figures correct as at 30 Sept 2015