Penalties for enablers of defeated tax avoidance
HMRC’s draft guidance
Comments from the Chartered Institute of Taxation

1 Introduction

1.1 We set out below our comments on HMRC’s draft guidance on the legislation introducing penalties for enablers of defeated tax avoidance in Schedule 16 Finance (No 2) Act 2017. References to ‘section’ or ‘paragraph’ are references to sections or paragraphs in the draft guidance.

1.2 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

2 General point

2.1 The guidance would be more useful if it described how HMRC intends to approach cases in practice. A key point is that HMRC will be considering potential sanctions on the enabler under this legislation many years after the abusive tax arrangements were designed and implemented and after the taxpayer’s own position has been defeated. By this time the adviser may have lost contact with the taxpayer client many years earlier, people’s memories will have faded, staff will have moved on and the relevant documents may no longer be available.

3 Paragraph 1.3.1

3.1 We suggest that the PCRT bodies should be listed in alphabetical order in the footnote.

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2 Professional Conduct in Relation to Taxation, issued 1 November 2016 effective 1 March 2017 is produced by seven leading professional bodies, including CIOT, for their members working in tax, and sets out the fundamental principles and behaviour expected of their members.
4  **Section 3.2**

4.1 We suggest that a new point is added to this section to reflect the contents of paragraph 3(4) Schedule 16 (i.e., where tax arrangements form part of other arrangements then regard must also be had to those other arrangements).

5  **Section 3.3**

5.1 We suggest that a new point is added to this section to reflect the contents of paragraph 3(6) Schedule 16 (i.e., the fact that HMRC previously indicated their acceptance of the practice is something which may indicate the arrangements are not abusive).

5.2 **Paragraph 3.3.3** – the legislation contains a double reasonableness test at paragraph 3(2) Schedule 16. The bullet points at 3.3.3 of the draft guidance suggest that the part ‘having regard to all the circumstances’ only applies to the ‘reasonable course of action’ part of the test. However, the legislation is clear that the ‘reasonably regarded’ part of the test must also be considered ‘having regard to all the circumstances’. Please update the second bullet point to reflect this.

6  **Paragraph 4.5.2**

6.1 This paragraph sets out ways in which a counteraction may occur if a document (e.g., a tax return) was given to HMRC. In some circumstances an assessment or determination may still be issued (e.g., if HMRC do not issue an enquiry but instead seek to counteract the tax advantage via a discovery assessment, against which the taxpayer may appeal). The counteraction in this case may be the assessment itself or the withdrawal/failure of an appeal against it. This is currently missing from the examples in this paragraph. Please consider adding it in, not least so that it is clear that assessments may arise when tax returns/documents are submitted (condition A) as well as when they are not (condition B).

7  **Section 5**

7.1 This section uses the word ‘implemented’ frequently. Please define in the guidance what actions HMRC consider comprise implementation. Does it, for example, include entering details of the arrangement and its tax effect on a tax return? Similarly, if advice is sought from Counsel as to what needs to be put on a tax return (including disclosure in the additional information box) is this advice on the arrangements which may trigger a sanction as an enabler.

8  **Paragraph 5.2.5**

8.1 The example at **paragraph 5.2.5.4** should refer to accounting advice. An auditor would not normally provide the advice in the way described here as part of an audit. Additionally, for some businesses, it is permissible for the tax advisers and auditors/those providing accounting advice to be within the same firm (it is only larger businesses which require different firms to act for them). We therefore suggest

https://www.tax.org.uk/sites/default/files/PCRT%20Effective%20March%202017%20FINAL_211216.pdf
8.2 **Paragraph 5.2.5.7** – the last sentence does not make sense of itself or in the context of tax avoidance. Tax avoidance is not fraud and therefore would not trigger a suspicion of money laundering in the absence of other factors. The last sentence could be simplified to ‘for example, taking the relevant action if fraud or money laundering is suspected’.

8.3 Please add an example with a company or trust formation agent to this section.

9 **Paragraph 5.3.1.6**

9.1 Example 8 is designed to illustrate the point made in paragraph 5.3.1.5 that simply performing a service such as completing and filing a tax return on behalf of a client even where it reflects a tax advantage from an abusive tax arrangement will not be managing or organising those arrangements provided that is all that has been done.

9.2 The example reads as follows:

‘A tax agent completes and submits his client’s tax return as requested by the taxpayer. The return reflects the tax position resulting from implementing abusive tax arrangements. The adviser has taken no part in helping their client set up or enter into the arrangements. The adviser’s first involvement with the arrangements is in relation to the completion of the tax return.

‘Provided the tax agent is adhering to their professional requirements, the tax agent should not expect to be an enabler because they won’t have had an involvement in organising or managing the arrangements’.

9.3 The example uses the words ‘professional requirements’. We assume that ‘professional requirements’ refers to PCRT (where the tax adviser is a member of one of the seven professional bodies signed up to PCRT) and the equivalent professional rules of other organisations that are not signed up to PCRT. It would therefore be useful to have a cross-reference here to PCRT at paragraph 5.9 of the guidance.

9.4 The guidance should clarify that advisers who are not members of a professional body should nevertheless adhere to the PCRT standards.

9.5 The text of the example suggests that the tax adviser just accepts anything the client tells or gives them which is not how our members adhering to PCRT would operate.

9.6 PCRT makes clear that our members should only enter on the tax return something which they think has a sustainable filing position, so in reality they would not knowingly be entering abusive tax arrangements on a tax return if they were adhering to their professional requirements. Therefore this example does not work as it is not a true reflection of how a tax adviser who is a member of a professional body signed up to PCRT would operate. This example needs to be changed.

9.7 It would be more accurate for the example to demonstrate that so long as the tax adviser acts within their professional rules then their action will not normally
constitute enabling. This would correspond with what is already being said at paragraph 5.9.6. A suggested replacement for Example 8 would be:

‘A client has entered into tax arrangements that may be abusive. The client’s tax adviser has taken no part in helping their client implement or enter into the arrangements. The adviser’s first involvement with the arrangements is in relation to the completion of the client’s self-assessment tax return.

‘Provided the tax agent adheres to their professional requirements (if they are a member of a professional body signed up to PCRT, this means PCRT) when deciding how and/or whether to include the tax arrangements giving rise to the tax advantage on the tax return, the tax agent should not expect to be an enabler, because they did not have any involvement in organising or managing the arrangements’.

9.8 The relevant extracts from PCRT are as follows:

**Members’ responsibility**

3.6 A member must act in good faith in dealings with HMRC in accordance with the fundamental principle of integrity. In particular the member must take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client. Where acting as a tax agent, a member is not required to audit the figures in the books and records provided or verify information provided by a client or by a third party. A member should take care not to be associated with the presentation of facts he knows or believes to be incorrect or misleading nor to assert tax positions in a tax return which he considers have no sustainable basis.

**Compliance Services in relation to returns that include a tax advantage**

4.49 A client may have implemented an arrangement offered by another adviser and the member has not been involved in implementing the arrangement. Subsequently the client may ask the member to enter the arrangement on his tax return. In this case the member is not responsible for advising the client on the potential implications of having undertaken the arrangement. However, from a client relationship perspective the member may wish to advise on the potential risk of a challenge.

4.50 A member should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis based on the information provided to him.

4.51 If the client provides inadequate information then the member should make a request for further information which will enable him to confirm that there is a sustainable filing position. If no further information is forthcoming, the member should refrain from including a claim for a tax advantage on the tax return, document his decision and explain his reasons to the client. If additional information is received but it is too complex or outside the member’s level of expertise to allow any reasonable assessment to be made, he should seek specialist support or recommend that the client obtains advice elsewhere.

9.9 PCRT also provides guidance on what a member should do when completing a tax return if they think the GAAR applies to a transaction.

3.23 The GAAR applies on a self-assessment basis. A member should consider whether the GAAR could apply when completing a tax return. Application of the GAAR is difficult and if the position is not clear then the client should be advised that specialist assistance or a second opinion is necessary. See also 4.17 – 4.26.

3.24 Where it is uncertain whether the GAAR applies the member should consider recommending additional and appropriate disclosure. Where the client disagrees the member should clearly record his advice and consider whether he can act as agent. See
10 **Section 5.5.1**

10.1 Please add an example to explain how trusts might be caught.

11 **Paragraph 5.7.3**

11.1 Please provide an example to show how a company leaving a group is impacted.

12 **Paragraph 5.9.3**

12.1 It would be helpful to provide a link to the paper ‘Tackling tax evasion and avoidance’ published in March 2015.

13 **Paragraph 6.4.1**

13.1 It would be useful to provide more explanation and examples as to the factors which HMRC will take into account when exercising its discretion to reduce or cancel a penalty. What do HMRC consider to be ‘exceptional circumstances’?

14 **Paragraphs 7.3.2.1, 7.3.2.2 and 7.3.3.2.**

14.1 Please add examples of the situations outlined in the above three paragraphs.

15 **Paragraph 8.2.3**

15.1 This paragraph uses the phrase ‘compliance check’. This is an HMRC term and is not used or defined in legislation. Please can the guidance include cross-references to the relevant HMRC online guidance where this term is explained?

16 **Paragraph 12.5.2**

16.1 It might be helpful to provide more explanation and examples of the sorts of situations which may constitute representations which would and would not be sufficient to, in HMRC’s view, prevent the publishing of the enabler’s details.

17 **The Chartered Institute of Taxation**

17.1 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

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3 Tackling Tax Evasion and Avoidance March 2015
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.

The Chartered Institute of Taxation
30 November 2017