

30 September 2020

Tackling disguised remuneration call for evidence
Room 2E/11
100 Parliament Street
London
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Written evidence submitted to HM Revenue & Customs “Tackling Disguised Remuneration Tax Avoidance” Call for Evidence

About this submission

1. TaxWatch is a UK charity dedicated to compliance and sound administration of the law in the field of taxation. We are an investigative think tank which conducts forensic research and analysis on tax avoidance, tax policy and tax law, publishing our research to improve public understanding of tax issues. Through our work we seek to encourage high standards of tax conduct and civic responsibility. We are independent of any political party.
2. This submission is made on behalf of the Executive Director of TaxWatch, George Turner, it is not necessarily the views of the Trustees of TaxWatch or the TaxWatch Editorial Committee.

Preliminary remarks – Disguised remuneration and tax fraud

3. The consultation sets out an impressive array of rules that HMRC has introduced in recent years in an attempt to restrict the ability of promoters of tax avoidance schemes to operate effectively.
4. However, all of these measures, the measures that HMRC say they will take in the future, and indeed the consultation itself, stop short of the one thing that HMRC could do to

effectively shut down the sale and marketing of disguised remuneration schemes. That is the application of existing criminal law and the prosecution of people who design, operate and promote dishonest tax avoidance schemes.

5. There is a myth that appears to have taken hold that the promoters of tax avoidance schemes have done nothing wrong as the promotion of a tax avoidance scheme is “not against the law”.
6. This is simply not the case where someone is involved in the promotion of a scheme that is dishonest, as demonstrated in the case of *R vs Charlton*, when the Crown successfully brought a prosecution against three accountants and a barrister for their roles in the design, operation and promotion of a failed tax avoidance scheme. All of the defendants received custodial sentences. The convictions were handed down in 1994 and related to schemes set up in the early 1980s.
7. As set out in the consultation document, disguised remuneration schemes often involve taxpayers “facing large bills that the promoter had led them to believe they would not have to pay”. Promoters take actions that include “obscuring their identity”; “trying to hide their activities from HMRC by not complying with their legal obligations to disclose their scheme”; “ignoring or only partially answering HMRC enquiries”.
8. When looking at the details of several well known tax avoidance cases, the facts set out clearly constitute tax fraud on the part of scheme operators. For example, in the case of *Murray Group Holdings vs HMRC*, the findings of fact at the First Tier Tribunal included officers of Rangers Football Club deliberately making false statements to HMRC in response to a Section 20 notice and evidence of an “active concealment of documents”.
9. These activities and the types of activities set out in the consultation document constitute in my view a conspiracy to cheat the revenue and clearly fit the circumstances under which HMRC should open a criminal investigation under their criminal investigations policy.
10. Despite this, criminal investigations have been rare, and we are unaware of any promoter being successfully prosecuted for tax fraud. It is my view that when HMRC finds an individual or company promoting a disguised remuneration scheme the default position should be to open a criminal investigation into the promoter of the scheme. HMRC should also review the cases of promoters who have ceased to operate to see if any prosecutions can be brought for historic cases of tax fraud related to the promotion and operation of disguised remuneration schemes.

Answers to specific consultation questions

Our knowledge of tax avoidance schemes – Question 1

11. Following the publication of the HMRC Spotlight earlier this year on disguised remuneration schemes targeting health care workers returning to work in the NHS in response to the Covid crisis, TaxWatch conducted a secret shopper exercise contacting an umbrella scheme broker posing as a contractor looking to better manage their tax payments and accounting. We found the broker through a simple google search. The broker offered a scheme where I was told that I would be able to retain 83% of my gross income, based on a split between a minimum wage payment made via the PAYE system, and an “employee advance” which would not be taxable.

12. The scheme appears to be operated by a company or group of companies that have been active in the disguised remuneration business for a very long time.
13. The scheme was marketed as being fully compliant with HMRC rules. The marketing material we obtained will be submitted to HMRC in a separate submission, however, I do not believe that the evidence we have uncovered could be new to HMRC as the promoter aggressively advertises on social media and the scheme offered fits the schemes outlined in the consultation document produced by HMRC at paragraph 32 and in HMRC's spotlight publication. Despite this, the broker still appears to be operating today.

Disguised remuneration and current legislation – Question 3

14. The consultation poses the question as to whether there are new disguised remuneration schemes not currently caught by legislation. This question is misplaced. The legislation as it stands, which is itself designed to capture tax avoidance schemes, is very broadly drawn. This is in part to capture schemes that had not been set up at the time the legislation was enacted. The courts have rightly supported a broad interpretation of taxing statutes, seeking to apply the intention of Parliament to real world economic transactions and what constitutes employment earnings in reality – regardless of how the earnings may be characterised by the operator.
15. It is difficult to understand how a scheme could be constructed today which met the terms of the legislation. In fact, even where legislation is silent on an issue, the Government stated its intention in 2005 to use retrospective legislation if necessary to close down schemes, and the courts have adopted a broad understanding of anti-avoidance legislation to stop abuses of the law (see for example UBS and DB vs HMRC).
16. Under these circumstances no tax advisor should be recommending any disguised remuneration scheme to their clients, and it is impossible to see how promoters and legal professionals currently involved in the design, marketing and operation of disguised remuneration tax avoidance schemes could honestly hold the view that the scheme they are promoting meets the requirements of the law. As a result, the continued design and marketing of such schemes constitutes a conspiracy to cheat the revenue, and should be prosecuted under existing criminal law.

Misleading information and consumer protection – Questions 4 and 18

17. As set out in the consultation document, scheme promoters often provide misleading information to their clients as to the lawfulness of the scheme they are selling.
18. The fact that the information provided to scheme users about the lawfulness of disguised remuneration tax avoidance schemes is misleading, and knowingly misleading, combined with the fact that this misleading information is designed to elicit substantial fees for the promoter of the tax avoidance scheme should be considered an attempt to defraud scheme users.
19. On the basis of evidence we have seen, the marketing material provided by scheme promoters goes beyond misleading. Today, there can be precisely no doubt that disguised remuneration schemes are unlawful. However, schemes are still being marketed as “compliant” and in line with the latest HMRC rules. This is clearly fraudulent and HMRC should take immediate action to shut these schemes down by starting criminal proceedings.

This would be the best way of protecting taxpayers from scheme operators and tackling misleading information.

20. TaxWatch has written to the City of London Police, the lead police force on economic crime, to request that they open an investigation into tax advisors marketing disguised remuneration schemes. HMRC should work with the appropriate law enforcement authorities to bring forward prosecutions against sellers of disguised remuneration schemes for defrauding their clients.

Offshore promoters – Question 4

21. The consultation asks what more can be done to tackle promoters based offshore. Disguised remuneration schemes we have seen have been based out of Crown dependencies such as the Isle of Man and Jersey. We have heard of some schemes using Cyprus as a jurisdiction – a member of the European Union.
22. There should be therefore no barriers in terms of extradition or the request of mutual legal assistance if HMRC were to open criminal investigations into promoters using these jurisdictions.

Further action to increase the financial risk to promoters – Question 5

23. As set out in the consultation document, promoters of tax avoidance schemes charge substantial fees. In some cases promoters have been known to have enriched themselves to the tune of hundreds of millions of pounds.
24. To this end, fines of up to £1m under the POTAS rules are unlikely to serve as a deterrent.
25. As should be clear, it is my view that the best deterrent should be the criminal prosecution of promoters engaged in dishonest tax avoidance schemes.
26. Where convictions are secured, the Crown Prosecution Service could apply for a Proceeds of Crime Act confiscation order to recoup the fees earned by the promoter or operator of a scheme.
27. Promoters of tax avoidance schemes often run a variety of different schemes which are iterations of each-other. Some of these schemes are very short lived. This may limit the amount that a POCA order could recoup in the event a successful prosecution was secured on one scheme.
28. The government should therefore consider adding tax fraud to the lifestyle offences in schedule 2 of the Proceeds of Crime Act. This would allow a confiscation order to be made for all benefits arising from the tax fraud activities of a promoter following the successful conviction of a promoter for a tax fraud offence.

Further comments

Responsibility for remuneration schemes – the involvement of the legal profession

29. Another myth that has developed around disguised remuneration schemes is that they are the work of a small number nefarious operators, unregulated advisory firms. Regulated, professional tax advisors would not be involved in such schemes.
30. Unfortunately, this myth is reflected in paragraph 40 of the consultation document, which speaks of promoters that are “rarely members of professional bodies”.
31. However, in the very next paragraph, the consultation document states that promoters often gain an “opinion from an eminent QC that the scheme is likely to be effective”.
32. I would like to highlight that Queens Counsel are senior members of the tax bar, and are regulated. It is well known that leading QCs, some of whom have risen to very prominent positions, and at least one that has become a member of the judiciary, have been involved in the design of disguised remuneration schemes.
33. Barristers who are involved in providing opinions for disguised remuneration schemes must be aware that their advice will be used as a marketing tool to encourage people into the schemes and as such, if a scheme was found to be fraudulent, they could be held to be part of a conspiracy to cheat the revenue.
34. The advice provided may itself be dishonest in that it may be illogical on its own merits, relies on facts which the barrister knows not to be true, or advise a promoter to take action which they know will not be or could not be followed.
35. For example, employee benefit trust schemes relied on the idea that employees should sacrifice their income in return for loans. However, so that the loans should not be considered an employment benefit barristers advised scheme operators that employees should not have any contractual entitlement to loans and that there should be genuine discretion available to the trustees of the employee benefit trust to refuse to grant loans.
36. However, the barrister advising on the scheme would know full well that the entire point of the scheme was to put cash in the hands of the employee, and so in effect any discretion that EBT trustees had would never be exercised. This calls into question whether the opinion on the scheme could possibly be honestly held.
37. The integral role that lawyers play in the design and operation of tax avoidance schemes is another powerful reason why a fraud investigation under criminal law is the most effective way of dealing with promoters, as the iniquity exemption means that professional legal privilege is not available in fraud investigations.

The liabilities of scheme users

38. Paragraph 83 of the consultation document suggests that scheme users either knowingly enter into contrived schemes with the purpose of avoiding tax, or simply don't understand what they are doing. This will undoubtedly be true in some cases.
39. However, there are also cases where the scheme user may have been actively lied to about the nature of the scheme, or not been aware they were part of a tax avoidance scheme.

40. In one case, a scheme user approached us following contact from HMRC. The user was a medical professional who says they were confused by the approach, because in the past they had been contacted by loan scheme operators and they rejected such approaches because they did not want to be involved in such schemes. Instead, the user went with an umbrella company that claimed to pay all taxes on their behalf.
41. I have researched this company, and it appears that the umbrella company had the practice of sending weekly pay slips to its clients indicating that “taxes and fees” were deducted from the weekly pay. This was a scam, with no tax being remitted to HMRC, despite the suggestion to the contrary.
42. It should be stressed that some of the people in these schemes would be basic rate tax payers, and therefore receive no financial benefit from the scheme as the fees extracted by the scheme operator would be equal to their expected tax payments. They may have had no idea that they were in a tax avoidance scheme.
43. In my view, the existence of such cases does speak to the fact that HMRC or the government more widely should have a responsibility to provide some support to genuine victims of disguised remuneration fraud. In cases where the scheme user has received no economic benefit, the policy of HMRC should be to recoup funds from the promoter via proceeds of crime legislation.
44. These cases also demonstrate the importance of pursuing promoters and scheme operators. In this particular case the scheme was operated by a company that had been the subject of a criminal investigation by HMRC in the mid 2000s. However, it appears that this investigation was not pursued after HMRC was able to recover tax lost via the insolvency process.
45. The company responsible for the scheme continues to trade today. It goes without saying that had the scheme operators been jailed and the company shut down, some victims of disguised remuneration fraud may not be in the position they find themselves in today.
46. I hope this consultation response is of use. Please do not hesitate to get in touch if you have any questions arising from it.

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