

# HMRC's expanding powers in tackling tax avoidance schemes

Semin Kaycin explores the implications of the Finance Bill 2024



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**P**ublished for consultation on 29 November 2023, the Finance Bill 2024 proposes to create a new strict liability criminal offence for promoters of tax avoidance schemes (POTAS) who fail to comply with certain stop notice obligations issued by His Majesty's Revenue and Custom's (HMRC).

The proposed bill also makes various suggestions including allowing HMRC to commence director disqualification proceedings. If the bill receives Royal Assent, HMRC's powers of enforcement will significantly increase and will send a strong message to promoters who are involved in POTAS.

## CURRENT REGIME

The regime to restrict POTAS was first introduced through the Finance Act 2014, with the aim to make it harder for promoters to market their 'high risk' tax avoidance schemes to the public. Subsequently, HMRC was permitted to use conduct notices and stop notices where an individual is carrying on a business as a promoter so long as it meets a threshold condition.

A promoter is defined as an individual responsible for the design of the relevant POTAS proposal, arrangement, organisation or management of the scheme. A person is also deemed a promoter if they make a relevant proposal available for implementation by another person or entity.

There are however some exclusions in 'prescribed circumstances' which are set out in 6 February 2015 regulations. These include when an individual is involved in the design, organisation or management of the relevant proposal or relevant arrangement but does not provide relevant tax advice or cannot be reasonably expected to know that a proposal is a relevant arrangement.

Stop notices were however substantially amended in sections 236A to 236K of the Finance Act 2021. This amendment granted HMRC greater power by allowing an authorised officer, who must be a senior HMRC officer outside of the counter-avoidance business unit, to issue such a stop notice. This notice immediately prohibits the promoter and entity involved

in POTAS from continuing their activities.

While HMRC can rely on other methods, such as applying through the First Tier Tribunal for a monitoring notice in order to restrict the activity of promoters when they had failed to comply with a conduct notice, the promoters appear undeterred as they are only subject to a financial penalty which most were willing to risk.

The introduction of the Finance Act 2022 also gave HMRC additional powers to deal with promoters. For example, it allowed HMRC to be able to apply to the court for an asset freezing order when seeking an anti-avoidance penalty or to make a winding up petition if an individual was carrying on as a promoter. HMRC were also allowed to publicly 'name and shame' promoters if they failed to comply with, for example, conduct notices, or were subject to a monitoring notice including providing the details of the conduct.

## REASONABLE EXCUSE

The All-Party Parliamentary Group on Anti-Corruption & Responsible Tax in their joint policy paper had however advised that not enough was being done to curtail the promoters. They also concluded that HMRC needed to focus further on criminal prosecutions rather than on the more frequently sought and preferred civil route. This partly aimed to deter the offending promoters, but also out of fairness, as it is argued that matters of dishonesty should be dealt with through the criminal courts rather than by governmental policy decisions.

So, the Finance Bill 2024 aims to enhance these stop notices by under section 33 imposing a criminal strict liability offence if promoters fail to comply with it or fail to give a copy to another offending individual, such as a client or intermediary, who may then continue promoting the scheme unless they have a "reasonable excuse".

The bill also includes LLP's in the provision therefore making partners/officers jointly potentially punishable with the promoter who is in breach of the strict liability offence. Importantly, if the offence is committed by a company with the control or consent of an officer, they will also be guilty of the offence.



The proposed bill, as drafted, will therefore add to HMRC's muscles and give the courts greater sentencing powers

There is no definition of a reasonable excuse but the following under section 33 have been set out as not being reasonable:

- Insufficiency of funds;
- If in the case of a monitored promoter, reliance on legal advice if the advice was not based on a full and accurate description of the facts or the conclusions in the advice are being relied upon on was unreasonable; and
- Reliance on others unless reasonable care is taken.

If an individual is however deemed to have a reasonable excuse, they must take steps to stop that failure without delay after the excuse ends. Therefore with the introduction of section 33, the legislation will be effectively extending HMRC's arm further in terms of its powers and will be a step in the direction of encouraging HMRC to pursue matters through the criminal courts in order to act as more of a deterrent to promoters.

#### **DIRECTOR DISQUALIFICATION**

Along with creating a criminal strict liability offence on promoters, under the proposed draft Finance Bill 2024, clause 32 and Schedule 13 have been introduced to amend the Company Directors Disqualification Act 1986. This enables HMRC to commence director disqualification proceedings – so long as it is in the public interest – against directors and shadow directors who are promoting POTAS and have been wound up under section 85 of the Finance Act 2022 or if the company carries on as a promoter of tax avoidance scheme.

Alternatively, if the director's conduct makes them an unfit person to manage the company.

HMRC had also initially published in their July 2023 policy paper that the scope of the Finance Bill 2024 be wider so that it included managers on the list. but this has since been removed.

In terms of sanctions, promoters will be looking at an unlimited fine or a custodial sentence of up to two years along with any possible director disqualification. And while there has always been a capped financial penalty, the possibility of a sentence of imprisonment or disqualification will no doubt have a certain amount of clout to any individual involved in such schemes. The bill does go further in terms of certain tax frauds as it has doubled the court's sentencing powers from seven years to 14 years, which includes fraudulent evasion of income tax and VAT. The proposed bill, as drafted, will therefore add to HMRC's muscles and give the courts greater sentencing powers.

The offence only applies to directors regardless of when the stop notice was issued. However if the court is to then consider director disqualification on the grounds of unfitness then the court can take into consideration the directors conduct before or after the bill receives Royal Assent.

The proposed Finance Bill 2024 will add a further string to the bow of HMRC in tackling POTAS by granting them and the courts greater powers in restricting those who engage in 'high risk' tax avoidance schemes through the criminal courts. <sup>51</sup>