

'Naming and shaming' of tax advisers (Lecture B1394 – 11.15 minutes)

Background

For some years now, HMRC has been taking an increasing interest in the behaviour of tax advisers. This is perhaps understandable, bearing in mind it has been estimated that around 65% of individuals and firms who undertake tax work aren't members of any professional body.

Publishing information about taxpayers and advisers

HMRC has a statutory obligation of confidentiality under the Commissioners for Revenue and Customs Act 2005, s 18(1), which states that HMRC officials may not disclose information held by HMRC in connection with a function of HMRC. HMRC's statutory duty of confidentiality is enforceable by criminal prosecution and carries a maximum penalty of two years imprisonment (CRCA 2005, s 19).

However, an important exception to HMRC's duty of confidentiality relates to public interest disclosures. Permitted public interest disclosures include those made to a regulated professional body, where it relates to misconduct on the part of a member of the profession, broadly where the misconduct relates to a function of HMRC (CRCA 2005, s 20(3)).

With regard to the publication of information about tax advisers, there was already a statutory exception from the confidentiality obligation for disclosures made for the purposes of a function of HMRC if it did not contravene any restrictions imposed by the Commissioners for Revenue and Customs (CRCA 2005, s 18(2)). However, this confidentiality obligation is subject to any other enactment permitting disclosure (CRCA 2005, s 18(3)).

For example, HMRC can publish information in respect of the disclosure of tax avoidance schemes (DOTAS) legislation. A statutory provision (in FA 2004, s 316C) allows HMRC to publish information about any proposals or arrangements which have been allocated a DOTAS scheme reference number. This includes information about any person who is a promoter in relation to those proposals or arrangements and any person who is a supplier of services in relation to them, where a scheme reference is allocated in certain circumstances (in FA 2004, s 311(3)).

In addition, under the regime for enablers of defeated tax avoidance, HMRC can publish details of an enabler if certain conditions are satisfied (F(No. 2)A 2017, Sch 16, Pt 10, para 46).

However, HMRC seemingly didn't consider these statutory powers to be adequate either.

'Promoters, enablers and suppliers'

HMRC's powers to publish information were therefore extended (in FA 2022, s 86). This provision allows HMRC to publish any information or documents considered appropriate "...to inform taxpayers about the risks associated with a tax avoidance scheme, and/or to protect the public revenue".

HMRC may publish information and documents identifying or concerning any person who is, or is suspected of being, a promoter in respect of a tax avoidance scheme 'relevant proposal' or 'relevant arrangement', or is a 'connected person', or a member of a 'promotion structure', or is a person suspected of having been involved in making the relevant proposal or arrangement available for implementation.

The definitions of 'relevant proposal' and 'relevant arrangement' are based on the legislation on promoters of tax avoidance schemes (POTAS), which also includes powers to publish information about a person subject to a stop notice, or a monitored promoter (FA 2014, ss 236H, 248):

- 'Relevant proposal' is defined as a proposal for arrangements which (if entered into) would be relevant arrangements;
- 'Relevant arrangements' are those which enable, or might be expected to enable, any person to obtain a tax advantage, where a main benefit that might be expected to arise from the arrangements is the obtaining of that advantage.

Furthermore, the identity of a 'connected person' depends on the type of scheme or arrangement. For example, if the proposal or arrangement involves a trust, a connected person can be a settlor, trustee or beneficiary of the trust. If the promoter is a company, it includes a director, employee or shareholder of the promoter.

The general rule about disclosure is subject to an exception if there are reasonable grounds for believing that the person's activities are subject to legal professional privilege.

Nevertheless, the scope of those definitions looks worryingly wide, and the element of judgment and discretion that can be exercised by HMRC has resulted in concerns being raised by the CIOT.

Published information

If information is to be published, it may be published in any manner HMRC thinks fit. However, if HMRC intends publishing information that identifies a person, HMRC must first notify that person and give them 30 days to make representations about whether the information should be published, for consideration by an authorised HMRC officer. In addition, HMRC's publishing powers don't authorise the publication of information if its disclosure would breach the 'data protection legislation', or the 'investigatory powers legislation'.

HMRC's 'new' powers were first used in a press release on 31 August 2022 to name directors of tax avoidance promoting companies. They were used again on 3 May 2023 to publish marketing materials from a promoter in relation to a tax avoidance scheme.

A 'Current list of named tax avoidance schemes, promoters, enablers and suppliers' has been published on the Gov.uk website, which is regularly updated (tinyurl.com/HMRC-TAS-info).

HMRC has also started publishing documents such as evidence of marketing material used by scheme promoters and suppliers to encourage taxpayers to use their tax avoidance schemes (tinyurl.com/HMRC-TAS-Evidence).

People who believe they're involved in a tax avoidance scheme are being advised to contact HMRC as quickly as possible (03000 534 226). People who have been encouraged to get into a tax avoidance scheme or have had contact with someone selling tax avoidance schemes are also being urged to report this by using an online form (www.gov.uk/report-tax-fraud). And with HMRC gathering an increasing amount of information from a multitude of other sources as well, the chances of tax advisers who are caught up in marketing tax avoidance schemes for their clients being 'named and shamed' are high.

Conclusion

The scope for reputational damage, and the commercial damage that could cause as a result, means that tax advisers need to think very carefully before becoming involved in tax avoidance schemes, even those arrangements where HMRC only has a reasonable suspicion about them. HMRC is required to amend or withdraw published information if it's later considered to be significantly misleading or incorrect. However, the reputational damage already caused might be irreversible.

Contributed by Mark McLaughlin