

## **Targeting the Enablers of Tax Avoidance – Seminar Summary**

On 12 November 2020, the APPG on Anti-Corruption & Responsible Tax hosted a virtual seminar to discuss a recent policy paper on tackling the promoters of tax avoidance. The panel gave thoughtful remarks in response to our paper and addressed wider issues around the enablers of tax avoidance. We were especially pleased at the engagement from the audience and the lively debate that followed. With over 100 attendees, this was the APPG's biggest event yet so we want to thank our speakers and all who joined.

### Our Policy Paper

The proposals in our [paper](#) are targeted at the promoters of the most aggressive and egregious tax avoidance schemes. The point is not to criminalise legitimate tax advisers, but to discourage advisers from promoting or supporting schemes that they know to be legally ineffective.

The key proposals, as set out in the paper, are as follows:

1. Use the GAAR “double reasonableness” test as an alternative route to criminal prosecutions for the promoters of failed tax avoidance schemes instead of needing to make out the dishonesty element in the offence of cheating the public revenue.
2. Toughen up the civil regime of penalties for the enablers of ineffective tax avoidance schemes by using a “more likely than not to fail” test so that it can be more easily applied.

To be clear, we are not talking about dropping the criminal standard of proof to a civil one in these cases. The “double reasonableness” test is in effect exactly as stringent as “beyond reasonable doubt” standard of proof in the criminal law. It is not a question of whether the avoidance was reasonable or not; the test is only met if it would not be reasonable for *anyone* to think the avoidance was reasonable.

### Panellist Remarks

Jesse Norman MP, Financial Secretary to the Treasury

- We can all agree on the principle that we must stop the promotion of tax avoidance, the question is how. We must get the detail right.
- Must not forget the principle that individual taxpayers are responsible for their own tax affairs.
- Argued that, as they stand, neither proposal in the paper is workable. Any new measures on tax avoidance must not be untargeted.
- On the first proposal, said the Government cannot sidestep proper legal due process and implement the “double reasonableness” test for criminal prosecutions as it is not the same high bar.
- On the second, the civil regime is already very tough and the penalties match the severity of wrongdoing. Making them more stringent could impinge upon human rights.

Jane McCormick, former Global Head of Tax at KPMG

- Both proposals are problematic and the measures are not targeted specifically at those enabling tax avoidance.
- Called into question whether this was the right legal approach and suggested that the GAAR proposal could do more harm than good by impacting upon rights.
- Often there is no objectively right answer, just the one decided by the courts. But 'bad law is still bad law.'
- Good advisers will not let their clients go anywhere near schemes that would be addressed by the GAAR rules.
- The duty of HMRC is not to chase criminal prosecutions, it exists to collect revenue.

George Turner, Director at TaxWatch

- Welcomed the APPG paper and supported the proposals.
- HMRC uses the line that the promotion of tax avoidance is not a criminal offence.
- Argued the GAAR "double reasonableness" test is as stringent as current criminal bar for prosecution.
- Named cases, such as Rangers Football Club, where the proposals in the paper could have led to prosecutions.
- These changes are needed so that criminal prosecutions become practically possible for the promotion of tax avoidance, which is a criminal offence.

Clair Quentin, APPG researcher

Despite the doubts of some of the panel, the "double reasonableness" test is effectively the same high bar as for the dishonesty element in the existing criminal law. The test must not be confused with a "single reasonableness" one.

It would be reasonable to think that a tax adviser might have been giving honest advice if that advice was within the range of reasonable opinions that a tax adviser could hold. But their dishonesty would be beyond reasonable doubt if the advice they gave was outside that range of reasonable opinions. That is precisely what is established if the GAAR test is met.

It is always possible to doubt that a tax adviser was being dishonest in giving wrong advice, since a range of possible opinions exists, but the GAAR test puts that dishonesty beyond *reasonable* doubt, and is therefore conceptually on all fours with the "beyond reasonable doubt" standard of proof applying in a criminal context.

#### Audience Recommendations and Comments

- There is a big difference between tax advice and the promotion of unlawful tax avoidance schemes.
- Professional standards are designed to reflect that difference, and so anyone selling tax advice should be required to sign up to a professional body.

- Rob Roberts MP called for an HMRC pre-approval regime for schemes so as to stop the problem at source.
- Promoters of these schemes will not care about the proposals as they will still escape punishment. They set up and phoenix companies, often with impunity. Tackling enablers should instead be a trading standards issue as it would be more easily enforced.
- The GAAR “double reasonableness” test was not designed for this purpose and should not be used in this way. It would harm the GAAR as a general anti-avoidance measure. Other simpler tests are available. Privileged access to documents would help with prosecutions under the existing criminal regime.
- Kevin Hollinrake MP called into question whether at the heart of the problem was the culture or lack of resources at HMRC.
- There is a need to redefine dishonesty. By relying on jury interpretations of dishonesty, there is too much room for confusion.

### APPG Response

We have a few initial takeaways from the seminar. If it is indeed the case that the existing law is adequate to go after these promoters, but HMRC's role is not to punish wrongdoing, then something needs to be put in place alongside HMRC's revenue collection function that places on them a duty to pursue wrongdoers. We also do not accept the argument that the GAAR “double reasonableness” test cannot be used for criminal prosecutions just because it was designed for something else.

The purpose of criminal prosecution is deterrence as well as punishment. That’s why we would push back against the claim that this isn't about revenue because the ineffective schemes fail at tribunal - this argument fails to take into account all the abusive transactions that HMRC never finds out about, but which they would challenge if they knew about them. This is where the deterrence element will really make a difference.

The APPG<sup>i</sup> will take away these insightful thoughts and recommendations for consideration. Thanks again to all who took part in the seminar. In the coming weeks we have a new policy paper on the duties of HMRC so keep an eye out.

---

<sup>i</sup> This is not an official publication of the House of Commons or the House of Lords. It has not been approved by either House or its committees. All-Party Parliamentary Groups are informal groups of Members of both Houses with a common interest in particular issues. The views expressed in this report are those of the group.