



Low Incomes  
Tax Reform  
Group

A voice for the unrepresented

**Strengthening the Tax Avoidance Disclosure Regimes  
HM Revenue & Customs (HMRC) Consultation  
Response by the Low Incomes Tax Reform (LITRG) Group**

**1 Executive summary**

- 1.1 We support the overriding objective of the Disclosure of Tax Avoidance Schemes (DOTAS) regime in detecting tax avoidance and appreciate that the Government's intention in amending DOTAS is to make it more robust.
- 1.2 We are responding to this consultation specifically with the interests of low-income workers in mind, who might unwittingly get caught up in tax avoidance arrangements organised by their employers. It is important that HMRC appreciate that some workers might 'sign up' to a scheme as part of terms and conditions of employment offered to them, but about which they have very little understanding.
- 1.3 In particular, we wish to emphasise the potential impact of the proposals on low-income and unrepresented agency workers who use arrangements involving overarching contracts of employment. There is a query about whether such arrangements even constitute 'avoidance' in the eyes of HMRC; but assuming they do, we do feel that this area merits special consideration in the context of this consultation, with the view to HMRC carving out an exception.
- 1.4 It seems to us that catching a mass population of taxpayers within DOTAS will not only be problematic for HMRC, but could be devastating for the taxpayers considering the new application of accelerated payment notices (to which there is no right of appeal, yet penalties for failure to pay) – particularly as workers may have little or no choice in working under such arrangements.

**2 About the Low Incomes Tax Reform Group**

- 2.1 The LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 the LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 The LITRG works extensively with HMRC and other Government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and

related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

### **3 Our approach to this consultation**

- 3.1 Our response is supplementary to that of the main CIOT submission, focusing on specific issues for those on low incomes.

- 3.2 We wish to further explore the issue of DOTAS becoming more widely targeted and low-income agency workers becoming 'employee users of employment schemes' as a result.

- 3.3 We hope that the points raised in this response will be useful as input for questions 1 and 14.

#### **3.4 General Comments**

- 3.4.1 LITRG support the overriding objective that everyone pays their fair share, although it is regrettable that ever increasing pages of complex law should be added to the statute book in an effort to achieve this.

- 3.4.2 In our view, some of the examples that Government give as justification for changing the standardised tax products hallmark suggest that the problem is more often than not promoters interpreting the tests in the hallmark differently to HMRC, rather than exploiting holes<sup>1</sup>. As such, it could be argued that HMRC should take action to ensure the current rules are properly applied by promoters, rather than introducing a further suite of rules.

- 3.4.3 Further, by HMRC's own admission:

'We also see people applying their ingenuity to getting round the disclosure requirements just as much as they do inventing tax avoidance schemes.'<sup>2</sup>

- 3.4.4 This may explain why we have seen a steady fall in the number of disclosures made in recent years<sup>3</sup> and if it does (which the frequency in amendments to the scope and operation of DOTAS in recent years suggests), then we cannot see that making changes to the grandfathering rule or around what constitutes bespoke arrangements will make any difference to promoters who seem intent on avoiding DOTAS.

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<sup>1</sup> See page 9 of the consultation document: 'For instance, although a promoter makes a scheme claiming to enable clients to retain 90% of their income available to a wide population by advertising it on the internet, they may argue that it is not discloseable because its implementation is tailored to each client's circumstances. However, fundamentally such a scheme is offering clients a way to retain more of their income after tax than would be the case if they did not enter is and tailoring to meet a client's requirements is likely to be around the periphery.'

<sup>2</sup> Sue Walton, Head of the Anti-Avoidance Group at HMRC is on record as saying this, as pointed out in a review of the DOTAS regime carried out by Oxford University Centre for Business Taxations.

[http://www.sbs.ox.ac.uk/sites/default/files/Business\\_Taxation/Docs/Publications/Reports/DOTAS\\_3\\_12\\_12.pdf](http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/DOTAS_3_12_12.pdf)

<sup>3</sup> While we appreciate that there have been nearly 2,500 disclosures under DOTAS since its inception, we understand that the number has fallen steadily since the introduction of the regime. Indeed, it seems the number of direct tax disclosures has fallen to around 150 in the year 1 April 2011 to 31 March 2012, 92 in 1 April 2012 to 31 March 2013 and 56 in 1 April to 31 March 2014 <http://www.hmrc.gov.uk/avoidance/avoidance-disclosure-statistics.htm#5>

- 3.4.5 The incentive for promoters to devote their talents to devising ways around DOTAS must now be even stronger considering the introduction of the accelerated payments regime. Therefore in our view, a revised hallmark may not achieve the desired result and could simply set a roadmap for promoters defining what is caught as well as what is not.
- 3.4.6 At the same time, we are worried that a revised hallmark will see the broadening of the application of the DOTAS regime to schemes such as the one we refer to in the next section. This could see HMRC swamped with disclosures. Given that HMRC have limited resources to process such information, we are concerned that this move may even defeat the purpose of the regime if HMRC's attention is diverted from more aggressive arrangements.
- 3.5 ***Specific comments***
- 3.5.1 The unrepresented low-income taxpayer to whom we seek to give a voice are generally unable to use avoidance devices in order to reduce their tax liabilities. However, agency workers or 'temps' as we might otherwise know them, are an exception, as the provision of an overarching employment contract by the agency or an umbrella company recommended by the agency is more or less the default position for such workers. We are concerned that this type of arrangement may be about to fall into the DOTAS regime.
- 3.5.2 Having an overarching contract of employment provides a temporary worker with the ability to turn their successive work locations into 'temporary workplaces' for the purposes of meeting s338 ITEPA 2003<sup>4</sup>. This means the expenses of travel to those workplaces from home are not taxable if reimbursed and not charged as earnings for the purposes of class 1 NIC. But if the expenses are not reimbursed, the employee can claim tax relief on them, though cannot similarly claim NIC relief. Without an overarching contract, each engagement is treated as a separate employment for tax purposes meaning no travel expense relief is available, despite the fact that the individual may be contracted to work on different engagements through the same employment agency<sup>5</sup>.
- 3.5.3 Traditional overarching contract arrangements are usually designed to generate moderate savings for both the employer and agency worker, although in practice the worker might not benefit significantly, taking into account the administration fee that they have to pay to participate in the scheme. Having such 'tax efficiency' in the agency worker supply chain also benefits the agency and the end hirers who have cheaper labour costs, so such arrangements could be said to be partly commercially geared.
- 3.5.4 Equally, agency workers would not be entitled to tax relief on the travel and subsistence expenses but for the use of an overarching contract of employment and this 'tax advantage' could be said to be one of the main benefits of using the scheme – meaning the first tests to determine which transactions require disclosure under DOTAS are met (as per section 318 Finance Act 2004).

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<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2003/1/section/338>

<sup>5</sup> This is described here: EIM32130 – 'Where a worker provides his or her services through an agency and the agency legislation in Section 44 ITEPA 2003 applies, each agency contract is treated as a separate employment.... Therefore, where there is only one workplace for an agency contract that workplace will be a permanent workplace for that employment. The agency employment is dealt with as a fixed term appointment.'

#### **4 Changes to Grandfathering**

- 4.1 We understand that umbrella/overarching contract arrangements have fallen outside the DOTAS regime to date because they do not fall within the ambit of one of a number of descriptors – including ‘arrangements which are standardised tax products’ – making up the second test. This is because the arrangements are longstanding and this hallmark has an exception for schemes that were around before 1 August 2006.
- 4.2 If the DOTAS regime is widened through the removal of the date qualification, we think it is conceivable that these types of arrangements may be caught in future, potentially bringing a massive population of agency workers<sup>6</sup> within DOTAS. This would in turn have regrettable consequences for many low-paid workers – not least perhaps having to pay the ‘disputed’ tax upfront and facing a penalty if they do not under section 226 of the Finance Act 2014 (penalty for failure to pay accelerated payment).
- 4.3 This would be an unacceptable result for low-paid and vulnerable workers – the system ought to seek means of protecting them, rather than transferring the burden of an employer-arranged tax avoidance scheme onto their shoulders.

#### **5 Employee users of employment schemes**

- 5.1 We note the proposals in the section ‘employee users of employment schemes’ on page 24 of the consultation document, and broadly think it is a good idea that employers running employment schemes are required to pass on Scheme Reference Numbers (SRN) to employees so that employees are fully aware that they are participants in a tax avoidance scheme.
- 5.2 However we do not think that this will act as a deterrent to agency workers in terms of getting involved in employer-run tax avoidance schemes. This is because the deterrent factor relies on two assumptions (not to mention the employer passing on the SRN in the first place), that we do not think apply in their case:
- 1) that the employee will understand what it all means; and
  - 2) that the employee has any other choice but to accept this work.
- 5.3 Before we go on to comment on these two elements in more detail, and as background to what follows, we would like to share some interesting information about a ‘typical’ agency worker that has come to us in the course of various research for another project:
- They tend to have jobs requiring low to medium skills that are low-paid – including administrators, cleaners, hospitality staff, care workers, factory workers, plant and machinery operatives and other lower paid occupations.
  - They are predominantly from younger age groups, although there is no real gender bias.
  - Minority ethnic groups tend to be over-represented in terms of agency working.
  - Educational attainment varies, but there is a correlation between low educational achievement and those in lower paid temporary and agency work.
  - Agency workers (and indeed temporary workers more generally) may be at higher risk of occupational accidents and tend to have less access to training.

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<sup>6</sup> Of which there are 1.67 million in total, though we do not know the number of those involved in umbrella schemes - Source: Office for National Statistics Labour Market Survey 16 July 2014, page 54, latest figures are for March to May 2014 – see [http://www.ons.gov.uk/ons/dcp171778\\_367199.pdf](http://www.ons.gov.uk/ons/dcp171778_367199.pdf)

- 5.4 The above helps us to see the situation from the agency worker's perspective.
- 5.5 ***The assumption that the employee will understand what it all means***
- 5.5.1 The intention behind the proposals around employment scheme users seems to be that upon the receipt of a form or piece of paper with an SRN number on it – i.e. labelling it as potential 'avoidance' – the taxpayer might be deterred from entering the scheme.
- 5.5.2 However, many agency workers are young, perhaps with lower levels of education or literacy, or are migrants, many of whom may be new into the country or will have a limited grasp of English. All of these people are likely to have extremely limited or indeed no understanding of what is expected of them under the UK tax system and will have no idea as to the importance of the piece of paper they are handed out of the blue, or what it even means.
- 5.5.3 Even if they understand what the document is telling them, ordinary taxpayers might have a very limited picture of what avoidance is – perhaps understanding that it involves some contrived, artificial transactions – more often than not formed through what they hear in the media about celebrities and 'Icebreaker' or 'K2'. In comparison, their own positions (where the employer basically processes some expenses and then applies PAYE as usual) will look very 'normal'; therefore they may assume that there has been an error or mistake in being given this document, or simply not understand it and ignore it anyway.
- 5.5.4 It seems, either way, more might be done to inform the workers, and we have written much in the past about the need for better guidance for taxpayers – particularly at the less sophisticated end of the spectrum. However as it stands, we would like to reiterate that it is extremely unlikely that the receipt of an SRN will even register with many agency workers. For those that do, it is unrealistic to expect them to delve deep into the recesses of HMRC's website to try and understand for themselves whether the way their employer is processing their PAYE counts as avoidance or not<sup>7</sup>.
- 5.5.5 It must also be remembered that they are unlikely to have (or be able to afford to pay) anyone else to explain the situation to them or provide them with advice.
- 5.5.6 Indeed, being handed a form or piece of paper with an SRN on it could have the opposite effect to deterrence on some workers, as they may interpret 'disclosed to HMRC' to mean 'approved by HMRC'. While we know that this is not the case, HMRC must take on board that statements about a scheme being 'DOTAS compliant' or such like will be understood by many taxpayers to mean that there is nothing risky to worry about.
- 5.5.7 Again, it seems that taxpayer education may be the key here – however this will require HMRC to dispense with their 'one size fits all' approach to material and communication and provide targeted, clear and easy-to-understand information – potentially through more than one channel. HMRC must recognise that in the absence of this, poor information could actually drive workers to use DOTAS schemes.

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<sup>7</sup> It is worth saying in passing that we are increasingly concerned about the movement of the HMRC guidance to GOV.UK, as we find that there is so much dilution of the material that often important key messages are being lost in transit. It seems to us more important than ever that taxpayers clearly understand what is expected of them and what the implications are of their actions (or inactions) and we question whether they will be able to do this once the full HMRC content is transferred to GOV.UK.

- 5.6 ***The assumption that the employee has any other choice but to accept this work***
- 5.6.1 Even with increased knowledge about tax avoidance and DOTAS, the individual potentially has a dilemma: to accept the situation, or to give up the opportunity to earn a living.
- 5.6.2 As discussed previously, there is every incentive for agencies to use overarching contracts to reduce their costs (or to use umbrella companies so that both their costs and payroll obligations are reduced) – therefore workers may not be given a choice to use the arrangements proposed to them. It may be that if they refuse to do so, they do not secure work. Indeed, against the backdrop of ‘making the labour market more flexible, efficient and fair’<sup>8</sup>, the Government commissions private employment businesses to assist with the integration of unemployed people into jobs via temporary work<sup>9</sup> so great care would need to be taken that different areas of policy were not working against each other here.
- 5.6.3 Furthermore, many who end up in low-paid agency work will be claimants of jobseeker’s allowance (JSA) and possibly other means-tested welfare benefits. JSA claimants have various strings attached to their claim, including the need to look for work and demonstrate that they are doing so. Failure to look for work, or to accept work when offered, may lead to ‘sanctions’ and a loss of benefit.
- 5.6.4 While the Jobcentre Plus Decision Makers Guide<sup>10</sup> suggests that decision-makers should take into account ‘tax avoidance schemes’ and so not force a claimant to accept a position which involves signing up to such terms nor threaten them with sanctions if they do not, we doubt whether the staff have enough support and understanding of the matter to ensure that the above guidance is put into practice in reality.
- 5.6.5 A similar result would arise under the new universal credit (UC), where the failure to accept a reasonable job offer can mean a claimant fails to meet the applicable level of conditionality, resulting in suspension of benefit. We are particularly concerned about this given the Government’s plan to force UC benefits claimants to take ‘zero hours’ contracts or face sanctions (unless there is an exclusivity clause in the contracts)<sup>11</sup>. This seems to indicate a general ‘toughening up’ by the authorities – pushing people to accept whatever is on offer whether or not the terms are favourable in their particular situation.
- 5.6.6 We hope that this section has illustrated that the provision of an SRN to an employee may not act as the deterrent that HMRC hope it will. Even if it does cause concern for the prospective employee, there is still not a genuine choice for the worker in accepting the work or not in many cases. Additionally, there is the potential for a double blow for those that do go on to use the schemes, as it is probable that increases in employers’ costs due to the additional administrative burdens will be absorbed by the employers themselves. It is more likely that the costs will be passed on to a significant degree to low-income workers in the form of lower hourly rates or spurious fees/charges; therefore it is possible that employees will then not only find themselves in a ‘DOTAS’ scheme with all that that brings, but will also suffer a direct financial cost.

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<sup>8</sup> See <https://www.gov.uk/Government/policies/helping-people-to-find-and-stay-in-work/supporting-pages/managing-the-work-programme>

<sup>9</sup> For example: <http://www.staffline.co.uk/candidates/welfare-to-work/>

<sup>10</sup> See Chapter 34, JSA sanctions –

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/337585/dmgch34.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/337585/dmgch34.pdf)

<sup>11</sup>[http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140512/text/140512w0002.htm#140512w0002.htm\\_wqn18](http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140512/text/140512w0002.htm#140512w0002.htm_wqn18)

## 6 Conclusion

- 6.1 There are sophisticated variations of overarching contract arrangements that involve offshore intermediaries, loan back facilities and so on and we are not suggesting that agency workers who have knowingly made use of these should be exonerated if they had a genuine choice whether or not to accept the arrangement.
- 6.2 Furthermore, there are other overarching arrangements under which low-paid workers are employed that may be closer to PAYE evasion than avoidance so should not be in the DOTAS regime at all because the employers should be subject to direct and immediate investigation and assessment of the underpayment by HMRC.
- 6.3 Most agency workers will be involved in the 'standard', less controversial overarching employment arrangements – the type that have been largely tolerated to date<sup>12</sup> and we cannot see how catching these in DOTAS can help to deliver the policy objectives – in fact it may do the opposite.
- 6.4 It will also be very problematic for the employees, not least now that DOTAS has been linked to the issue of accelerated payments. In our view, the proposals around providing employees with a SRN would not help protect them by giving them a chance to bypass the employment – as discussed in this response, often their involvement in such schemes is far more complex.
- 6.5 It may not be HMRC's intention to catch such activity at all on the basis that the arrangements are 'benign' and/or result in low value savings, so this response seeks confirmation of whether or not umbrella arrangements will be caught within the revised DOTAS provisions as proposed.
- 6.6 We hope that the information given above is sufficient to enable HMRC to confirm the position and whether there is any means of carving out such overarching arrangements so that DOTAS and the accelerated payment regime will not apply. Whilst we think some action could be taken to protect low-income workers caught up in them, we do not think the proposed rigours of DOTAS will be helpful here – to either the workers or HMRC.
- 6.7 We would be pleased to provide further information and discuss the above in more detail as necessary.

LITRG  
23 October 2014

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<sup>12</sup> In 2008, in a consultation entitled '*Tax relief for travel expenses: temporary workers and overarching employment contracts*'<sup>12</sup>, the Government looked at the arrangements, stating: 'It was not the original intention that relief should be given for such journeys and it is unfair that some get tax relief when others working in similar circumstances do not. The Government wishes to consider whether there is a case for continuing to give relief in this way through these sorts of arrangements.' However the outcome of the consultation was: '5.104 following the consultation *Tax relief for travel expenses: temporary workers and overarching employment contracts*, the Government have decided to leave the current rules unchanged'.