

Errors in taxpayers' documents
Finance Bill 2017-19, Clause 64
Briefing from the Low Incomes Tax Reform Group (LITRG)

1 Errors in taxpayers' documents

- 1.1 Clause 64 of Finance (No. 2) Bill 2017 amends Finance Act 2007, Schedule 24, which provides for penalties to be charged in respect of inaccuracies in taxpayers' documents where those inaccuracies are the result of careless or deliberate behaviour by the taxpayer. Clause 64 provides that where a person receives advice in relation to certain tax avoidance arrangements, they cannot rely on that advice to show they have taken reasonable care to avoid an inaccuracy arising from their use of the arrangements in certain circumstances.
- 1.2 We acknowledge that the measure is primarily intended to act as a disincentive to using tax avoidance arrangements. We are concerned, however, that the provision is drawn far too widely and that as a result it may unintentionally catch unrepresented taxpayers, who have not engaged in the type of tax avoidance that HM Revenue & Customs (HMRC) intend to target. This is a particular concern, because they may catch arrangements of the type that might be forced on low-income, unrepresented taxpayers in order for them to be able to obtain work, for example through umbrella companies or personal service companies.
- 1.3 In addition, we are strongly opposed to and do not agree with the provision insofar as it reverses the burden of proof, meaning that HMRC will presume the taxpayer has been careless unless they can prove they have taken reasonable care: this is wholly wrong.
- 1.4 This provision will make it much more difficult for taxpayers who use affected avoidance arrangements to prove they took reasonable care, as (in addition to reversing the burden of proof) the measure also restricts the type of advice on which the taxpayer can rely to prove

they took reasonable care. The restrictions are problematic for low-income, unrepresented taxpayers who would not necessarily be able to judge whether or not an adviser has the appropriate legal or tax expertise to advise on the arrangements, nor whether the adviser has a direct interest in selling the arrangements to the taxpayer. This places the (unrepresented) taxpayer in a very difficult position, as they do not have specialist knowledge themselves, yet are being asked to determine whether the advice they receive falls within the provisions and is therefore “disqualified”.

- 1.5 We are hugely concerned that the provision places an insurmountable and quite unnecessary burden on unrepresented taxpayers, who: may enter into arrangements without fully understanding that they are caught; may not appreciate the need to obtain specific advice, or indeed be able to afford advice; may have been forced into using tax arrangements in order to obtain work; may have been mis-sold arrangements; and may not be able to judge whether or not an adviser has the appropriate legal or tax expertise to advise on the arrangements. If they did not obtain appropriate advice as provided for in clause 64, they would be unwittingly removing a whole line of defence.
- 1.6 **We strongly recommend** that HMRC produce clear guidance, which is well-publicised, to assist taxpayers in assessing whether or not advice is “disqualified” under any of the conditions in paragraph 3A (4). This guidance should set out clearly what “appropriate expertise” is and what “reasonable steps” in accordance with paragraph 3A (5) are.

2 Comments on proposed legislation

2.1 *Errors in taxpayers' documents*

- 2.1.1 Clause 64 sets out amendments to the Finance Act 2007, Schedule 24 and proposes new paragraphs 3A and 3B.
- 2.1.2 New paragraph 3A (2) sets out the presumption that an inaccuracy in a taxpayer document relating to the use of tax avoidance arrangements is careless. We strongly disagree with this proposal, which reverses the normal burden of proof. As a matter of principle, when HMRC are seeking to impose a punishment, they should have to make the case for the penalty to be charged, rather than the taxpayer being forced to provide enough evidence as to why they should not be penalised.
- 2.1.3 New paragraph 3A (4)-(7) of Schedule 24 of Finance Act 2007 set out a definition of disqualified advice. This is advice that HMRC and the tribunal must not take into account when determining whether or not the taxpayer took reasonable care. We do not favour the introduction of legislation describing what does not constitute reasonable care – this is a question of fact and degree, which should be determined ultimately by the tax tribunals. We are concerned moreover that a low-income, unrepresented taxpayer, who is approached and sold tax arrangements (or told they have to accede to such arrangements in order to obtain work) will be unable to identify whether or not the conditions set out in paragraph 3A

(4) apply; further, they may not appreciate they are being sold (or forced to accede to) tax arrangements, as such, and so may not realise that this provision applies to them at all.

- 2.1.4 With regard to paragraph 3A (4)(c) and the reference to “appropriate expertise”, we note that while it may be careless to rely on tax advice provided by an obvious non-tax specialist, for example someone with no relevant qualifications, an unrepresented taxpayer is unlikely to appreciate that technical advice from an apparent specialist¹ (especially if supported by Counsel’s opinion), will require a second opinion or further advice. If the person selling the arrangements appears to be experienced and knowledgeable in tax matters, it may not be obvious to a taxpayer that they are not a tax expert. We would therefore question how the taxpayer should determine whether or not the adviser has “appropriate expertise”. Following on from that, in relation to paragraph 3A (5), we would question what “reasonable steps” (to find out whether advice is disqualified or not) are, as the legislation does not make this clear.
- 2.1.5 New paragraph 3B of Schedule 24 of Finance Act 2007 defines “avoidance arrangements”. Sub-paragraph (2) ensures that this is drawn extremely widely, as it can include any arrangements that have obtaining a tax advantage as their main, or one of their main, purposes. Although new sub-paragraph (3) provides an exclusion for arrangements which both “accord with established practice” and have HMRC’s acceptance, this is not sufficient to protect low-income, unrepresented taxpayers. We think it would be more appropriate to restrict the application of these provisions to arrangements that meet any of the conditions A to E set out in sub-paragraph (5).
- 2.1.6 In addition, we propose that the provisions should only apply where the obtaining of a tax advantage **by the person (“P”)** was the main purpose, or one of the main purposes, of the arrangements. This would ensure that the provisions do not inadvertently catch low-income workers, who have perhaps been forced into receiving payment through an umbrella company, which then operates a tax avoidance scheme that falls within the provisions.

3 About Us

- 3.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 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.

¹ To the lay person, various people could appear to be specialists, including not only qualified tax advisers, accountants and lawyers, but also independent financial advisers.

- 3.2 LITRG works extensively with HM Revenue & Customs (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.
- 3.3 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.

LITRG
18 October 2017