



INSIGHTS

# Tax avoidance penalties – when taking advice just isn't enough

For those who may be interested, Taxwatch's recent article "*Is HMRC fighting the right fight on avoidance schemes?*" makes for an interesting read.



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Spoiler alert – it acknowledges that HMRC has increased its efforts to halt some aspects of the promotion of avoidance arrangements whilst recognising that more needs to be done to bring to account the beneficiaries of the significant fees paid by users of those arrangements.

Concurrently, the Loan Charge Action Group continues to lobby the Government to initiate change; notably to make the application of the loan charge provisions “prospective rather than retrospective” and to ease the plight of thousands of people who face financial ruin following their decisions to participate in various forms of disguised remuneration tax planning.

## Purpose of this Insight

The purpose of this article, however, is not to offer any judgement on whether HMRC has got the balance right regarding its continuing efforts to rid the UK tax system of artificial tax schemes (i.e. measures taken to thwart users of avoidance versus promoters of them). Rather, it is to focus on HMRC's power to charge penalties for inaccuracies in tax returns or other documents where those errors arise from a taxpayer's participation in avoidance arrangements.



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## An about turn

The relevant penalty provisions were introduced by Finance (No 2) Act 2017 and catch documents which contain an error brought about by the taxpayer's participation in a tax avoidance arrangement that does not work. The document in question must relate to a

period beginning on or after 6 April 2017, meaning errors for periods prior to that escape the regime.

Ordinarily the onus is on HMRC to demonstrate that an error is culpable. However, that is not the case under this regime. The position is reversed. Indeed, we have personal experience from our dealings with HMRC officers who have referred to these penalties as

"presumed careless penalties."



To be clear, in order to successfully defend a position and avoid a penalty, the taxpayer must be able to demonstrate they took reasonable care despite making the error. If they are unable to do that, the penalty will normally apply.

## Reasonable care

HMRC's guidance (CC/FS7c) cites three examples of how a taxpayer can satisfy an officer that reasonable care was taken:

- ▶ By checking as far as possible that the arrangements have the effect which is shown in the particular tax return;
- ▶ By checking the position with HMRC or a tax adviser and following the advice given; and
- ▶ Making sure that whoever provided the advice has the appropriate level of expertise.

## Disqualified advice

If this article ended at the third bullet point (above), one might be forgiven for wondering what the problem is. Surely, anyone who participates in an avoidance arrangement is bound to obtain advice before proceeding, more often than not perhaps by their own tax agent and the third party promoter who introduced the mechanism in the first place.

Unfortunately, the effect of the legislation is to exclude "disqualified advice" from the armoury of taking reasonable care. Advice is disqualified if;

1. The provider of the advice is an "interested person" (broadly someone who participated in the arrangement or any part of it or facilitated the taxpayer's participation and did so for consideration);



2. The advice was provided as a result of arrangements between an interested person and the person who gave the advice;
3. The provider of the advice did not have the appropriate expertise;
4. The advice did not take account of the taxpayer's bespoke circumstances; or
5. The advice was provided for someone other than the taxpayer.

There is a relaxation with regards to points 1 – 3 (above). Advice that would normally be held to be disqualified for any of those reasons will be deemed not to be provided the taxpayer took reasonable steps to check the advice and, having done so, genuinely believed that it was not disqualified.

## Conclusion

These rules were introduced to prevent or at least significantly limit instances where users of tax avoidance arrangements might look to avoid penalties by using the “shield” of their tax advisers to demonstrate they took reasonable care.

Broadly speaking, the effect of the disqualified advice rules means that in order to secure “advice protection,” a taxpayer will need to demonstrate they consulted with another tax professional prior to the implementation of the arrangements. That is likely to mean an additional fee for the taxpayer and it is reasonable to suppose it will be seen to be a disincentive to proceeding with such arrangements. Of course, such an effect is precisely HMRC's objective.

Whilst putting taxpayers' off from participating in tax avoidance going forward can hardly be criticised, the effect of these measures does raise questions in respect of individuals who are already caught.

We are currently helping a considerable number of clients to reach financial settlements with HMRC following their implementation of failed avoidance arrangements. A common fact pattern is that they were introduced to the arrangements quite innocently by their accountant or tax adviser who may have received a commission or introductory payment from the promoter of the scheme. Consequently, the advice received is likely to be disqualified leaving them exposed not only to the unpaid tax and late payment interest but also a sizeable penalty.

Penalties for careless behaviour can be suspended in certain circumstances. However, HMRC's guidance on the matter makes clear that that is unlikely on the basis that

“... it goes against our anti-avoidance strategy.”



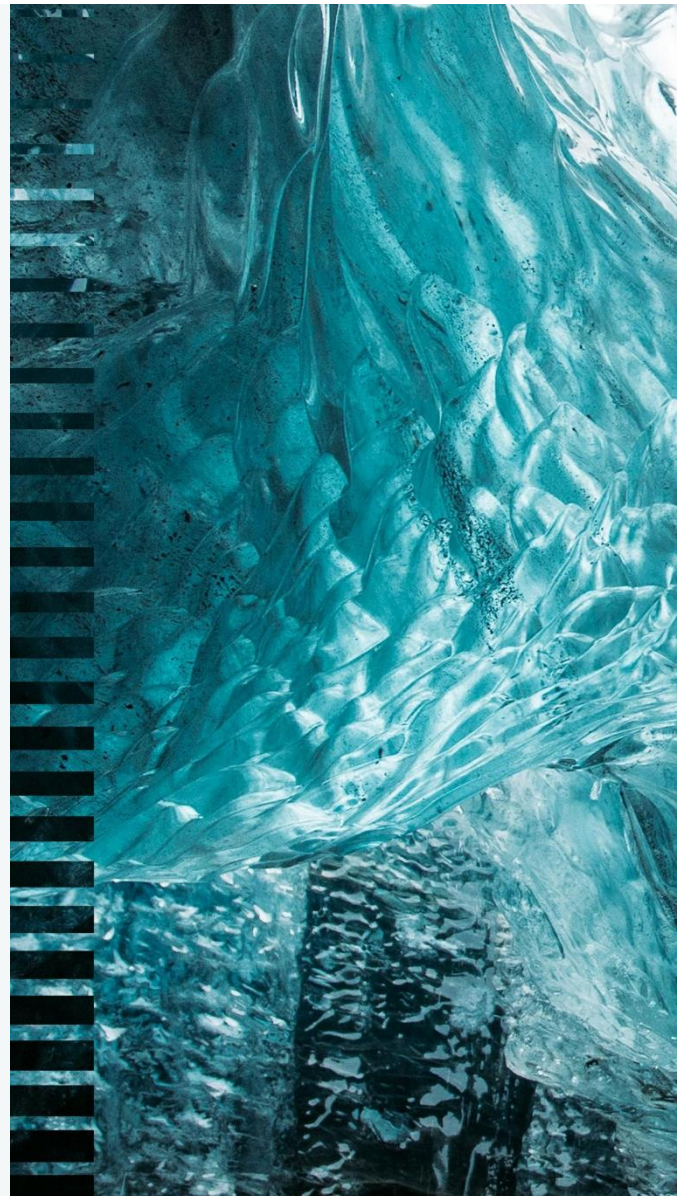


## Protect Yourself from Penalties with Expert Tax

At Trident Tax, we specialise in providing tailored advice to help you navigate the complexities of tax compliance and avoidance arrangements. Our expert team collaborates closely with professional advisers, financial institutions, and accountants to ensure you have robust defences against potential penalties for "careless inaccuracies."

We leverage our deep understanding of HMRC's penalty provisions and their application to tax avoidance arrangements, offering personalised strategies to demonstrate reasonable care and mitigate the risks associated with disqualified advice.

Our services include thorough tax compliance reviews to ensure your tax returns and documents are accurate and compliant. We assist in gathering and presenting evidence that reasonable care was taken in your tax affairs, helping you demonstrate compliance. Additionally, we provide valid advice and avoid disqualified advice penalties. Whether dealing with past avoidance schemes or seeking to prevent future pitfalls, we provide comprehensive defence and support to protect your financial interests.



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