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Article

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TAX CLIMATE CHANGE: WHERE DOES IT LEAVE THE ADVISERS?

By Jim Oulton and Sandy Bhogal

A notable consequence of the recent financial downturn has been a shift in attitudes towards tax. Historically, in the boom times, tax evasion and aggressive tax avoidance were not at the forefront of people's minds. Now the media abounds with issues and comments about 'fairness' of tax. This is fundamental to the change in attitudes: tax no longer appears to be about the government imposing a levy on its population (as was the widely-held view in the times of the introduction of the poll tax for example), it is now seen as something people and companies have a moral obligation to pay in order to make a 'fair' contribution to society. This shift in attitude has been reflected in discussions, policies and action taken by the UK government, and the international community as a whole. Plans to combat aggressive tax avoidance and tax evasion are being developed not only at the national level, but new international agreements are being entered into, and new models of accepted practice are being discussed (e.g. the new OECD report on base erosion and profit sharing), to take into account changes in the business world, such as those brought about by the internet.

This year it is the UK's turn to hold the presidency of the G8. In an article in the Wall Street Journal, David Cameron set out his agenda for the presidency of the G8, with three key points: increasing trade; fairer taxes; and greater transparency. David Cameron identifies transparency as being key to fighting "the scourge of tax evasion". As part of the UK government's efforts during its presidency of the G8, David Cameron has written to leaders of a number of crown dependencies and overseas territories, describing this as a "critical moment to get our own houses in order". Three key areas through which the UK aims to improve transparency are international agreements, legislation and international task forces.

International agreements

International agreements, with the intent of increasing transparency, generally provide for exchanges of information between tax authorities. Some go further than this by levying a charge where such information is not forthcoming. Exchanges of information can take place automatically or may only occur following a request from one jurisdiction. Recent agreements entered into (or being discussed) include the UK-US Inter-Governmental Agreement ("IGA") relating to FATCA agreements with the Isle of Man, Jersey and Guernsey and special agreements with Switzerland and Liechtenstein.

The UK-US FATCA IGA provides for automatic exchange of information between HMRC and the IRS. Under this agreement, HMRC will collect information in relation to US persons and automatically pass it to the IRS, and the IRS can be required to provide information to HMRC on UK persons. Although the genesis for this agreement lies in US legislation, the UK seems to have adopted this style of agreement, and has since introduced 'FATCA-style' agreements with other jurisdictions (such as the Isle of Man and the Channel Islands).

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Under the UK-Isle of Man agreements, HMRC has established a disclosure facility allowing for relevant persons with beneficial interests in investments structured through or out of the Isle of Man to make disclosures to HMRC in return for reduced limitation periods and penalties. In addition, the UK and the Isle of Man have agreed a 'FATCA-style' automatic information exchange agreement which is to come into force from the end of the disclosure facility on 30 September 2016. Similar disclosure and 'FATCA-style' arrangements have been agreed with Jersey and Guernsey and a similar disclosure facility has been agreed with Liechtenstein.

The special agreement with Switzerland entered into force on 1 January 2013 and gives UK taxpayers with assets in Switzerland the choice to disclose those assets to HMRC (and be assessed to tax) or to not disclose those assets, in which case they will be subject to a one-off payment and/or withholding tax.

Legislation

The EU Savings Directive (Council Directive 2003/48/EC) was agreed in June 2003. The aim of the Savings Directive is to counter cross-border tax evasion through the collection and exchange of information between EU Member States about foreign resident individuals who receive savings income outside of the jurisdiction in which they are resident. HMRC developed a scheme to collect information for the purposes of the Savings Directive, which came into force on 1 July 2005.

FATCA is US legislation that aims to improve tax transparency within the USA by requiring foreign financial institutions to provide information on their US customers to the IRS. As a punitive measure, where such information is not forthcoming, a withholding tax will apply. The international nature of FATCA has led to international agreements such as the UK-US IGA identified above, which, as well as facilitating the aims of FATCA in the USA, have also provided for greater exchanges of information from the USA to other jurisdictions also.

International task forces

The UK is a member of JITSIC (the Joint International Tax Shelter Information Centre), along with Australia, Canada, Japan and the USA. JITSIC was established in 2004 to identify and curb aggressive tax transactions. The relevant tax authorities work together to increase public awareness of aggressive tax schemes, share best practices with each other, allow for real-time information exchanges, develop new methods (including use of the internet) to identify promoters of and investors in aggressive schemes and identify emerging patterns and trends that indicate tax abuse.

Advisers

Tax evasion has never been acceptable – and no doubt greater transparency will lead to HMRC and others detecting and stamping down on tax evasion. Advisers who have unwittingly been used by clients to help them evade tax might feel they have little to fear from those clients by way of claims for negligence. However, those advisers may find themselves at the sharp end of difficult questions from regulators, professional bodies and those responsible for money laundering offences but would also be wrong to assume that they are otherwise 'in the clear'. Trusts and corporate bodies which as a consequence of tax evasion have lost money as they have had to pay penalties, surcharges, incur costs and have lost the opportunity to structure their tax affairs legitimately and effectively may have claims against advisers.

In this new climate tax practitioners, when asked to advise upon tax structures, and in particular those with an international element, would be well advised to make sure they and their client understand and appreciate all of the issues which might arise and the risks which may impact the efficacy of the advice – giving competent advice may include understanding how tax authorities in other relevant jurisdictions may view arrangements.

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Those involved in aggressive tax planning, or tax planning the legitimacy of which may be called into question in the 'court' of public opinion should contemplate that their work will be carefully scrutinised by tax authorities. If tax planning work is flawed in design or execution (which is a common problem) which leads to greater than anticipated tax liabilities, here or elsewhere, tax practitioners should contemplate that their clients will, particularly if they have been publicly vilified, likely look for compensation. Tax practitioners will also want to consider whether clients are asking them to underwrite whether the arrangements that they are considering are not only technically legitimate but "socially acceptable" – an issue outside the compass of advice tax practitioners have historically given. It seems to us that the best advice for tax practitioners in this brave new world is to tread cautiously – delineate the scope of your role carefully, make sure you have all the information which you may need to advise and stick to your professional skills. Tax practitioners who do not do this put themselves at risk if their clients are subsequently criticised or found to be operating a tax structure or scheme which does not in fact achieve the intended results.

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