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Tax Avoidance Sanctions and Deterrence: Practice Protection in Uncertain Times

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In August 2016, a consultation document entitled "Strengthening Tax Avoidance Sanctions and Deterrents" was published by HM Revenue & Customs. This article discusses some of the implications for those involved in giving tax advice.

In the 2016 U.K. Budget the government began to clarify the actions which it proposed to take to tackle tax evasion and aggressive tax avoidance. In August 2016, a consultation document entitled "Strengthening Tax Avoidance Sanctions and Deterrents" was published by HM Revenue & Customs ("HMRC") outlining proposed measures to be taken against those who enabled failed tax evasion and tax avoidance schemes.

The consultation period has now closed and professional bodies including the Institute of Chartered Accountants in England and Wales and the Law Society have made critical representations. There are genuine concerns as to the scope of those who might be caught by the proposed sanctions, whether the proposed regime effectively targets those who are promoting or enabling transactions or schemes which amount to evasion or unacceptable tax avoidance and how such a regime might operate. This article discusses some of the implications of such a regime for those involved in giving tax advice. No doubt they will wish to consider the position carefully as the government's intentions become clearer (which may be soon as, at the time of writing, the Chancellor has announced in his Autumn Statement an intention to proceed).

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I. The Code

In the March 2015 paper entitled "Tackling Tax Evasion and Avoidance", HM Treasury and HMRC laid down the challenge in this arena to "the regulatory bodies who police professional standards to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good." On November 1, 2016, guidance was published by a number of professional bodies, entitled "Professional Conduct in Relation to Taxation," taking up that challenge. I refer to this as the "Code." This should be carefully read by all tax practitioners. It has an effective date of March 1, 2017.

The new Code runs to 55 pages and reinforces the importance of members acting ethically and of the fundamental principles of Integrity, Objectivity, Professional Competence and Due Care, Confidentiality and Professional Behavior.

Further specific standards are set out and discussed in the Code. These include requirements as to specific advice, and that members should not only act lawfully and with integrity but that tax planning should be

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based on a realistic assessment of the facts and on a credible view of the law. The Code requires members to draw their clients' attention where there is material uncertainty around the law. Further, the standards specifically require that "members must not create, encourage or promote tax planning arrangements or structures that (i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or (ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation". The Code requires that members exercise professional judgment but also specifically requires and guides members that contemporaneous notes recording the reasons for judgments made by members are required and likely to be highly probative if a member has to defend those judgments.

Whilst the Code identifies the risks associated with relying on generic opinions or advice and acknowledges that members are entitled to make reasonable assumptions, it warns that assumptions should not be relied upon when they are known to be unrealistic or unreasonable. Further, members are warned that if advice is generic and/or depends on assumptions, a client should be warned of the need to take specific advice before acting and this should be highlighted with "sufficient prominence to prevent any misunderstanding arising". The guidance requires that "members should consider including in their advice the potential impact of a change in the assumptions made and/or the circumstances which requires specific or updated advice to be obtained."

The Code highlights that tax evasion (and involvement in it) is never acceptable, but that the expression "tax avoidance" is an expression used by different people in different contexts to mean different things and that its use had led to confusion. The Code emphasizes that HMRC's position is that a distinction must be made between tax planning, and tax avoidance, which is not acceptable to HMRC. HMRC's position is that:

> Tax avoidance involves bending the rules of the tax system to gain a tax advantage that Parliament never intended. It often involves contrived, artificial transactions that serve little or no purpose other than to produce this advantage. It involves operating within the letter—but not the spirit—of the law.

So, assuming that measures that are brought in are consistent with the August 2016 consultation document, what impact might this have on practitioners?

II. Impact of Potential Measures

Perhaps the first point is that the scope of those who may be caught up in such a new regime seemingly (at least on paper) goes beyond those who promote or market aggressive tax schemes. It seems the scope would extend to an adviser giving advice in the context of a transaction, tax planning found to be abusive or, indeed, submitting a tax return, the tax effect of which is subsequently found to be unsuccessful avoidance. The advisers in question may all be considered "enablers."

Whilst there is discussion in the consultation document of a reasonable care defense in the context of the users of tax avoidance, there is no equivalent reasonable excuse safeguard of those falling within the broad definition of "enablers". It may be that the manner in which this evolves is that compliance with the Code will be sufficient to avoid sanction from HMRC. Put another way, those who do not comply with the Code are likely to be in HMRC's sights!

This issue presents a number of concerns or issues. From a practical perspective, the knowledge that an adviser had at any time will commonly be an important factor as to the accuracy and adequacy of advice which they gave. For example, the client's intended use of a scheme or structure may have changed since the time of the advice. The adviser might have advised their client that they could not advise a particular course, which the client nevertheless decided to pursue. An adviser may have made assumptions which were verified by a client but which turned out not to be true, the position of a client may have changed materially since advice was given *and* warnings may have been sounded.

As the Code acknowledges, most professional advisers operate in an environment where they owe clients a duty of confidence, an obligation which is taken very seriously by professional bodies and courts alike. Whilst, when considering the position of an enabler under the new regime, confidential advice might have been disclosed to HMRC as part of an investigation into a client's affairs, it may not have been disclosed. If faced with potential sanctions, an adviser might wish to disclose the advice it gave. The starting point is that the duty of confidence the adviser owes to their client should be maintained. Absent the client's agreement (which may not be forthcoming) or statutory or similar compulsion, only in some limited circumstances can an adviser disclose client confidential information to protect their own legitimate interests (but specialist legal advice should be sought in advance).

Where advice or information held by an adviser is subject to legal professional privilege then that privilege belongs to the client and that privilege can only be waived by the client absent a statutory provision. These are rightly areas of concern to advisers, who may have confidential or privileged information in their possession which sheds very important light on their conduct but which they may not be able to disclose. Tax advisers will want to consult with their General Counsel or lawyers as to their terms of engagement to ease the situation, at least as regards confidential information.

A further consideration for advisers is the availability of insurance. Practitioners will wish to consider whether they have cover in relation to the costs of the defense of proceedings commenced against them under the new regime, and there will be questions (at least) as to whether any penalty is insurable. This will turn on the nature of the penalty, which is currently unclear, and the way regulators respond to this once it is clear. It may also turn on the appetite of the insurance market. The regime, if implemented without significant change, also raises questions for insureds and insurers around the duty of fair presentation and a reasonable search contained in the new Insurance Act.

So whilst many professional bodies and others have urged the government to think carefully about the ef-

fectiveness of the proposed steps, including whether or not they will, in fact, promote HMRC's objectives, practitioners should think carefully about what might happen at the sharp end. Tax practitioners will want to think about their terms of engagement, the clarity and assurances they need from clients to give advice and about the purposes to which their advice may be put or used. They need to consider how they ensure they have an appropriate available document trail. Whilst practitioners do not currently know HMRC's next steps with regard to enablers, they should hope for the best but prepare for the worst. They should carefully consider the PCRT Code and take steps to ensure compliance with it—both in dealings with clients and in documenting their own judgments.

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