President's page, January 2017

Welcomes

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Advisers, not enablers

The CIOT and many advisers were alarmed by the original announcement in August 2016 of a new penalty ‘for those who construct, market, sell or otherwise enable the use of tax avoidance arrangements which are defeated by HMRC.’ The concern wasn’t about the principle of penalising those who market egregious avoidance. It was much more with ensuring that those advising on commercial structures where the tax implications fell into the more complex category did not find themselves facing such significant possible detriment should advice ultimately not prove correct that they could not advise at all. For the majority of advisers, their return for advisory work is an hourly rate and even the largest do not have the financial capacity to bear even a very small risk of paying an amount equivalent to the tax at issue.

There was also a problem with a possible penalty regime extending to financial advisers and others working on a transaction – say, an acquisition – where the prospect of a penalty regime could make the UK a more difficult place to do business.

The CIOT hosted a consultation meeting with HMRC and several of our team attended other meetings with HMRC. The objective was to demonstrate how commercial advice could inadvertently fall foul of the initial proposals. I think we should thus be pleased at the changes made as a result of consultation. The key elements of the new penalty for enablers will be that they:

- apply to abusive schemes defeated by HMRC
- impose a fixed 100% fee based penalty on everyone in the supply chain; and
- apply to advice provided after Royal Assent to the Finance Bill 2017

The second and third points are critical; anyone facing a penalty must have notice of it, so they can modify their behaviour, if necessary. Similarly, penalties should always be proportionate, as HMRC’s own guidance on penalties states.

What then is ‘defeated avoidance’? The consultation response says: ‘The government will define defeated avoidance as arrangements which take an unreasonable position in relation to the legislation. The draft legislation will provide further detail, but the test will be based around the GAAR concept of the double reasonableness. This is a test of whether arrangements entered into could reasonably be regarded as a reasonable course of action. The enablers’ penalty regime will apply where the defeated arrangements meet this test, regardless of whether they are notifiable under DOTAS or whether they are defeated or counteracted by a TAAR, unallowable purpose test, the GAAR or some other statutory rule. This will ensure that the measure does not inhibit genuine commercial transactions. External scrutiny will be provided by the GAAR Advisory Panel, and any penalty HMRC decides to charge having considered the Panel opinion will be appealable. The government recognises too that clear guidance will need to be provided.’

Obviously advisers will need to ensure they have robust procedures around assessing whether or not the GAAR principles could apply to advice. Some may need to take advice from specialists in particular cases. It is helpful for there to be a reference to the GAAR panel, which can give a broader commercial view of the choices put forward in the advice challenged by HMRC. The GAAR is aimed at more extreme cases of avoidance and advising on whether or not a TAAR, or unallowable purpose rule, could apply in a commercial transaction is unlikely to fall within its scope.

The response document also acknowledges the new ethical standards set out by the CIOT and other bodies: ‘The government welcomes the progress made by the seven leading tax and accountancy professional bodies in revising their code of conduct for members, the Professional Conduct in Relation to Taxation (PCRT). The revised code was published on 1 November 2016 (to have effect from 1 March 2017) and sets out, for the first time, 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’.

There are strong parallels with the reasonableness test so, provided members act wholly within the spirit of the ‘Standards’ for tax planning contained in Part 2 of the PCRT, the government would not expect that they would normally be affected by this policy.’

No doubt we shall all need to read the detail again and there may well be drafting points – but for me this outcome demonstrates the value of our engagement with HMRC, where presenting reasonable evidence leads to policy that is workable for tax advisers – and indeed the UK.