



Balancing the Tax System

The last few weeks have certainly been an interesting time in the tax profession. The Budget announcement of a registration process for both direct and indirect tax planning adds a significant extra dimension to the way most of us work. That said, one might also say that nothing has changed. PricewaterhouseCoopers, our clients and the vast majority of practitioners have only ever operated on the basis of full disclosure to the tax authorities. Arguably all that is changing is that such disclosure has to be advanced a little.

What all of us wanted to know from the start of this process was exactly what we had to disclose and when. We have been in the new regime since 18 March and at the time of writing this article we are still waiting for the regulations to clarify what we have to disclose. What we all want, at the end of the day, is a set of workable, practical rules that will allow taxpayers to understand their legal obligations so that they can make appropriate commercial decisions within as certain a tax framework as possible. The disclosure obligations must not impact these fundamentals. The administrative burden on taxpayers and the authorities should be minimised whilst allowing the tax authorities to find what they are looking for. We don't want a system that simply delivers a haystack of disclosure to Somerset House (or should that be the Treasury building?) and leaves the new Avoidance Intelligence Unit floundering in despairing attempts to find the proverbial needle that they are looking for.

The key issues

From the start, there have been several key issues that tax professionals wanted to know:

- Who is a promoter, and thus liable to register?
- What actually needs to be registered?
- What form that disclosure should take? and
- When it has to be disclosed.

Richard Collier-Keywood, UK Head of Tax, PricewaterhouseCoopers, asks some very pertinent questions about the new disclosure rules

Who is a promoter?

The wording of the Finance Bill left the definition of promoter unclear. Certainly one can interpret that it only applies to professional firms but the Inland Revenue has said repeatedly that it sees it as applying to everyone – accountancy-based firms large and small, law firms, the financial sector including financial advisers etc. In my view, it has to have a broad definition. This is because there needs to be a level playing field for advisers. If there is a gap tax planners will gravitate towards it, preventing effective policing.

The issue of Legal Professional Privilege (LPP) has been cited by some as

departments are already deeply concerned about how they are going to identify all the necessary registrations, particularly for financial transactions. Has the Revenue any idea of the volume of treasury transactions a major plc undertakes – all with a tax driver to some extent? Hopefully many of these can be excluded in some sort of 'white list'.

The burden will perhaps be most felt in the financial sector. These businesses are potentially affected in a way that could impact on the core of their activities. For most businesses, minimising their tax costs is a legitimate part of maximising shareholder returns but it is an activity that is not core to the business itself. But for

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meaning that lawyers won't have to – or won't be able to – comply with this new regime. This is something that has been probed carefully with the Revenue and it seems clear that nothing it is asking for will breach LPP, fundamentally because it is not asking for client details. So the lawyers are on the same level playing field.

What needs to be disclosed – balancing burdens on business

The new registration requirements do make some concessions to the need to minimise the administrative burdens on business with the requirement for in-house planning only needing disclosure with the CTSA filing. That is helpful; but many tax

much of the financial sector, tax is integral to what they do. It's not that what they do is 'tax driven'; it's just that tax is a factor, and a significant one, in core parts of the services that they provide.

Finance leasing is perhaps the obvious example, where any transaction is hugely influenced by the tax consequences that result. The prices agreed between the parties will depend on the tax results. In the same way, someone doing equity trading will automatically set prices to have regard to any withholding taxes that are relevant.

Does this make all such transactions registerable under the new regime? After all, tax is a 'main benefit' in many ways.



NEW DISCLOSURE RULES

If so, does this mean that many of our largest City institutions will be registering most of what they do? I'm sure this is not what the authorities want. Their argument is probably that they simply want the 'first scheme' to be registered. After that it's just a question of giving the scheme number out. But that is still a major burden and ignores the way financing ideas mutate faster than the latest flu virus. A number of these financial activities can be provided from a range of territories; if the UK becomes too burdensome then the big financial services companies will reduce the business they do from the UK.

So when it comes to what actually needs to be disclosed, will we be in elephant territory? I have no difficulty in recognising a fully formed elephant, be it in the jungle or on the plains and so I'm confident that I can recognise the fully formed, pre-packaged scheme that forms the core of what the Inland Revenue is looking for.

Where I continue to have difficulty is in understanding exactly when general planning turns into a registerable scheme. Like elephants, this throws up vistas of large grey areas. We do seem to be heading for the situation where it is only when a scheme is devised and taken out to clients that it becomes registerable. But if we are just modifying an existing scheme, how much modification do we have to do before reregistration is necessary? When does the idea that my colleague sketches out on his whiteboard in conjunction with the client become registerable? I think only when I get hold of what has become a fully formed scheme and take it to another client. But all this needs more clarification.

What form should the disclosure take?

Then what format should this disclosure take? The Revenue has indicated that it does not want the 'full Monty'. They have requested, in plain English:

- a description of the scheme; and
- an indication of the legislation in question.

This seems reasonable: the registration process is not about telling them whether the scheme works or not. But I'm still worried about the Revenue coming back and saying to us, somewhat later, 'you didn't tell us quite enough'. Would that therefore qualify us for a £5,000 penalty?

You want it when?

It seems that we will have to register schemes within five days of the trigger date. Now, I am proud of the responsiveness of my colleagues but is five days really a practical limit? The Revenue thinks it is. Its thesis is that if we are



Richard Collier-Keywood

organised to market a scheme, we must have the documentation done to explain it to clients. So all we have to do is copy the Revenue with such materials. That is not unreasonable – if all we did was to deal in packaged schemes. But to me this exposes a lack of understanding by the Inland Revenue of the way the majority of the tax profession works. We don't spend all our time thinking up and selling carefully packaged schemes. How realistic is it to identify the point at which a plan has to be registered in amongst the delivery of continuous client advice? Depending on the breadth of what has to be registered, this will be a significant challenge for PricewaterhouseCoopers and the rest of the profession.

What's it all really about?

The Inland Revenue has said many times that this new system is all about 'transparency'. In fact I believe it is about the Treasury trying to instill a behavioural change to discourage taxpayers from indulging in 'abusive' tax planning as a follow through to the morality campaign. Over the past few weeks, our clients have been increasingly concerned about the prospect of their confidential tax affairs appearing in the press. At the moment the UK has a very good international reputation for fairness and certainty which has resulted in a co-operative and compliant tax culture envied by Tax Authorities across the world. This has been built on a combination of the rule of law, which provides a high level of certainty, and taxpayer confidentiality. No-one will complain about earlier disclosure, providing that taxpayer confidentiality is maintained and there is no attempt to use

retrospective legislation that would impact the UK's reputation for certainty.

Transparency or balance?

There is an additional factor here and one that cannot be ignored; if, as tax advisers, we don't take to our clients ideas for reducing their tax bill, it may be that we can be sued for professional negligence. If you doubt this assertion, look at the developing line of cases in recent years such as *Grimm v Newman* [2000] STC 84, *Sayers v Clarke-Walter* QBD [2002] (2) BCLC 16 and *Little and Others v George Little Sebire and Co* [2001] STC 1065. There is a clear and growing trend with these cases that stresses that advisers are negligent if they don't come up with good creative tax planning ideas. Another gloss is that, following cases such as *Slattery v Moore Stephens* [2003] STC 1379, the client has a right to expect more from the larger, more senior, firms.

The tax authorities need to realise that we advisers do not spend all our time dreaming up artificial schemes. The great majority of what we do is, I believe, not what these provisions are aiming at and they need to be drawn up with this in mind. At the same time, the tax authorities must recognise that clients expect us to help them lower their tax bills. No one wants to pay more tax than they have to. And the fact that it is all too often far from clear what tax provisions actually mean, or that acting in different ways achieves different tax results (think incorporation v unincorporation), is part of what life is all about. If the Government wants to change these fundamentals then legislation will be required.

Conclusion

Whatever people might think, I'm not old enough to remember the forerunner of what is now s 703 being brought in, nor the advent of capital gains tax. But I do remember being told about their impact by people who worked through what seemed to be apocalyptic changes. I have, however, seen the development first hand of much of the *Furniss v Dawson* run of cases and the way that at various times people have predicted that tax planning life was coming to an end. It didn't with any of those; and good tax planning is not likely to disappear as a result of this new registration regime. Instead, providing it is reasonably drawn and the commitment to confidentiality and certainty remain, the registration system will be something we will be able to live and work with and in time will no doubt just be part of the normal fabric of tax planning.