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PCRT Helpsheet B: Tax Advice

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Tax Advice

Introduction

This helpsheet provides guidance on the application of the [PCRT Fundamental Principles and Standards for Tax Planning](#). This helpsheet includes the Standards for Tax Planning, further discussion of the Standards, and FAQs which are designed to illustrate the practical application of the Standards.

Date of this helpsheet - 1 March 2019

The Standards for Tax Planning

1. As the Standards for Tax Planning are critical to any planning undertaken by members they are reproduced here for ease of reference.

Client Specific

Tax planning must be specific to the client's facts and circumstances. Clients must be alerted to the wider risks and the implications of any courses of action.

Lawful

At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law.

Members should draw their clients' attention to where the law is materially uncertain, for example because HMRC is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the case, for example where litigation is likely.

Disclosure and transparency

Tax advice must not rely for its effectiveness on HMRC having less than the relevant facts. Any disclosure must fairly represent all relevant facts.

Tax planning arrangements

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.

Professional judgement and appropriate documentation

Applying these requirements to client advisory situations requires members to exercise professional judgement on a number of matters. Members should keep notes on a timely basis of the rationale for the judgments exercised in seeking to adhere to these requirements.

2. Further discussion on these Standards for Tax Planning is set out below.

Client Specific

3. The risks referred to in this Standard are those which are directly attributable to the planning and could be reasonably foreseeable by the member. There would not normally be a duty to comment on, for example, the commercial risk of the underlying transaction. The obligations of the member to the client continue to be governed by the engagement letter.
4. Where wider risks should be highlighted, the member may either advise on them, or identify them as matters on which separate advice should be sought by the client, depending on the scope of the member's practice and of the engagement.
5. Generic opinions or advice that does not consider the position of specific taxpayers (or a narrowly defined group of taxpayers such as a group of employees of the same company) pose risks. Members are entitled to make reasonable assumptions in giving advice (for example, where it would be reasonable on the facts to assume that the taxpayer(s) is/are UK resident), but assumptions should not be relied upon which are known to be unrealistic or unreasonable. If advice is generic, and/or depends on certain assumptions, this fact, and the need for specific advice to be taken before acting should be highlighted with sufficient prominence to prevent any misunderstandings arising¹. Members should consider including in their advice the potential impact of a change in the assumptions made and/or the circumstances which might require specific or updated advice to be obtained.

Lawful

6. The requirement to advise clients on material uncertainty in the law (including where HMRC take a different view) applies even if the practical likelihood of HMRC intervention is considered low. Clients should be told what would be reasonable, at the time of the transaction, to expect HMRC to believe the application of the law to be (assuming HMRC was fully apprised of all the facts of the transaction). Where the likely view of HMRC is uncertain or not known, the member should include this fact as part of their advice.
7. The fact that the member may disagree with HMRC on a matter is not of itself indicative of behaviour that might breach these standards. A member may reasonably believe that an HMRC view is wrong in law but, if so, the client should be alerted to the fact that HMRC holds a different view of the law and should be advised of the risks and likely costs that might be incurred to determine any dispute.

Disclosure and transparency

8. Disclosure should be made whenever required by law and fuller disclosure must be recommended to clients wherever it is appropriate given a wider relationship or dialogue with HMRC relevant to that client. What is to be disclosed will inevitably reflect a professional judgement considering all relevant facts and law specific to the case in question and what the client consents should be disclosed.

¹ For some suitably qualified members, this might, for example, include the preparation of standard wording for inclusion in contracts, Wills or other documents.

Tax planning arrangements

9. Where a member has a genuine and reasonable uncertainty as to whether particular planning is in breach of this Standard, the member should:
- document the detailed reasoning and evidence sufficiently to be able to demonstrate why they took the view that any planning was not in breach of this Standard;
 - include in their client advice an assessment of uncertainties and risks involved in the planning - see Standard *Lawful* above; and
 - include in their client advice an assessment of the relevant disclosures that should be made to HMRC to enable it, should it wish to do so, to make any reasonable enquiries – see Standard *Disclosure and transparency* above.

Professional judgement and appropriate documentation

10. Members are not required to complete paperwork for its own sake, but they should be prepared to identify, support and where appropriate defend the judgements they made in applying these requirements to their work.
11. Where the judgements made are reasonable, notes taken on a timely basis are likely to be the most convincing way of demonstrating compliance with the principles after the event, to the benefit of the member and the client and to satisfy any wider public concerns.

Guidance

12. The paragraphs and the FAQs below provide guidance for members when considering whether advice complies with the Fundamental Principles and Standards for Tax Planning.

Tax evasion

13. A member should never be knowingly involved in tax evasion, although, of course, it is appropriate to act for a client who is rectifying their affairs.

Tax planning and advice

14. In contrast to tax evasion, tax planning is legal. However, under the Standard members 'must not create, encourage or promote tax planning arrangements 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'.
15. Things to consider:
- Have you checked that your engagement letter fully covers the scope of the planning advice?
 - Have you taken the Standards for Tax Planning and the Fundamental Principles into account? Is it client specific? Is it lawful? Will all relevant facts be disclosed to HMRC? Is it creating, encouraging, or promoting tax planning contrary to the 4th Standard for Tax Planning?
 - How tax sophisticated is the client?
 - Has the client made clear what they wish to achieve by the planning?
 - What are the issues involved with the implementation of the planning?

- What are the risks associated with the planning and have you warned the client of them? For example:
 - The strength of the legal interpretation relied upon.
 - The potential application of the GAAR.
 - The implications for the client, including the obligations of the client in relation to their tax return, if the planning requires disclosure under DOTAS or DASVOIT and the potential for an accelerated payment notice or partner payment notice?
 - The reputational risk to the client and the member of the planning in the public arena.
 - The stress, cost and wider personal or business implications to the client in the event of a prolonged dispute with HMRC. This may involve unwelcomed publicity, costs, expenses, and loss of management time over a significant period
 - If the client tenders for government contracts, the potential impact of the proposed tax planning on tendering for and retaining public sector contracts.
 - The risk of counteraction. This may occur before the planning is completed or potentially there may be retrospective counteraction at a later date.
 - The risk of challenge by HMRC. Such challenge may relate to the legal interpretation relied upon but may alternatively relate to the construction of the facts, including the implementation of the planning.
 - The risk and inherent uncertainty of litigation. The probability of the planning being overturned by the courts if litigated and the potential ultimate downside should the client be unsuccessful.
 - Is a second opinion necessary/advisable?
 - Are the arrangements in line with any applicable code of conduct or ethical guidelines or stances for example the Banking Code, and fit and proper tests for charity trustees and pension administrators?
 - Are you satisfied that the client understands the planning proposed?
 - Have you documented the advice given and the reasoning behind it?

HMRC guidance

16. HMRC publications in respect of Tax avoidance and Tax evasion can be found on Gov.uk.

While every care has been taken in the preparation of this guidance the PCRT Bodies do not undertake a duty of care or otherwise for any loss or damage occasioned by reliance on this guidance. Practical guidance cannot and should not be taken to substitute appropriate legal advice.

