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SOLICITORS WARNED ON SDLT AVOIDANCE

The solicitors regulatory body has warned its members not to get involved in stamp duty land tax avoidance schemes

Solicitors have been warned by their regulatory body, the Solicitors Regulation Authority (SRA), against giving advice on stamp duty land tax (SDLT) avoidance. The SRA has gone as far as saying that solicitors risk disciplinary action if they don't comply.

The warning gives the strong impression that the SRA considers that by getting involved in such schemes solicitors would be harming the integrity of their profession.

Although the warning does not form part of the solicitors' handbook on ethics, the SRA asks solicitors to consider whether any SDLT schemes they get involved in would be compatible with the principles laid out in the handbook. In particular:

- integrity
- independence
- best interests of the client and
- behaving in a way that maintains the trust the public places in you and the provision of legal services.

The SRA describes a SDLT scheme as "a scheme which is designed to reduce or eliminate the correct level of stamp duty payable on a property". The word "correct" is very telling.

It goes on to say "in view of the level of concern on the part of HMRC and the fundamental importance of integrity in the provision of legal advice, we are likely to look very closely at the conduct of any firm that is actively involved in these schemes".

COMMENT

It is clear that a number of artificial schemes exist on stamp duty avoidance. Tax avoidance is not currently held in high regard because of the current economic situation. It may be for this reason that the SRA wants to ensure the public image of solicitors is not tarnished by activities that some may consider not to be in the public interest.

HMRC DECIDES SMARTPHONES CAN BE TREATED AS MOBILE PHONES

Until now it has been unclear whether the new generation of smartphones, such as Iphones and Android phones, are to be treated as mobile phones, personal digital assistants (PDAs) or personal computers for taxable benefit purposes.

In its recent Revenue and Customs Brief (02/12) HMRC has now laid this issue to rest.

HMRC states in the Brief that *"for smartphones as configured and understood at the start of 2012"*… it *"now accepts that smartphones satisfy the conditions to qualify as 'mobile phones'. Developments in PDAs following the penetration of smartphones into consumer markets from late 2007 onwards mean that many modern consumer PDAs are now also likely to be smartphones. But this will not apply to devices that are solely PDAs."*

Before the issue of this Brief HMRC had considered smartphones as being treated in the same way as PDAs, based on the understanding that smartphones were not devices that are designed or adapted for the **primary purpose** of transmitting and receiving spoken messages and used in connection with a public electronic communications service.

Having changed its stance, HMRC is now inviting claims for repayment of Class 1A NICs paid by employers who entered the provision of a smartphone on form P11D.

Information provided to HMRC by employers will be used to repay any income tax overpaid by employees in respect of the benefit. However, employees whose employer does not provide the relevant information are invited to contact HMRC direct.

The time limit for claiming repayment is four years from the end of the relevant tax year, but HMRC is allowing extra time for 2007/08 so that claims have to be made before 31 July 2012.

THE FOREIGN ACCOUNT TAX COMPLIANCE ACT

Five EU countries (see below) have signed an agreement with the US to help it implement the Foreign Account Tax Compliance Act (FATCA) when it comes into effect in January 2013.

FATCA requires foreign financial institutions (FFIs) to report all of their American clients' dealings to the US Internal Revenue Service (IRS). The FFI must also block payments to American clients and to other FFIs if ordered to do so by the IRS; and must close accounts belonging to individuals regarded by the US as “delinquent”. Banks that refuse will have 30 per cent tax deducted from their earnings from US investments.

The legislation has attracted international criticism, partly because of the compliance costs and partly because it would require banks to break the law in some jurisdictions. In particular, banks in EU member states are bound by the 1998 EU Data Protection Directive, which includes a general ban on the transmission of sensitive personal information to the US.

But recently the governments of Germany, France, Spain, Italy and the UK agreed to collect this client account information from banks and pass it on to the US tax authorities on the banks' behalf.

The joint statement issued by the six governments commits the European countries to implement legislation "requiring" FFIs in their jurisdiction to collect FATCA information on bank clients. It is not clear whether banks will be permitted to opt out of this scheme if they elect not to comply with FATCA. The joint statement suggests that they will not be.

Banks in these five countries that agree to check for American beneficial ownership of assets and to supply this information to their domestic governments will be treated by the IRS as compliant with the FATCA. They will not have to sign an agreement with the IRS (although they will have to register with it) and they will not be subject to the 30 per cent withholding tax imposed by the IRS on non-FATCA-compliant banks. Nor will they be required to block payments to "recalcitrant" individuals, or collect US withholding taxes from other banks in the jurisdiction.

In return the US has committed itself to collect information on US bank accounts operated by European residents and automatically pass it to the relevant national tax authority. This so-called "reciprocity" arrangement would be based on the countries' existing bilateral tax treaties.

The European Commission issued a statement approving the agreement and noted that FATCA compliance could have cost European multinational banks as much as $US100 million if they had had to achieve it individually. The Commission also encouraged other EU member states to come to similar arrangements with the US.

The US Treasury stresses that it is not contemplating an exemption from FATCA for any jurisdiction.

The adoption by the US of this reciprocity tactic appears to legitimise the whole thrust of the FATCA which, without this approach, looks overbearing and totally one-sided.

THE CONTRACTUAL DISCLOSURE FACILITY

On 31 January 2012 HMRC launched its contractual disclosure facility (CDF). The CDF is only suitable for people who want to admit to tax fraud. It is not for people who only want to tell HMRC about errors, mistakes or avoidance schemes where fraud is not involved.

Individuals can voluntarily admit to fraud or may be asked to respond to a letter from HMRC because it suspects fraud has been committed. HMRC's letter will offer the taxpayer a CDF contract, and it will include an acceptance letter, a denial letter, a disclosure form and a copy of Code of Practice 9.

Under the CDF, there are 3 options:

1. Owning up to fraud: the CDF route
2. Deciding not to own up to fraud: the denial route
3. Not replying to HMRC: the non-cooperation route

Owning up – the CDF route

Taxpayers who have committed fraud and complete the acceptance letter are entering into a CDF contract with HMRC which means that both parties are agreeing to stick to the terms and conditions of the contract.

HMRC will agree not to criminally investigate and prosecute the fraud that is disclosed.

The taxpayers will agree to

- tell HMRC about all the tax deliberately evaded, with no exceptions;
- give HMRC details of all the tax evaded within 60 days of being offered the contract;
- sign a statement to say that accurate and complete details of the tax fraud have been provided;
- pay all taxes, duties, interest and penalties due; and
- stop any fraud immediately

If the taxpayer formally discloses everything not only will he not be prosecuted but HMRC states that any penalties will be closer to the lower penalty levels.

The denial route

Those who do not wish to admit fraud (whether or not a fraud took place), should sign and return the CDF denial letter within the 60 day time limit (see below). Denying fraud means that HMRC can begin a criminal investigation at any time, and the denial letter can be used in court as evidence of deception.

The non-cooperation route

Not responding to a CDF letter could lead to a civil or criminal investigation.

Timescales

The taxpayer has 60 days to decide whether or not to tell HMRC about tax fraud. The 60 day period will run for 60 calendar days after they have received the CDF letter from HMRC.

During those 60 days there will be no contact from HMRC unless the taxpayer contacts them first. HMRC can still take action against goods or possessions, start or continue debt collection or any other action that is needed as part of HMRC's legal obligations.

PRE-OWNED ASSETS TAX GUIDANCE 6 NOW AVAILABLE ON HOME LOAN SCHEMES

HMRC has updated its guidance about pre-owned assets tax and home loan schemes as explained in the HMRC Trusts and Estates Newsletter of December 2011

This guidance concerns the inheritance tax and pre-owned assets tax consequences of "home loan" or "double trust" schemes.

Over the past years HMRC has issued a number of guidance notes on this subject and the latest view is that none of the variants of the scheme do in fact avoid the gift with reservation of benefit (GWR) rules.

At the time the pre-owned assets tax (POAT) charge was introduced in 2005 the view was that if these original schemes worked for inheritance tax avoidance purposes (ie. they did not amount to a gift with reservation) then they would be caught by POAT and so be subject to income tax. Initially, HMRC considered that only some of those schemes were caught. In due course, following receipt of legal advice, HMRC changed its view that none of the schemes are successful to circumvent the GWR rules. This means that they should not be subject to the POAT rules as these provisions only bite where the scheme is successful in avoiding the GWR rules.

This issue is currently subject to litigation and so we have to await the decision of the Tribunal on whether the view of HMRC is correct or not.

The purpose of the new guidance note is to set out the recommended action for those who are paying the POAT charge on the basis that they believe that the original scheme avoided the GWR provisions. In avoiding the GWR provisions the original scheme was effective to take the value of the property that was sold to the trust, and in which the taxpayer retained a life interest, out of the taxpayer's estate for IHT purposes.

HMRC's view is that those who are currently paying the POAT charge should continue to pay it. It confirmed that if HMRC's view prevails in the Courts, then all the income tax that has been paid under the POAT charges will, subject to a claim being made, be repaid with interest irrespective of any time limits for repayment that might otherwise apply.

As for the payment of inheritance tax should the settlor of the scheme die in the meantime, HMRC's recommendation is that personal representatives should pay the tax that they consider is due (which in practice will mean the tax calculated on the basis that the GWR provisions do not apply). HMRC further states that in such a case if the tax paid is less than the full amount that

would be payable should their view prevail, the personal representatives may choose to make a payment on account of the additional IHT that will be due so as to reduce future interest charges. Any subsequent repayment of income tax will form an additional asset of the estate.

HMRC also confirmed that where an estate has been settled already on the basis of HMRC's previous view of the law, then neither the IHT nor the POAT charge will be re-opened.

It is to be hoped that the uncertainty caused by the ongoing litigation is resolved soon. However, as yet there does not appear to be any indication as to when the Tribunal will arrive at a decision on this issue which is currently subject to litigation as mentioned earlier.

IFS GREEN BUDGET PUBLISHED

The IFS published its Green Budget on 1 February.

Of particular interest to financial planners will be the chapters on

- the impact of the 50% additional rate tax
- tax reform and growth

In relation to the 50% tax rate the IFS summary states:

"There has been much discussion about the impact on tax revenues of the 50p income tax rate above £150,000 that was introduced in 2010/11, but, as we lack robust evidence, this is currently a debate characterised by much heat and little light.

The impact of the 50p tax rate on revenues will depend not just on how many taxpayers there are with incomes above £150,000, but also on how taxpayers react to the increased rate of tax (the so-called behavioural response).

The HM Treasury (HMT) estimate of how much revenue the 50p rate will raise assumes a lower level of behavioural response than previous UK and US studies have found, and does not allow for any impact on indirect tax revenues. This might imply that the 50p rate is raising less than HMT was expecting. On the other hand, the HMT estimate does not take account of the possibility that more tax will be raised later on, or through other taxes such as capital gains tax.

It is important not to fixate just on whether any revenue is raised. Even if HMT's estimate is right, there will be a great deal of avoidance activity and changed economic behaviour. There are costs to this and there might well be better ways of raising a similar amount of revenue from a similar group of people.

Experience from reforms to higher rates of tax in other countries suggests that most of the behavioural response to the 50p rate will take the form of increased (legal) tax avoidance. With or without the 50p tax rate, an effective way of increasing the tax take from high-income individuals would be to remove opportunities for tax avoidance.

The Chancellor has asked HM Revenue and Customs to estimate the impact of the 50p tax rate on tax revenues and to report to him in time to inform his Budget 2012 decisions. The first shreds of evidence will appear shortly, once tax returns for the 2010/11 tax year have been processed. However, this will tell us, at most, only the very short-run impact of the 50p tax rate on revenues; the true impact in the long run could be higher or lower. If the future of the 50p rate is to be determined on the basis of evidence about its impact, then Budget 2012 will be too soon to form a robust judgement."

The impact of high tax rates on taxpayer behaviours is one that causes a great deal of debate. At a simple everyday level, though, this is an important issue for advisers and their clients. If rates are likely to fall in the future and subject, of course, to commercial considerations, deferring taxable income and accelerating qualifying expenditure would be worth considering on tax grounds.

STEP WARNS OF SCHEMES DESIGNED TO AVOID THE COSTS OF CARE

It might be possible for a person to avoid the local authority charge for the costs of care by transferring their home into trust. However Michael Young, the Worldwide Chairman of STEP England and Wales regulatory group, has issued a warning over using such schemes, particularly as the welfare reform system is under review. This warning was based on evidence of advisers taking advantage over the uncertainly regarding welfare reform.

COMMENT

Any client contemplating entering a scheme designed to avoid the costs of care needs to be appraised of all the potential downsides and pitfalls of such a course of action – in particular that success is not guaranteed and that the future position on care funding may change.

DISCLOSURE: UPDATED GUIDANCE

HMRC has issued updated guidance notes, running to 115 pages, on the disclosure of tax avoidance schemes (DOTAS). All the relevant taxes (income tax, corporation tax, CGT, NIC, SDLT and IHT) are covered.

HMRC states that the guidance notes have been rewritten to incorporate supplementary guidance published between November 2010 and April 2011 and to clarify areas where previous advice may have been unclear.

The main change appears to be an amendment to HMRC's definition of "reasonable excuse" to provide greater clarity following a number of Tribunal judgements which criticise HMRC's use of the word "exceptional".

The DOTAS rules are quite complicated. Anyone wishing to either design a tax avoidance scheme or disclose one should take professional advice on DOTAS first.

COMPANY CAR ADVISORY FUEL RATES

HMRC has published revised advisory fuel rates which took effect from 1 March 2012. The new rates may be used to negotiate dispensations for mileage payments for business travel in company cars, or where employees are required to repay the cost of fuel used for private travel.

For one month from the date of change, employers may use either the previous or new current rates as they choose. Employers may therefore make or require supplementary payments if they so wish, but are under no obligation to do either.

Engine Size	Petrol	LPG
1400cc or less	15p	10p
1401cc – 2000 cc	18p	12p
Over 2000 cc	26p	18p

Engine Size	Diesel
1600cc or less	13p
1601cc – 2000 cc	15p
Over 2000 cc	19p

Petrol hybrid cars are treated as petrol cars for this purpose.

HMRC TO CHASE TAX RETURNS OF HIGHER PAID

Without giving a lot of detail HMRC recently announced that sometime this year it will launch a campaign to track down missing tax returns. What is more, it states that the campaign will initially be aimed at those paying tax at the highest rates.

It is never wise to wait for HMRC to catch up with you if you have not made a tax return when you ought to have done so. Interest and penalties should be a deterrent. Remember HMRC will not accept the excuses “I didn’t realise” and “I forgot”.

INCOME WITHDRAWAL RATE FOR MARCH 2012

The appropriate gilt yield, used to determine the ‘relevant annuity rate’ from HMRC’s tables for an adult member commencing income withdrawals (or reaching an income withdrawal review date), in March 2012 is 2.5%.