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HM Revenue & Customs
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For the attention of Philippa Staples

By email:

Philippa.Staples@hmrc.gsi.gov.uk

31 August 2011

Dear Sirs

Revenue Law Committee response to Consultation Document on High Risk Avoidance Schemes

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the consultation document on high risk avoidance schemes has been prepared by the CLLS Revenue Law Committee.

General comments

We understand that, in summary, the proposals aim to deter the implementation of schemes that do not achieve the desired tax advantage they purport to achieve and instead seek to obtain a cash-flow advantage for the relevant taxpayer. We note from the outset that such arrangements are usually not implemented for cash-flow reasons, as the cost of implementing such schemes (including the cost of any penalties or interest) is usually high and the current level of interest rate does not provide an incentive to incur such high costs of implementation (as explained below).

In any event, we consider the stated objective of nullifying any cash-flow advantage obtained where a taxpayer effects arrangements within the scope of the proposals is not

achieved by the proposals. This is particularly the case given the current level of interest rates, since there is seemingly little or no cash-flow advantage to be obtained by those who utilise a scheme within the scope of the proposals.

Responses to the questions posed by HMRC

Listing a high risk scheme

Question 1: Do you agree that the taxes listed are the right taxes to include (in the primary legislation providing the power to list a scheme)? Should any taxes be added or deleted from the list, and if so why?

We consider the current proposals unnecessary given the scope of powers already available to HMRC under legislation (and particularly TMA 1970). For example, HMRC can enquire into a tax return (section 8(2) TMA 1970), ask for further information (Finance Act 2008, Schedule 36) and state its view on the amount of tax payable (section 28A TMA 1970).

In addition, the proposals state that "firm independent legal advice" will be obtained as one of the criteria to determine whether a scheme should be listed. We consider that: (a) there may be some dispute where a taxpayer has an opinion from Counsel which is favourable to its position (thereby potentially expending revenues in the course of litigation), and (b) it will be difficult to obtain such "firm" opinions in areas such as SDLT schemes where there is a lack of case law.

Question 2: Do you agree with the proposed criteria for listing a scheme? If not what should the criteria be?

We consider the criteria at paragraph 3.7 of the consultation document to be too wide in scope. Terms used in paragraph 3.7 of the consultation document, such as "one of the main purposes", "might" be entered into for a tax advantage, and "unlikely" to be entered into unless there was a tax advantage, are inherently uncertain. We also consider that whether these criteria apply will be difficult to judge (which is clearly against the intentions of HMRC). This is particularly evident in the last bullet point which refers to HMRC's belief, which may not correspond with the actual position under law.

Question 3: Do you consider that the safeguards described are sufficient to ensure that schemes listed are firmly targeted on high risk tax avoidance? If not, what further safeguards would you suggest?

Our concerns in relation to the first safeguard are noted above. In addition, unless HMRC is under an obligation to publish its legal advice and to obtain advice of senior counsel (i.e. of at least 10 years standing), we do not consider that this mechanism will act as an adequate safeguard.

In relation to the second safeguard, we doubt whether this is practicable given HMRC's desire to list schemes quickly and we would also welcome further information regarding the steps to be taken regarding maintenance of confidentiality. In any event, we consider that the second safeguard should not be used in place of the first safeguard.

We agree with the concept of the third safeguard.

Reporting the use of a listed scheme

Question 4: Do you believe that informal consultation would be feasible in the circumstances described? If so, what form might it take and how long would it take?

Please see our general comments in this response. We have no further comments on this question.

Question 5: Do you agree with the proposed time and manner of reporting a listed scheme number?

Please see our general comments in this response. We have no further comments on this question.

Question 6: Do you agree with the proposed penalty model for failure to report the use of a listed scheme?

Please see our general comments in this response. We have no further comments on this question.

Question 7: Can you suggest ways to avoid requiring a listed scheme user to report both the SRN allocated under DOTAS (if there is one) and the listed scheme number?

We do not consider it necessary to establish a system which is independent of the DOTAS system, and as stated above, we consider that the current powers of HMRC provide an efficient method of seeking to deal with these avoidance schemes.

Question 8: Do you agree that HMRC should inform promoters and users when it is satisfied that a scheme disclosed under DOTAS is a listed scheme? If so, what would be the best way of doing this?

We have no specific comments on this question.

Payment of the tax in dispute

Question 9: Do you agree with the general principle, described in Chapter 5, governing the design of the additional charge?

As noted above, the basis of the current penalty and interest regime should be satisfactory to address HMRC's concerns (and in particular to ensure that taxpayers using high risk tax avoidance schemes do not obtain an unfair advantage (for cash-flow reasons) over those taxpayers who do not use such schemes).

HMRC's proposed charge appears to be in addition to the existing interest charge (reflecting a penal nature rather than ensuring that no unfair advantage is gained by those taxpayers utilising avoidance schemes). In addition, as the proposed charge is calculated as x% of the tax underpaid, it appears that "x" is likely to be additionally penal if it is related to the funding rate, which may not equate to any cash-flow benefit.

Whilst it is provided that taxpayers will have a right to appeal a notice relating to such charge, little detail is provided regarding the extent of such right (e.g. whether there will be a right to appeal against HMRC's view of the cash-flow benefit obtained). In addition, we query how this system will operate in relation to upfront payments. In particular, it appears that the upfront payment applies at the time the amount of tax payable is determined by HMRC and a notice is issued, instead of when the relevant taxpayer's

right of appeal in relation to the notice expires. Consequently, we presume that should a taxpayer's appeal be successful, the same x% (reflecting cash-flow cost) will apply in calculating the repayment amount.

Question 10: Do you agree with the model described in Chapter 5 for the additional charge? If yes, to what periods (days, months, quarters etc) should it apply to? If no, please suggest your preferred alternative model.

Please see our general comments in this response. We have no further comments on this question.

Question 11: What would be the best way to ensure a fair outcome for all individuals who use a listed scheme in circumstances described in Chapter 5?

Please see our general comments in this response.

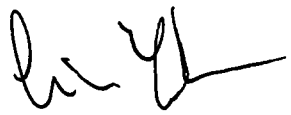
In addition, paragraph 5.10 of the consultation document notes that "[i]t is possible that even if a scheme is listed quickly once HMRC becomes aware of its existence (using the procedures described in Chapter 3) some users may implement the scheme before it is listed. The Government wishes to ensure that all individuals who use the scheme in such cases are treated fairly and equitably". We consider that the best way of obtaining a fair outcome here is to ensure that if a scheme was not listed at the time when the taxpayer filed its return, then the proposals will not apply.

Taxes Impact Assessment

Question 12: Do you have any comments upon the initial taxes impact assessment?

No estimate is provided regarding the impact on the Exchequer, which makes it difficult to assess the benefit of the proposals. This is of particular concern given the assessment suggests that the proposals will only impact "those participating in aggressive tax avoidance schemes" but we consider the proposals will impact those participating in simpler small scheme transactions, especially since no *de minimis* is provided in relation to the size of the tax concerned.

Yours faithfully,



Simon Yates
Co-Chair
City of London Law Society Revenue Law Committee

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