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By email: philippa.staples@hmrc.gsi.gov.uk

Dear Sirs

Revenue Law Committee response to the 23 July 2012 Consultation Document: Lifting the Lid on Tax 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 has been prepared by the CLLS Revenue Law Committee.

General comments

We have always considered that the primary focus of the DOTAS regime should be tax avoidance schemes which are suitable for mass marketing. As the potential scope of disclosable matters is widened (generally justifiably), our view is that this becomes more important still. We consider that some form of mass marketability test should need to be satisfied as a necessary condition for the operation of many aspects of the proposed extensions to the DOTAS rules, and we have flagged throughout our comments where we feel this is most important.

We also consider that the review of the DOTAS process should be more closely integrated with the ongoing work on the GAAR. It is currently proposed that the GAAR will be subject to self-assessment, although in our view this is self-evidently unworkable and we understand that this aspect of the GAAR is likely to be changed. Our view is that the GAAR should not apply to structures which are not required to be disclosed under DOTAS (and hence also that the GAAR should only apply to taxes within the DOTAS regime). If this is adopted as a policy, then the concern over the

identification of schemes to attack using the GAAR which led to the self assessment suggestion is addressed through the requirement for taxpayers to include scheme numbers on their tax returns.

If this view is shared it is necessary to review the DOTAS rules with this in mind. In particular the question of which aspects of the rules should be limited to mass marketed schemes comes into acute focus, as a GAAR should be able to apply to a one-off piece of egregious planning as well as to a mass marketed one. We have borne this in mind in our suggestions as to which aspects of the DOTAS rules should be limited to mass marketed schemes.

Perhaps relatedly, the original intention of the DOTAS rules was to catch "new technology". Old structures which were well known in the market (and to HMRC) were not targeted, not least as if they had been this may have led to a volume of disclosure which would have been excessively burdensome for both HMRC and taxpayers. We do not believe that this focus should change materially, although we would acknowledge that in the world of SDLT in particular many promoters have in the past been able to avoid disclosure on this basis.

Finally, although it is not a point specifically raised in the consultation document, we would repeat a point which we have made in responses both to the GAAR consultation and to consultations in the field of SDLT. We cannot understand why disclosed SDLT schemes are not given DOTAS numbers which taxpayers can then be required to include on land transaction returns. This is an extraordinary lacuna in the DOTAS system and, especially given that the SDLT enquiry window is relatively short, our view is that it may be costing the Exchequer a genuinely significant amount per annum due to resulting failures to identify and challenge schemes of questionable merit.

Responses to questions

Q1: Do you have any comments on the programme of work suggested in Chapter 3 for improving public information about tax avoidance arrangements and the risks associated with using them?

Q2: Do you have any suggestions for improving the quality of information about tax avoidance?

Overall, in circumstances where HMRC's resources are very thinly stretched, we do not think that this programme of work is an optimal allocation of those resources. That is not to say that we think it would be valueless, but our strong suspicion is that far greater benefits could be attained by redirecting resources to other areas.

We suspect that the vast majority of users of tax avoidance schemes know exactly what they are doing. Some schemes may be over-sold by promoters, but even there when taxpayers are of a mind to participate, we suspect that any public hostile comment by HMRC would be met by an attitude along the lines of "they would say that, wouldn't they". Users of tax avoidance schemes hardly expect HMRC to embrace them enthusiastically, and increased public evidence of HMRC hostility is unlikely to change many potential scheme participants' minds.

We do not think it is realistic to expect the advisory community to share information about tax avoidance schemes with HMRC. Quite apart from confidentiality conditions imposed by promoters, lawyers and accountants (who will form a great proportion of the relevant advisers) have professional duties of confidentiality to their clients.

These duties of confidentiality are critical to the adviser/client relationship, and we would resist most strongly any suggestion that they should be qualified or watered down.

We are very concerned at the suggestion that a mis-selling type regime might be introduced for schemes that "patently do not work". In order for a sanction at that level to be appropriate, our view is that a scheme would need to amount to tax evasion: ie it required deliberate non-disclosure to be effective. In such circumstances a promoter endorsing it could almost certainly be reported to their professional body for misconduct, if they are a member of a regulated profession. Perhaps in such extreme cases the possibility of a mis-selling type sanction might also be appropriate, although for regulated promoters it is difficult to see what it would add.

The next category of schemes to which such a measure might apply are those where a very aggressive interpretation of the law is needed in order to conclude that the scheme is effective, but where an adviser has nonetheless given an opinion to the effect that the scheme works. Good examples of this are the SDLT sub-sale schemes post-introduction of s.75A Finance Act 2003. Many member firms of this Committee took the view that many of these schemes "patently did not work", but they were nonetheless implemented in large numbers backed by the opinions of Counsel and other advisers (in many cases going unchallenged by HMRC despite full disclosure of the position being taken being made along with the relevant land transaction returns). However frustrating it may be for HMRC (and indeed for those advisers that take a more cautious view of the law and so lose work) that such schemes continue to be promoted, we do not consider that some kind of mis-selling sanction is appropriate in such cases.

Given the experience with SDLT sub-sale schemes, it must also be absolutely clear that there can be no question of any mis-selling or other sanction against a promoter who duplicates a scheme which HMRC has previously neglected to challenge despite full disclosure of its details being made available to them.

Our view would be that a better response would be for HMRC to raise the conduct of advisers who routinely provide overly aggressive opinions which are held to be wrong by the courts with the appropriate professional bodies as involving misconduct. Put simply, an adviser who consistently gives advice which proves to be negligent – whether in the context of tax avoidance schemes or otherwise – deserves to answer to his regulator.

Q3: Do you agree that the options suggested in Chapter 4 for widening DOTAS would be feasible ways to achieve the described objectives?

We support the proposal that HMRC should be able to require greater detail of disclosed schemes. However, this is an area where we feel very strongly that the rules should be limited to mass marketed schemes. An adviser engaged in bespoke tax advice will sometimes feel obliged to make a DOTAS disclosure on a very conservative basis in order to protect its own position: such an adviser should not face a potentially protracted discussion with HMRC as to the detail of his advice. The particular concern expressed here is whether HMRC's response should be legislative or operational: we would suggest that the mass marketability of a scheme is one of the most important factors in that decision. A genuinely one-off piece of planning is very unlikely to merit a legislative response.

We also support the extension to the number of parties to be identified, although again only in the context of mass marketed schemes. In particular it seems inappropriate to us for HMRC to be able to obtain details of unconnected counterparties involved in bespoke tax planning.

We have commented in response to previous consultations that we support the introduction of personal liability for promoters who do not comply with their DOTAS obligations, although again only in the context of mass marketed schemes. Our perception is that it is only in the case of such schemes that the kind of promoter behaviour identified in the consultation document is seen.

On the question of "reasonable excuse", our view is that an opinion provided by a qualified and practising lawyer or accountant that a scheme is non-disclosable should be sufficient. Such an adviser will be subject to a regulatory professional body so, as in the case noted above, it will be open to HMRC to report them if they engage in "misconduct", ie essentially persistent negligence or worse. Advice given by an unregulated adviser should not form the basis of a "reasonable excuse". However, in this context, it should not be "reasonable excuse" that advice has been obtained where not all material facts were addressed in that advice: it is clear from the personal experience of members of the committee that some schemes are promoted in a form which is subtly but importantly different from that put to the relevant advisor whose opinion is being used to back the scheme up, or alternatively where key points have been assumed rather than analysed in the supporting legal opinions.

We agree that where a given promoter is found to have failed to comply with their obligations under DOTAS, it should be possible to impose more onerous obligations on them in future. Again, though, our view is that this sanction should be confined to promoters of mass marketed schemes.

Q4: Can you suggest alternative options for achieving the same objectives?

As noted in the response above, our view is that in dealing with many of the issues the most appropriate route would be for HMRC to approach advisers' and/or promoters' professional bodies where an adviser or promoter is considered routinely to be advising in a manner which constitutes misconduct.

We are conscious that this raises the issue of favouritism of the professions – should it be the case that clients should only be protected from penalties and so forth where they have been advised by regulated professionals? Whilst we can see that this issue could be seen as difficult, our view is that given the context this would be an effective way of limiting the activities of the kinds of advisers and promoters who are less concerned with proper compliance.

Q5: Would the proposed changes to Hallmark 1 (paragraphs 5.16 to 5.18) be proportionate and effective?

We doubt that the proposed change in 5.16 (moving from a requirement that the specific promoter would want to keep the scheme confidential to a requirement that there be a reasonable belief that any promoter would want to do this) would have any effect. We suspect that in practice a promoter that was itself relaxed as to confidentiality would easily convince itself that others would be too.

However, we think the changes in 5.17 and 5.18 are sensible and would be effective.

Q6: Would the proposed changes to Hallmark 2 (paragraph 5.22) be proportionate and effective?

We have the same reservation as that applying to paragraph 5.16. We doubt that in practice this change would make any difference.

Q7: Would the proposed safeguard (paragraph 5.27) address concerns about catching ordinary business start-ups?

Yes.

Q8: What types of benign tax planning around corporation tax losses might the proposed change (paragraph 5.34) catch inadvertently?

It is difficult to identify in advance all circumstances which might be caught, since by its nature benign tax planning is likely to be bespoke in nature (save in the limited circumstances discussed in response to Q9 below). Our view is that the corporate loss hallmark should share with the individual one the need for a promoter to expect more than one participant to use the same, or substantially the same, scheme. We can see no policy reason to distinguish between corporates and individuals in this regard, and if this approach were adopted then in our view the concern that benign planning might be caught will be substantially eliminated.

Equally it might be useful here to frame the hallmark such that it caught situations where a relief arising was disproportionate to the taxpayer's investment, in circumstances where it could not reasonably be said that that was consistent on the policy or principles of the relevant legislation.

Q9: Would a hallmark based on the characteristics above (paragraphs 5.44 to 5.46) be workable?

We have real concerns with the introduction of this hallmark.

The disguised remuneration rules are deeply flawed. Although some improvements were made in response to consultation, the rules still apply to a large number of situations which as a policy matter are not intended to be attacked. In consequence it is very common for structuring to be adopted in benign cases to avoid the inadvertent application of the rules. There should be no question that this sort of planning should give rise to DOTAS disclosures. A mass marketing condition would help, although would not necessarily address the problem completely as there are already a large number of identified benign scenarios with recognised "fixes" which member firms routinely recommend to clients to stop the disguised remuneration rules applying in cases where as a policy matter they should not.

Our view is therefore that structuring to avoid the application of the disguised remuneration rules should only be disclosable if there are any of the more general hallmarks of avoidance present (confidentiality, premium/contingent fees etc). And if those hallmarks are present, the structuring will be disclosable anyway assuming the other changes suggested in the document are adopted, as other hallmarks will be present. No specific disguised remuneration hallmark would therefore be necessary.

Clearly the best result would be to target the disguised remuneration rules properly, but until this is done we do not think it appropriate or workable to have a hallmark specific to them.

Q10: Would a "but for" test (paragraph 5.54) be reasonable for determining whether a financial product is an active ingredient of an avoidance scheme or merely incidental to it?

Even a "but for" test may give rise to issues: if a scheme were to need cash to be provided for a short period and this cash was borrowed (but the fact it came from a loan was not necessary to the tax analysis), could the tax advantage not have been obtained "but for" the loan if the cash could not have been obtained any other way as a commercial matter?

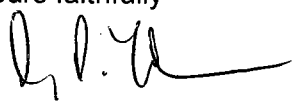
Q11: Would filters based upon standard products or the amount of the tax advantage (paragraph 5.56) be workable? If not, what are the alternatives?

Generally we are concerned as to whether a financial products hallmark is necessary at all. It is likely to be very difficult to scope out the good from the bad, and on the assumption that the general hallmarks are broadened as discussed elsewhere in the document the need for more specific ones is rather less obvious.

In particular in this area there is a real danger that the proposed hallmark is so broad that advisers may innocently overlook that there may be a DOTAS reporting obligation, leading to consequent reputational damage as well as exposure to penalties. At present one instinctively knows when one is in DOTAS territory, but with a hallmark of this breadth that will no longer be the case. Our view is that it will likely lead to a much greater volume of disclosures of non-offensive planning and an increase in innocent non-compliance, neither of which is a helpful result.

If there is to be a specific hallmark, we believe an additional filter is necessary, and we believe that it should be along the lines of a mass marketing test. Absent this, and given the limitations of the "but for" test noted above, our view is that there will be too much scope for benign, bespoke planning to be caught. However, even with a mass marketing filter there may still be a concern that benign situations such as offering loan note alternatives on public takeovers might be caught.

Yours faithfully



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

THE CITY OF LONDON LAW SOCIETY
REVENUE LAW COMMITTEE

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