TAX AVOIDANCE SCHEMES – A SMALL PRACTITIONER'S VIEW

feature

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Accountants can find themselves in a difficult position if their clients are eager to engage in "tax reduction". Some are worried that they will be legally liable if they do not comply. But accountants do not have to advise on tax schemes and no one can force them to do so.

I have made no secret of my dislike of complex avoidance schemes throughout my career as a lecturer and writer. That dislike is rooted in my belief that if a client cannot understand the full purpose of a series of transactions and how they relate to his business or personal life then he should not be entering into them.

The advice I deliver through my practice is aimed at supporting my clients to grow their businesses, making use of available tax reliefs that are appropriate to them. If I am asked for advice about "tax reduction", as I have been this year, I am firm. Tax reduction is not my area of expertise, and should a client wish to take advice elsewhere, then he is welcome to leave me. It is a stance that is perhaps easier for me to take than many of my colleagues – I have more than one business, and my practice is a small part of my income, giving me the luxury of speaking my mind to clients.

However, as chair of the Institute of Chartered Accountants in England and Wales (ICAEW) Tax Faculty, I do also hear from fellow professionals who are worried about tax schemes which are being offered to their clients directly, or schemes which are heavily marketed to smaller firms of accountants.

My fellow practitioners are worried that they might be regarded as negligent if they fail to give advice to clients about aggressive avoidance schemes which might be open to them. No doubt this concern is stimulated by promoters who plant the seeds of doubt. Indeed, in the past, I have spoken at events where other speakers have delivered just that message – if you don't advise clients to go into the latest tax schemes then you risk a negligence case.

How these promoters must have smiled and rubbed their hands when the decision of the High Court went against the advisers in the case of Mehjoo v Harben Barker. Here was a Court apparently ruling that the advisers were negligent because they were not aware of a complex avoidance scheme open to non domiciled individuals. Of course the case was more complex than the headlines indicated, and the world was largely set right again when the Court of Appeal ruled in favour of the advisers.

My view for my fellow professionals in smaller firms is the same in respect of avoidance schemes as it is in relation to any other area in which they have no expertise. If they are generalists, and that is clear to their clients, then clients cannot expect them to advise on highly specialised areas. There are numerous areas where I would refer a client to a specialist – setting up an employee share scheme, for example. The fact that areas in which I regard myself as technically unqualified to advise include tax avoidance schemes is not a problem to me. Because I know that complex schemes need very careful execution down to the last detail, I would ask a client to leave my practice if they wanted to take up a scheme. This is not a moral judgement on them – although I happen also to have a personal dislike of these types of arrangement, but I rule myself not competent to give a client the support that he or she is likely to need following his course of action.

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So that, I believe, deals with the adoption of tax avoidance schemes in the future. In fact, when advising anyone now on taking up a tax avoidance scheme, I am now able to point out that under the Accelerated Payment Notice legislation, clients entering into a 'DOTAS' scheme may be required to pay the tax up front pending the scheme being examined by the courts. (DOTAS is the acronym for Disclosure of Tax Avoidance Schemes, and indicates that a scheme or arrangement exhibits some of the characteristics which give HMRC cause

for concern; such schemes have to be registered with the tax authority and are allocated a reference number, so that their use can be carefully monitored, particularly if they are subsequently overturned by the courts.) I have already found that this advice dampened the enthusiasm of an individual who was referred to me by another practitioner, to the point that, on reflection, he decided not to look for any schemes to reduce his tax liability.

But there is another difficult area for the smaller practice. Clients may have taken advice elsewhere in the past, and that advice is now coming back to haunt them! With the introduction of another new Notice – this time a Follower Notice – the client may find that he has been invited to settle a long standing dispute in favour of HMRC. A follower notice allows HMRC to ask users of schemes which have not been to court to settle in the taxman's favour if the scheme they have used is similar to another scheme which has failed in the courts. Clients who have come to us with an old scheme under enquiry – entered into some years before we took over their affairs – may now seek advice from the new adviser as to what they should do. Follower Notices do exactly what the consultation document said they would do – "Raise the stakes" for those who have entered into tax avoidance schemes in the past. Clients do not have to settle their case – they may choose to fight on; but if they do, the money at stake (excluding of course the very high cost of litigation) will increase by 50% – the penalty for failing to settle the dispute as requested by the Follower Notice.

Our natural reaction is to try to support our clients – we want to help. But I would encourage smaller practitioners who are out of their depth to be very careful how they approach these cases. If the present adviser does not understand the scheme the client entered into, he is hardly well placed to advise of the chances of success in court. He should also be aware that some schemes preclude a purchaser of the scheme from reaching a settlement with HMRC. Directing a client back to the original adviser or promoter is the safest way to protect your client – and indeed your own professional indemnity premiums.

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The agreement between the taxpayer and his adviser is governed by contract law, underpinned by the professional requirement to act in the client's best interests. However, advisers must always stay within their area of expertise, and if smaller practitioners are not comfortable with advising on tax schemes, then they cannot be required to do so, by their client or by anyone else. Trying to be helpful can be a dangerous thing to do.

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