Professional Conduct in Relation to Taxation (PCRT)
Helpsheet B: tax advice

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

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 particular 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 particular 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 particular 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 judgements 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 take into account the position of specific taxpayers (or a narrowly defined group of taxpayers such as a group of employees of the same company) pose particular 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 arising[1]**.** 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 takes 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 in order 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 actually to be disclosed will inevitably reflect a professional judgement taking into account all relevant facts and law specific to the case in question and what the client consents should be disclosed.

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)
- include in their client advice an assessment of the relevant disclosures that should be made to HMRC in order 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

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

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 fourth 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 the them? For example:
    - the strength of the legal interpretation relied upon
    - the potential application of the General Anti-abuse Rule (GAAR)?
    - the implications for the client, including their obligations in relation to their tax return, if the planning requires disclosure under disclosure of tax avoidance schemes (DOTAS) or disclosure of tax avoidance schemes for VAT and other indirected taxes (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 at gov.uk.

Frequently asked questions on tax advice

FAQ 1. My job is to advise clients on the law. Can I still do that under the Standards for Tax Planning?

Yes. The Standards for Tax Planning are designed to address behaviours which are damaging our profession, not to stop members from giving *bona fide* tax advice to clients based on an analysis of tax law as it applies to their situation, even if as sometimes may happen this might lead to surprising results. The concern is over advisers who create schemes to exploit loopholes and frustrate the will of Parliament, or who promote them to clients, or encourage clients into them.

It is the behaviour of the adviser that is the focus of PCRT, not the tax outcome for the client.

FAQ 2. If the situation is more borderline, do I still have to advise my clients?

In any area where the results of tax analysis produce apparently surprising and/or beneficial results, the adviser needs to advise the client dispassionately, objectively and fully (including in relation to the costs and risks of HMRC challenge and any similarly foreseeable results). This would include exploring the substantive nature (or, at the opposite end of the spectrum, artificiality) of the arrangements proposed: balanced advice, which covers such risks, as distinct from encouraging the client into such arrangements, should not amount to the creation, promotion or encouragement of arrangements that are against the clear intention of Parliament or seek to exploit shortcomings in the relevant legislation.

FAQ 3. How would I know if the planning was contrary to the clear intention of Parliament?

Discerning the intention of Parliament at the time that the legislation was enacted is likely only to be an issue where more complex or ground-breaking planning is concerned. In such cases the legislation and any associated explanatory notes issued at the time of enactment should prove sufficient. Only rarely should it be necessary to consult Hansard. If the intention of Parliament was genuinely unclear at the time of enactment then you would not be expected to second guess what was the clear intention of Parliament.

FAQ 4. Do I need to have an engagement letter in place to cover tax-planning advice?

An appropriately worded engagement letter sets out the scope of any engagement and the responsibilities of both the tax adviser and the client. It protects both the client and the adviser, and the professional bodies that subscribe to PCRT strongly recommend you have an engagement letter in place for all tax work.

You should understand your client's expectations around the tax-planning advice and ensure that the engagement letter reflects your role and responsibilities, including limitations in or amendments to that role. The importance of this has been highlighted by the *Mehjoo* case.

FAQ 5. I am considering introducing my client to another adviser's planning arrangement. What should I consider?

You first need to ascertain whether the promoter is subject to a monitoring notice within the promoters of tax avoidance schemes (POTAS) regime. If they are, it is difficult to envisage any circumstance in which it would be appropriate for you to introduce their arrangement to your client.

Assuming the promoter is not a monitored promoter, you should appraise the planning and form a view on its effectiveness and risk:

- Is it compatible with the **Standards for Tax Planning**? See also FAQ 11 below.
- Is it client-specific rather than a generic packaged scheme?
- Is it lawful? Does it accord with your understanding of the law? The fact that HMRC may not agree with the legal position adopted is not of itself indicative of behaviour that would breach the standards. You may reasonably believe that an HMRC view is wrong in law but you should alert the client to the fact that HMRC holds a different view.

- Is the legal advice current?
- Is the promoter appropriately qualified?
- Have there been any recent challenges to similar planning?
- Might the GAAR apply?
- Does it look like a Spotlight scheme (see bit.ly/tax-spotlight)?
- Are there any restrictions on full disclosure of the relevant facts to HMRC? Planning should not rely for its effectiveness on HMRC having less than the relevant facts.
- Is the planning highly artificial or highly contrived, or contrary to the clear intentions of Parliament? See also FAQ 3 above.
- Do you wish to be associated with the planning both from a technical and a reputational perspective?

If you do not have sufficient understanding of the proposed planning to enable you to alert the client to the risks, as well as the merits, you should make the client aware of the limitations of your advice. You should consider very carefully whether you are comfortable introducing a client to planning where you are uncertain of its effectiveness.

FAQ 6. If I do introduce my client to the planning arrangement in FAQ 5 above, I will receive commission. Do I have to tell my client about this?

You must disclose and account for any commission received for making such an introduction in line with the rules of your professional body (*ACCA Rulebook*). You need to take care that by receiving commission you are not compromising your objectivity (see *PCRT Fundamental Principles and Standards for Tax Planning*). See also FAQ 11 below.

FAQ 7. Can I receive commission if I am asked to give a second opinion on another adviser's tax planning arrangement?

You should not accept commission in these circumstances as that would compromise your objectivity. See also FAQ 11 below.

FAQ 8. What is my responsibility if a client wishes to engage in planning which I do not consider to be appropriate or does not sit comfortably with my business principles and ethics?

You do not have to advise on or recommend tax planning which you do not consider to be appropriate or otherwise does not align with your own business principles and ethics. However, in this situation you may need to ensure that the advice you do not wish to give is outside the scope of your engagement letter. If you owe a legal duty of care to the client to advise in this area, you should ensure that you comply with this by, for example, advising the client that there are opportunities that they could undertake, even though you are unwilling to assist, and recommending that they seek alternative advice. You should document any such discussions with your client.

Ultimately it is the client's decision as to what planning is appropriate having received advice. However, you should ensure that the client is made aware of the risks and rewards of any planning, including that there may be adverse reputational consequences.

FAQ 9. What is the position if my client tells me that they will go ahead with a tax-planning arrangement without taking full advice from me?

You should make your client aware of the potential risks of proceeding without full advice and ensure that the restriction in the scope of your advice is recorded in writing.

FAQ 10. The tax-planning arrangement my client is considering has Counsel's opinion, which says it is effective. Can I/my client rely on that?

It should be noted that any legal opinion provided, for example by Counsel, will be based on the assumptions stated in the instructions for the opinion and on execution of the arrangement exactly as stated. HMRC and the courts will not be constrained by these assumptions.

Points to consider include:

- Does the opinion seem reasonable in your view? Does it accord with your understanding of the law?
- What is Counsel's reputation? Have they been associated with aggressive tax planning?
- Has their opinion been overruled by the courts in other tax-planning cases?
- Has Counsel considered whether the GAAR could apply to the transaction?

The generic opinion given by Counsel may be based on an assumption that the participant in the planning is, for example, 'trading' in used cars or that a film lease partnership is trading or that a gilt strip investment is not part of a trading activity. As your client's adviser, you will be familiar with their circumstances and be able to offer some insight as to whether the assumption held true in your client's circumstances.

FAQ 11. Would it be acceptable under the Fourth Standard to make a referral to another adviser whom I know offers planning which could be considered to be highly artificial or highly contrived and seeks to exploit the shortcomings within the relevant legislation?

Under the Fourth Standard a member must not 'create, encourage or promote tax planning arrangements or structures that are highly artificial or highly contrived, and seek to exploit the shortcomings within the relevant legislation'. If you refer clients to another adviser expressly so that they can benefit from such planning it is quite probable that this behaviour would be considered to be 'encouraging' behaviour which is in contravention of the Fourth Standard.

If you are uncertain whether the planning being offered by the other adviser is highly artificial or highly contrived and still decide to refer it to them, you should make the client aware of the risks associated with aggressive planning, including probable challenge by HMRC and potential damage to reputation. You should document your reasons for making the referral.

FAQ 12. Unbeknown to me, my client has undertaken planning with another adviser and has now asked me to enter it on his tax return. What should I do if I am not sure whether the planning is effective or not?

You should not include within the tax return a claim for a tax advantage which you consider has no sustainable basis based on the information provided to you.

The questions at FAQ 5 should help you to assess whether there is a sustainable filing position and these can broadly be summed up in the following:

Do I believe I have sufficient understanding of the planning to be satisfied that there is a sustainable filing position, or do I need to take a second opinion? Is it so significant that I should caveat my compliance responsibility?

If the client provides inadequate information for you to form an opinion as to the sustainability of the filing position, then you should ask for further information. If no further information is forthcoming, you should not include a claim for a tax advantage on the tax return, document your decision and explain your reasons to the client.

If you do receive additional information but you are unable to draw a reasoned conclusion, you should seek specialist support (either within your firm or externally) or recommend that the client obtains advice elsewhere.

FAQ 13. What is the position if the adviser responsible for the planning in FAQ 12 above is not a member of a professional body? HMRC has issued its standards for agents (bit.ly/hmrc-st-ag). If an adviser has breached those, you could consider reporting them to HMRC (bit.ly/hmrc-rep-ta). You would need to take care not to breach client confidentiality and report only the nature of the planning and not the client's name.

FAQ 14. What should I do if I believe the planning implemented by my client on the advice of another adviser constitutes evasion?

You cannot make a claim on the tax return. You should advise the client of your concerns and recommend that they take action to rectify matters. See *Helpsheet C: dealing with errors*. If the client refuses you should cease to act. You cannot inform HMRC because of client confidentiality but you will need to consider whether you have any anti-money laundering (AML) reporting obligations in respect of the original adviser and the client (bit.ly/CCAB-AML).

FAQ 15. What are the consequences if I create, encourage or promote tax planning which is contrary to the Standards for Tax Planning and the Fundamental Principles?

Each of the Professional Bodies that subscribe to PCRT deals with all complaints made against their members and students. If you were found to have breached the **Standards for Tax Planning** or the **Fundamental Principles,** the sanctions may range from a reprimand to removal from the students, affiliates or members register.