

TAXREP 40/04

DISCLOSURE OF TAX AVOIDANCE SCHEMES AND LEGAL PROFESSIONAL PRIVILEGE

Copy of a letter dated 20 July 2004 from the Chairman of the Tax Faculty to the Chancellor of the Exchequer in relation to concerns over the effect of legal professional privilege on the requirement to disclose tax avoidance schemes together with a reply dated 16 August 2004 from the Paymaster General.

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WHO WE ARE

- 1 The Institute of Chartered Accountants in England and Wales ('ICAEW') is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
- 2 The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
- 3 The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter 'TAXline' to more than 11,000 members of the ICAEW who pay an additional subscription.

INTRODUCTION

- 4 The purpose of this exchange of letters is to provide reassurance to ICAEW members that the new tax avoidance disclosure rules will not put the accountancy profession at a competitive disadvantage as compared to members of the legal profession.
- 5 The ICAEW Tax Faculty has been involved in a number of discussions with the Inland Revenue in respect of the new tax avoidance disclosure rules in the Finance Act 2004. These rules require certain defined tax avoidance schemes to be disclosed to the Inland Revenue. The ICAEW Tax Faculty has expressed a number of concerns about the legislation, most recently in June 2004 in response to the draft regulations (which was published as TAXREP 24/04).
- 6 A key concern of the Tax Faculty has been whether legal advisers are protected from disclosing tax schemes as a result of legal professional privilege (LPP). Although the rules are designed so that LPP does not apply to prevent disclosure, the Tax Faculty is concerned that there are legal opinions that disagree with this analysis and that the legal profession may be protected from disclosure by LPP.
- 7 In paragraph 28 of TAXREP 24/04, we stated that:

'In respect of the UK profession, we understand that the UK Bar is generally of the view that barristers will not be required to disclose advice given to clients as such advice will be protected by Legal Professional

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Privilege (LPP). If this is correct this will give them an unfair advantage as against other advisers who will come within the disclosure requirements. In paragraph 4.5 of the draft Guidance it is stated that 'LPP does not in itself provide justification for not disclosing a scheme if it meets the criteria for disclosure'. If this statement is based on legal advice then we would ask for this advice to be published. If the view of the UK Bar proves to be correct then we believe the Government should consider what steps should be taken so that a 'level playing field' is maintained for professional advice. '

- 8 If LPP does apply to the legal profession, this would put the accountancy profession at a serious competitive disadvantage to the legal profession. Subsequently, we understand that the Law Society has received advice which confirms our concerns. Given these developments, the Chairman of the Tax Faculty, Mark Lee, wrote to the Chancellor of the Exchequer in July 2004 to express these concerns.
- 9 The Tax Faculty has now received a response to this letter from the Paymaster General, Dawn Primarolo, which provides reassurances that the accountancy profession will not be put at a competitive disadvantage by the tax avoidance disclosure rules. The letter from Mark Lee and the response from Dawn Primarolo are set out below.

LETTER FROM THE CHAIRMAN OF THE TAX FACULTY TO THE CHANCELLOR OF THE EXCHEQUER DATED 20 JULY 2004

- 10 I am concerned that the effect of the provisions in Part 7 of the Finance Bill 2004 and the accompanying draft Regulations is going to be fundamentally different from what the Standing Committee examining the Finance Bill was assured would be their effect by the Paymaster General on 22 June.
- 11 If this is the case we believe the provisions in this section will put professional accountants in an artificially uncompetitive position in relation to solicitors, with consequent damage to the market in tax advice and thus to the detriment of clients.
- 12 When the Draft Regulations were published on 17 May they were accompanied by Draft Guidance which stated at paragraph 4.5:

'The disclosure rules do not in any way override Legal Professional Privilege (LPP). However, LPP does not in itself provide justification for not disclosing a scheme if it meets the criteria for disclosure. There is no requirement upon an accountant or lawyer to identify the client or to provide copies of actual documents or planning advice. The rules are intended to obtain details of the product and not the technical or legal advice given to the client. Solicitors and barristers in particular should be able to meet the requirements through the normal redactive processes.'

- 13 The provisions in Part 7 of the Finance Bill were debated in Standing Committee A on 22 June. During the debate the Opposition introduced an amendment to the effect that 'LPP does not ...prevent compliance with Part 7 of the Act.' intended to clarify and

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put beyond doubt any fears that LPP would prevent solicitors from complying with the new disclosure regime.

- 14 In the ensuing debate (Hansard 22 June Column 738) the Paymaster General gave her assurance that this amendment was not necessary because LPP would not prevent disclosure by solicitors, and barristers.

‘The rules apply equally to all persons involved in marketing, or advising in or assisting in the implementation of disclosable schemes.’

- 15 The Paymaster General then went on to say that if what she had said was incorrect she was sure she would have heard from the Law Society.
- 16 We understand that the Law Society have now received formal advice from leading counsel to the effect that the disclosure rules do not apply to solicitors because of LPP. This is likely to put accountants at a serious competitive disadvantage in comparison with solicitors. We further understand that the Law Society wrote to Chris Davidson at the Inland Revenue to explain their position on 7 July.
- 17 We fully appreciate that Government is committed to establishing a level playing field to ensure that all advisers involved in tax planning are under the same obligation to comply with tax avoidance disclosure requirements.
- 18 In the light of the above we would ask that the starting date for the introduction of this legislation be deferred until its effect is clarified. This must be preferable to a situation whereby many ‘promoters’ (solicitors) hold an informed view that they are outside its scope because of LPP.
- 19 I am sending a copy of this letter to the Paymaster General whose comments in the Standing Committee debate I have quoted above.

RESPONSE FROM THE PAYMASTER GENERAL DATED 16 AUGUST 2004

- 20 Thank you for your letter of 20 July to Gordon Brown about the new rules requiring the disclosure of tax avoidance schemes to the Inland Revenue. I am replying as Minister responsible.
- 21 Your letter was prompted by your understanding that the Law Society believe, on the basis of advice from Counsel, that lawyers and solicitors will not be able to comply with the disclosure rules by virtue of Legal Professional Privilege (LPP). You are concerned that the effect of this would be to put accountants and other advisors not covered by LPP at a serious competitive disadvantage in the tax advice market when compared with the legal profession.
- 22 I cannot support this interpretation of the way in which LPP interacts with the disclosure rules. As I said in the Standing Committee debate on 22 June, the disclosure rules are intended to apply fairly and equally to everyone who is in the

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business of marketing or advising on disclosable schemes. And the way in which the legislation is designed fully achieves this intention.

- 23 In developing the new disclosure rules, the Inland Revenue have, on a number of occasions, consulted leading Counsel and taken advice on the matter of LPP. The Revenue's position is that there is nothing in the disclosure regime which prevents lawyers from complying with the rules in the same way as accountants and other advisors. The rules require the disclosure of information on tax schemes and arrangements, whilst the effect of LPP is to protect legal advice which a lawyer provides to a client. Since there is no requirement for a lawyer to disclose any advice, only the fact that a disclosable scheme has been designed and promoted, there is no conflict between the disclosure rules and LPP. Counsel has confirmed this view. What this means is that the legal profession are wholly within the scope of the disclosure rules, and therefore the risk of unfair competitive advantage does not arise. The Revenue are continuing discussions with the Law Society with the aim of reaching a shared understanding.
- 24 I should also add that, if lawyers were ultimately found to be in the special position which you describe, the Government would need to consider options for amending the legislation to re-establish its original intentions.
- 25 Your final point is that, in light of the uncertainty around the impact of LPP, the implementation date for the disclosure rules should be deferred. As you will be aware, on 22 June I announced changes to the secondary legislation which were specifically designed to provide promoters sufficient time to make the transition to the new regime. These have been generally well received by the profession and I can see no case for postponing implementation of the rules on the grounds of LPP.
- 26 I hope this addresses the concerns of you and your members.

FJH
24 August 2004