Tax Representation

Tax Faculty

TAXREP 16/05

DISCLOSURE OF DIRECT TAX AVOIDANCE SCHEMES (DoTAS)
Revised Draft Revenue Guidance

Memorandum submitted in April 2005 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to Revised draft Guidance issued in March 2005 by the Revenue

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INTRODUCTION

1. We welcome the opportunity to comment on the revised draft Revenue Guidance explaining the DoTAS regime and how it operates in practice.

KEY POINT SUMMARY

2. Whilst we believe that overall the draft Guidance is an improvement on the previous version published last summer by the Revenue we remain concerned that this redraft is still deficient in many respects.

3. We believe the major issues that still need to be addressed are:

- The status of the document. There needs to be a clear statement that anyone relying on the guidance will not be subject to penalties if it subsequently transpires that they should have disclosed a particular scheme or arrangement. For example, there are several instances where the legislation is open to a number of possible interpretations (such as the meaning of tax advantage or the premium fee filter or the transitional rules). The guidance notes explain the Revenue's interpretation in each case and a taxpayer should be able to rely on this in good faith so that if it latter transpires that this interpretation is incorrect, no penalties should arise. This is, essentially, only asking the Revenue to confirm that the guidance notes have the same standing as, say, the Revenue Manuals or a Tax Bulletin;
- The Guidance should incorporate a high level summary of what the rules actually say and the fact that the scheme has been designed only to require disclosure 'of those schemes and arrangements which pose the greatest threat to the Exchequer' (PMG statement in the Finance Bill Standing Committee debate – 22 June 2004);
- There need to be more examples showing how the various terms and conditions apply in practice;
- The Guidance still needs to deal with the transitional rules;
- The Guidance needs to be properly updated for the stamp duty land tax changes.

4. We are also disappointed that it has taken so long for the inadequate first draft guidance to be updated and, now this is happening, that so little time has been given to ourselves and other interested parties to comment. In order to prepare a detailed response we needed to circulate the revised draft Guidance to our Committee members and to obtain their feedback. The draft Guidance was sent to us on 18 March

and we were given exactly two working weeks to reply, by 1 April 2005, with Easter falling within that period.

WHO WE ARE

5. 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.

6. 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.

7. 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.

GENERAL COMMENTS

The status of the Guidance document

8. At the time the Guidance was first published the Revenue gave a specific assurance to the ICAEW Tax Faculty that the Revenue will not instigate penalty proceedings against any practitioners who do not disclose arrangements which it later transpires are disclosable if those practitioners have relied on the (Revenue) Guidance Notes in not making the disclosure. This assurance was included in our own Guidance Note (see paragraph 12 of TAXline Tax Practice No 9 – of which we have previously supplied you with a copy). It can also be accessed on our website at http://www.icaew.co.uk/viewer/index.cfm?AUB=TB2I_73812

9. This is clearly a very important reassurance and in our view it is imperative that it be included in the published Guidance.

The need for a high level summary

10. There is an overview section but it does not explain in general terms what the DoTAS regime is all about. We believe that the Guidance would be greatly improved if it had a general explanation of the scheme along the lines of the 'Introduction and Overview' section of our own Guide to the scheme which we published in September 2004. We supplied the Avoidance Intelligence Unit (AIU) with copies at the time. It can be accessed on our website. The URL is given in paragraph 8 above.

The need for more examples

11. In order to make the guidance more practical we believe it needs more examples showing how the various terms and conditions apply in practice. The Revenue has now been operating the rules for more than six months. We understand there have been over 400 disclosures and the AIU has made visits to professional practices and answered numerous queries on the DoTAS scheme. With all that knowledge and experience it should be possible to provide practical examples in the Guidance.

The transitional provisions

12. There is nothing in the current Guidance on the transitional rules. We understand from our members that they are still receiving questions about these so they remain a live issue. We also understand that our members have had discussions with the Revenue as to how the transitional rules work in practice. We suggest that the advice given in those discussions forms the basis for the Guidance. The Guidance needs to confirm whether disclosure is required (by either an adviser or a taxpayer) where the taxpayer implements for a second time some planning which was originally implemented prior to the commencement of the disclosure regime.

Stamp Duty Land Tax

13. Section 7.4 notes that the guidance is 'to come'. This needs to be added as soon as possible.

SPECIFIC COMMENTS

14. We set out below our specific comments in relation to the detailed points in the draft Guidance.

15. Paragraph 3.4 indicates that the user of the arrangement needs to make the disclosure in certain circumstances, one of which is said to be 'if the promoter is a lawyer'. That is only true if the lawyer also believes that Legal Professional Privilege applies. The Guidance needs to be amended to make this point clear.

16. Paragraph 4 – Flow Chart – is at the moment blank and uncompleted. You may like to refer to our own flowchart in preparing your version. Our Flow Chart is aimed at the general practitioner accountant and tax adviser who is least likely to need to make disclosures. We adopted this approach to allay such members' concerns and also to help reduce the number of inappropriate precautionary disclosures that might otherwise be made. Your guidance and flow chart should have the same objectives. Our Flow Chart was reproduced as Appendix 2 of our TAXline Tax Practice Note No 9 of which you already have copies and which can also be accessed on our website at the URL given in paragraph 8 above.

17. The guidance in Section 5 'Who is a promoter?' needs to be expanded and made more comprehensive. The Guidance needs to look at the filters for design/implementation

promoters and whether an adviser might be regarded as a promoter under the secondary designer test. These must be covered with examples to make it clear

18. Paragraph 5.1 refers only to marketing and design promoters but a person can also be a promoter if they are involved in managing the implementation. The same applies to paragraphs 5.4 and 7.1.1. The paragraphs need to be amended to reflect this point.

19. Paragraph 5.3 needs to be amended as it confuses two points:

a) a group company that provides tax planning services to another group company is not necessarily a promoter; and

b) an adviser only advising peripherally on a tax planning idea (which is not directly connected with the tax advantage) is also not a promoter.

20. At paragraph 5.5 it would be useful to cross refer to the special rules that apply to lawyers and offshore promoters.

21. Section 6.2 needs to be expanded to deal with in-house schemes.

22. The Guidance at paragraph 6.2.1 needs to be amended. A promoter is not required to give the reference number to anyone who uses the scheme but only to those to whom the promoter marketed the idea (or for whom he helped implement or design it). The same point applies also to paragraph 3.5.

23. As a general point we understand that reference numbers should only be issued for 'disclosable' schemes. If a scheme, though disclosed (possibly to deal with an uncertainty in the rules), does not, in the Revenue's view, need to be disclosed then no number should be issued. This should be confirmed in the guidance notes.

24. The earlier Guidance also seemed to contemplate that some schemes that were disclosed would not be the type that DoTAS was targeting, perhaps because they did not pose a threat to the Exchequer, and so in such circumstances no number would be issued. This last point was covered in the current published Guidance at page 5

> 'On receipt of a disclosure, the Revenue may issue a reference number. If the Revenue decide not to issue a reference number then a letter confirming this will be issued.'

25. The draft Guidance needs to be expanded to deal with all the instances when no reference number will be issued and how the Revenue will communicate this decision to the person who made the disclosure.

26. Paragraph 6.2.3 only deals with overseas promoters. It needs to be expanded to cover those situations when lawyers are claiming legal professional privilege.

27. Paragraph 6.3 needs an introduction explaining when the filters might apply. Paragraph 3.2 refers to the need for arrangements to fall within the descriptions

prescribed in the regulations. Nothing further is then said about the regulations until paragraph 6.3 which refers to the filters with no introduction into financial products or employment products. As a general point it is not clear why the filters are mentioned in this section which is dealing with 'what needs to be disclosed'.

28. We suggest that there should be click throughs from paragraph 6.3.1 to the premium fee etc paragraphs and that there should be similar click throughs in the document to facilitate use of the document online.

29. Under paragraph 6.3.2 the draft Guidance has as a question 'Do we need to deal with the benign advice test and so on beyond a reference to it?' We recommend that the benign tax advice test, the non tax advice test and the ignorance test all need to be properly explained as they are in the current Guidance.

30. It would be helpful in paragraph 7.1.2 to include a cross reference to section 10 where there is detailed advice on what is meant by 'made available for implementation'.

31. It would be helpful in paragraph 7.1.3 to explain whether or not the promoter has an obligation to monitor the activities of his clients to assess when the first transaction occurs. The Revenue has told our members that this is not the case but the Guidance should confirm this.

32. Further guidance is required (probably in section 10), with examples, to help the promoter determine what is the first transaction forming part of the arrangements (e.g. is it the first step in the arrangement or will the Revenue interpret it to be the first action such as a clearance request or feasibility study?). It would also help to spell out what happens if the arrangement subsequently aborts.

33. In relation to paragraph 7.2.2, what happens with planning to avoid withholding tax – does this need to go on the WHT form or the CT form? The Guidance should cover this point.

34. In relation to the request at paragraph 7.2.5 it may not be feasible in some cases and the Guidance should be amended to make it clear that this information is not required by the rules.

35. At paragraph 7.5.4, the telephone number has been omitted from the contact details. It is shown on the AIU page on the Revenue website.

36. Paragraphs 8.1, 8.2 and 8.3 should be clearly cross referenced to section 5.

37. We query whether the comments at paragraph 8.1.4 are practical and whether it makes sense to appear to push the onus of whether to disclose onto persons who are outside the UK tax net and so have no real detailed knowledge of how the rules may apply. Indeed the approach suggested could be used by some less scrupulous overseas adviser as a possible way round the rules – by simply providing their clients with a note saying that they do not believe the idea needs disclosure. We believe this

whole section needs to be refocused on the reality of the position, which is that the taxpayer will need to make the disclosure.

38. Section 8.2 which deals with 'promoters who are lawyers' needs to be amended to make the point that the client can waive legal privilege to allow the lawyer to deal with the disclosure.

39. We believe that section 8.4 'Interaction with Clearance Applications' should be in section 7 as it deals with the time limit for making a claim. Also, there ought to be a clear explanation as to the circumstances when these provisions are likely to be used. Firstly the provision is likely only to apply to marketing promoters since design/implementation promoters only need to disclose five days after implementation starts which is likely to be after the clearance has been submitted. So how does it apply for a marketing promoter? Some guidance is needed to show how, at the time he makes something 'available for implementation', the promoter can be expected to know whether the taxpayer has a reasonable intention to make the clearance request. At the time the scheme is made available for implementation, the taxpayer may not yet have decided to go ahead with the plan – so is it sufficient that the promoter believes that, if the taxpayer were to decide to go ahead, the latter would be likely to go for clearance? If not, it is difficult to see how this provision could apply.

40. At paragraph 8.4.2 it would be useful to spell out that these provisions do not apply to the equivalent to the CGT clearances under the Intellectual Property regime nor to Treasury consent requests.

41. The statement at paragraph 8.5.1 needs to be redrafted to make it more helpful. The DoTAS scheme is designed to obtain disclosure of arrangements which produce a (tax) advantage. Under COP 10 no advice will be given 'on transactions designed to avoid or reduce the tax charge which might otherwise be expected to arise'. That seems on the face of it to suggest that advice under COP 10 will never be given when there is a tax advantage disclosable under the DoTAS scheme. The Guidance states that applications under COP 10 in respect of disclosable schemes 'will be judged on (their) merits as before.' But what does that mean? Is the AIU able to distinguish schemes that create a tax advantage on which COP 10 advice can nevertheless be given whereas other schemes will not only create a tax advantage but also represent tax avoidance on which no COP 10 advice can be given?

42. Paragraph 8.5.2 indicates that if a COP 10 request is made then it needs to include the AIU number if one has been issued. If this is to be the practice of the Revenue then COP 10 needs to be updated to reflect this additional requirement and it would be helpful if the Revenue explained why this additional information is necessary – is it based on the decision in *R v IR Commrs ex parte Matrix Securities Ltd* [1994] STC 282 in that the DoTAS disclosure is one of the 'facts' to be disclosed if Revenue advice can be relied upon.

43. It would also be helpful if the Guidance gave some general description of COP 10 and what it covers.

44. The Revenue policy, as stated in writing to the ICAEW Tax Faculty, is that no penalty will be charged against any practitioners, or taxpayers, who do not disclose arrangements which it later transpires are disclosable if they have relied on the Guidance Notes in not making the disclosure. This assurance must be repeated. If the reassurance cannot for some reason still be given then the Revenue needs to explain this change of heart although this would undermine the value and credibility of the Guidance Notes.

45. Section 10.2 sets out what is a tax advantage. It would be helpful to provide some examples as has for instance been done in the Revenue's draft guidance published on Budget Day 2005 in relation to the 'Avoidance through Arbitrage' proposals now in FB 2005.

46. We understand from a number of discussions our members have held with the Head of the AIU that in his view the meaning of tax advantage is to be taken from the relevant section 709 ICTA 1988 case law. It would be helpful to state this categorically in the Guidance Notes and provide a summary of the relevant case law.

47. Paragraph 10.2.3a needs to be more explicit as to how far a person needs to go in looking for the relevant comparatives. For example does one have to compare a loan to all other forms of debt instrument or also to equity?

48. We believe that paragraphs 10.3.1 to 10.3.12 which are headed up 'made available for implementation', would more logically fit within section 7 which draws the distinction between the different types of promoter. The Guidance needs to make it clear that the distinction between design/implementation and marketing promoter does not only impact timing but also the more basic question as to whether one is a promoter, taking into account for instance the ignorance filter etc.

49. Paragraph 10.3.12 should be made clearer by confirming that the question of whether something is 'made available' is answered by reference to the promoter and the information he provides. It is clearly not when the client decides to go ahead but is the timing dependent on the intelligence/experience etc of the client (i.e. if they could reengineer the idea on being given just the bare bones, would the idea have been made available for implementation)? The Revenue should give examples (e.g. if a vital piece of information is missing then the idea is not made available until this information is provided).

50. The meaning of 'where appropriate' in the final sentence of paragraph 10.3.15 should be clarified. Presumably this would only apply where there was a genuine uncertainty as to the tax treatment which it was felt could only be resolved by seeking Counsel's advice.

51. Paragraphs 10.3.19 to 10.3.25 should more logically be included in section 7 dealing with promoters.

52. Paragraph 10.3.22 needs to be expanded to give some indication of the circumstances when the adviser might be acting as a designer.

53. In section 10.5, Confidentiality, it would be helpful to have confirmation that if a promoter is aware that an idea is known to other promoters then they can assume that the confidentiality test is not a problem. The same applies to the premium fee filter which is covered in section 10.4. The Revenue's comments in the past have implied that where a promoter is putting forward a tried and tested idea which has been around for many years, then the premium fee and confidentiality filters should apply so that no disclosure is required. It is important that such a view is confirmed in the Guidance. It would also be helpful to deal with the situation where an idea is an old one but it has a resurgence of popularity, and therefore may merit a higher fee than in the past, because of, for example, a corporate law change which makes the idea more suitable.

54. Some of our members found the statements at paragraphs 10.5.2 and 10.5.3 to be contradictory. The first paragraph seems to indicate that the test is whether the particular promoter wants to keep his scheme secret whereas the second of the paragraphs indicates that the test is a hypothetical one. Paragraph 10.5.3 then indicates that the 'existence or otherwise of a confidentiality agreement is not relevant to the test' whereas paragraph 10.5.1 states 'The confidentiality test is aimed at agreements …'. Precisely what the Revenue believes the test to be needs to be explained more clearly and the existing ambiguities need to be removed from the current draft.

55. We believe that the point in paragraph 10.4.9e is actually two points and should therefore be split. There may be a scarcity of suitably skilled staff and as a separate issue the particular area in respect of which advice is being given may be more complex.

56. We suggest there is a further additional category that should be added to paragraph 10.4.9. This is 'intrinsic technical difficulty or perceived risk'. For example, in relation to offshore trust matters Professional Indemnity insurers may impose a higher excess just because this is an area where the legislation is complex and difficult. A professional firm may decide that any work in such an area will justify charging a higher level of fee even where there is no question of a scheme or arrangement being involved. We do not believe that this would be a premium fee in the context of the disclosure regime.

57. We believe Appendix 1.3 needs to be expanded to make it clear that disclosure is not limited just to planning related to funding requirements. Since 'financial products' includes shares, it can catch other planning where there is no intention to provide additional finance e.g. CGT planning.

58. We believe Appendix 1.5 should be expanded to retain some of the material in the existing Guidance which confirms that planning which does not focus on a financial or employment product would not need to be disclosed simply because, as an ancillary point, the taxpayer needs to take on some debt.

IKY
1 April 2005