

## TAXREP 64/07 – OECD Tax Intermediaries’ Study

PAPER SUBMITTED ON 1 OCTOBER 2007 BY THE ICAEW TAX FACULTY TO THE OECD TAX INTERMEDIARIES’ STUDY TEAM

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# OECD Tax Intermediaries' Study

## INTRODUCTION AND GENERAL COMMENTS

1. We submitted a response on 17 September 2007 (TAXREP 62/07) to the OECD Tax Intermediaries' Study team. That response covered the work of the Study team to date and in particular the two main papers (Working Papers 5 and 6) dealing with Risk Management and the Enhanced Relationship.
2. The main areas that we covered in that earlier paper were:
  - Who is responsible for the completion of returns submitted to the revenue bodies;
  - Ethical standards of accountants and tax advisers;
  - Risk management in relation to taxpayers and, more importantly, in relation to tax advisers; and
  - The Enhanced Relationship.
3. We submitted that earlier paper in the knowledge that the Study Team was organising a Workshop in UK from 3 to 5 October at which the papers on which we commented were to be discussed in detail.
4. We hope that the comments in our earlier paper will prove helpful and enlightening to those present at the workshop.
5. During the week immediately prior to the October workshop we received a further set of draft papers and we were asked, in the time available, if we had any comments on these further papers. These further workshop papers are:
  - A Introduction
  - B The Seoul Declaration and its history
  - C The Tax Environment
  - D Tax Intermediaries – detection and response strategies
  - E Implementation
6. We understand that these additional papers, together with the papers published previously, will, when finalised, be incorporated into the final report for which a draft framework was published as Working Paper 2 – *Draft framework for the report*. This will be discussed at the January 2008 meeting of the OECD Forum on Tax Administration after which we anticipate that the report will be published on the OECD website.
7. In the time available it has not been possible to consult widely within the Tax Faculty for reactions to the papers nor to subject them to other than initial scrutiny. Nevertheless we hope that the comments in this response will prove helpful to the study team.

## DETAILED COMMENTS

### Workshop Paper A – Introduction

8. Paragraph 9 states that:

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‘One conclusion from the assessment is that the tax intermediaries are one part of a tripartite relationship that features taxpayers and revenue bodies as its other two parties.’

9. One of the fundamental problems faced by the study is that although it starts from the perspective of the tax intermediary (or tax adviser) in many countries the most important relationship is between the taxpayer and the tax authority. This perspective was very clearly articulated in the CFE (Confédération Fiscale Européenne) response to the study to which we contributed and from which we quoted extensively in our own submission.
10. We feel that the final report ought to reflect the primacy of the relationship between taxpayer and revenue body which is particularly clear cut in a number of European countries.

### **Workshop Paper B – The Seoul Declaration and its history**

11. Paragraphs 5 and 6 set out the reasons for the growth of aggressive tax planning. These two paragraphs are written as if the major driver for this growth was developments in the tax intermediary market place (paragraph 5) and there are other factors ‘beyond the tax intermediary industry’ which are set out in paragraph 6.
12. In our view it is an over simplification to suggest that the tax intermediary industry is the main driver for this development and we suggest that if this section is included in the final report it should reflect a more ‘sophisticated’ analysis of the history of the developments being described.
13. Paragraph 14 states:

‘... approaches on ‘abuse of law’ differ from country to country. The body of doctrine on the idea of ‘abuse of law’ or ‘anti avoidance’ may date back several centuries in those countries governed under legal systems with Napoleonic/Roman origins.’
14. And footnote 9 gives the source as an article by Jonathan Schwarz who is a member of the ICAEW Tax Faculty.
15. Jonathan Schwarz has confirmed as follows:

‘My presentation was on the thesis that modern “avoidance” doctrine in all western legal systems, whether common or civil law, derives from two separate Roman law doctrines of “abuse of right” and “fraus legis”. The summary [in the OECD study paper] is not really accurate as both legal traditions derive this from the same original source. My point was that this is an issue that is common to both traditions not separate. It is also not particular to tax but goes to the nature of law itself, which I hopefully illustrated through the old South African case of *Dadoo Limited v Krugersdorp Municipal Council* 1920 AD 530.’

### **Workshop Paper C – The Tax Environment**

16. In this and Workshop Paper D the abbreviation ATP is used, particularly in Paper D, to denote **A**ggressive **T**ax **P**lanning. We do not believe that ATP is going to be a

generally recognisable abbreviation for Aggressive Tax Planning. There are already a considerable number of different 'meanings' for ATP - see Wikipedia <http://en.wikipedia.org/wiki/ATP>

17. Paragraph 13 considers the role of government in generating aggressive tax planning when a tax system denies, in the quoted example, tax relief for genuine commercial losses.
18. So-called aggressive tax planning can also be the result of government introducing overly generous reliefs within a tax system.
19. If the reliefs are sufficiently generous then tax intermediaries may have no real option other than to advise their clients to take advantage of them. And if too many taxpayers follow that, appropriate, advice the government may well call 'foul' and stigmatise that behaviour as tax avoidance, aggressive tax planning or whatever.
20. The introduction of the nil rate corporation tax band by the UK government in 2002 is an example of a relief which was so generous that tax intermediaries would have been remiss if they hadn't advised their taxpayer to take advantage of it.
21. This is another example of what the government came to consider as rather aggressive tax planning but which had its genesis in the very relief which taxpayers were then held to have unfairly 'exploited'.
22. Paragraph 25 the third bullet point states 'This transparency driver continues to move up the ladder of importance and ....' We suggest that it might be better to say, merely, 'Transparency is becoming increasingly important and ....'
23. Paragraph 28. We believe that the simple question has been put in such a complicated way that it is almost impossible to work out what the answer is! As currently drafted there are too many negatives. We suggest the statement should be simplified.

#### **Workshop Paper D – Tax Intermediaries – detection and response strategies**

24. In paragraph 17 there is a small editorial correction. Include the word 'of' between 'sanctioning' and 'behaviour' at the very end of that paragraph.
25. In paragraph 31 you could add paragraph 26 of the UN Model Tax Convention.

#### **Workshop Paper E – Implementation**

26. In relation to Key Issue 3 – Are countries content for the study to recommend that revenue bodies make the first move? It is very difficult in practice to imagine how the body of taxpayers, or even tax intermediaries, could collectively themselves decide to make that first move. There is no practical alternative, in our view, other than for revenue bodies to make the first move.

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1 October 2007

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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.