Potential implications for solicitors who enable tax avoidance

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HMRC has recently published a discussion document "Strengthening Tax Avoidance Sanctions and Deterrents" which addresses a proposal to impose penalties on "enablers" of defeated tax avoidance schemes. If the proposals are introduced, law firms which advise clients on tax avoidance schemes may face significant uninsured exposure.

The paper marks an attempt by HMRC to clamp down on those who seek what it perceives to be unfair advantage through tax avoidance. Solicitors and barristers would be "enablers" if they "benefit financially from enabling others to implement tax avoidance arrangements". The proposals would empower HMRC to introduce "stronger and more certain sanctions on all those in the avoidance "supply chain", ensuring that no one can walk away without consequence after implementing tax avoidance arrangements that HMRC defeats". The consultation closed on 12 October 2016.

HMRC proposes that penalties be proportionate to the services provided by the enabler and the financial reward they obtained. The document suggests several possibilities which include:

(i) basing the penalty *"on the financial or other benefit enjoyed by the enabler in providing their services"* (i.e. effectively wiping out the professional fees charged); and

(ii) a *"tax-geared penalty"* which would be equivalent to the sum of tax the scheme sought to avoid.

The paper states that the government needs to define an avoidance enabler clearly and to provide safeguards for those who are within that definition but were unaware that the services they provided were connected to wider tax avoidance arrangements. This will create difficult issues as to how enabler penalties are imposed, particularly where advisers did not recommend that their client enter the tax avoidance schemes. HMRC has invited proposals in this regard.

Unsurprisingly, since the new proposals raise significant implications for solicitors advising on tax law, they have prompted concerns to be raised. The Law Society has stated that it hopes "the government will design these proposals with the greatest of care, to ensure that in their desire to respond to public concern on this issue they do not inadvertently prevent millions of people from accessing legitimate professional advice on their tax obligations". Meanwhile, the Chartered Institute of Taxation has warned that the penalty regime could prevent taxpayers from getting access to honest, impartial advice on the law.

Insurers of lawyers will be interested in the outcome of the proposals which, if introduced, could impose significant additional liabilities on solicitors and counsel who are found to have enabled tax avoidance.

The SRA's Minimum Terms and Conditions of professional indemnity insurance for solicitors provide that insurance must not exclude or limit the liability of the insurer except to the extent that any claim or related defence costs arise from any fine or penalty. Accordingly under the current MTCs it is likely that law firms would not be entitled to an indemnity in respect of HMRC penalties arising from the proposals. There are therefore significant questions as to the insurance consequences of the proposals which require careful consideration by Insurers, lawyers, HMRC, the SRA and insurance brokers. For any firm engaged in tax planning advice, it is certainly important to be aware of the proposals and take an interest in the outcome of the consultation.

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