



## ICAEW TAX FACULTY GUIDANCE NOTE

### TAXGUIDE 1/11

### PROFESSIONAL CONDUCT IN RELATION TO TAXATION

*Guidance published on 4 January 2011 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales*

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# PROFESSIONAL CONDUCT IN RELATION TO TAXATION

## FOREWORD

1. This guidance is effective from 4 January 2011. It replaces the guidance which was last updated in September 2006 in Section 7.3 of The Institute of Chartered Accountants in England and Wales Members Handbook [www.icaew.com/regulations](http://www.icaew.com/regulations). It has been reviewed by Counsel and in draft by HM Revenue and Customs. It has been prepared by ICAEW with the Association of Certified Chartered Accountants, Association of Taxation Technicians, Chartered Institute of Taxation, Institute of Chartered Accountants of Scotland, Institute of Indirect Taxation and Society of Trust and Estate Practitioners.

## WHO WE ARE

2. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 136,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
4. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions 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 Institute who pay an additional subscription, and a free weekly newswire.

# PROFESSIONAL CONDUCT IN RELATION TO TAXATION

## 1. INTRODUCTION

### Scope

- 1.1 The purpose of this guidance is to assist and advise members on their professional conduct in relation to taxation.
- 1.2 Chapter 2 sets out the fundamental principles which govern the conduct of members, namely:
  - Integrity;
  - Objectivity;
  - Professional competence and due care;
  - Confidentiality; and
  - Professional behaviour
- 1.3 Chapters 3 - 9 apply these principles to tax specific situations which all relate to the tripartite relationship between a member, client and HMRC:
  - Chapter 3: Tax returns
  - Chapter 4: Access to data by HMRC and other authorities
  - Chapter 5: Irregularities (including errors)
  - Chapter 6: HMRC rulings and clearances
  - Chapter 7: Tax avoidance
  - Chapter 8: Disclosure of tax avoidance schemes
  - Chapter 9: Investigation of tax practitioners by HMRC
- 1.4 The situations addressed in Chapters 3 – 9 are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by members which may create threats to compliance with the fundamental principles. Consequently, it is not sufficient for members merely to comply with the examples presented; rather they should observe the fundamental principles across all their professional activities.
- 1.5 This guidance includes practical advice about ethical and legal issues. If in doubt about the ethical or legal considerations of a particular case, a member should seek advice from his professional body and, where appropriate, his legal advisers. The professional bodies take no responsibility for failure to seek advice where appropriate.
- 1.6 A member should at all times be aware of his obligations under the anti- money laundering legislation. Anti-money laundering issues are not covered in detail in this guidance; the member is instead referred to the Treasury approved CCAB anti-money laundering guidance for the accountancy sector (which includes an appendix for the tax practitioner) which can be found at [www.icaew.com/index.cfm?route=167513](http://www.icaew.com/index.cfm?route=167513).

### Status

- 1.7 The guidance has been prepared jointly by the
  - Association of Chartered Certified Accountants
  - Association of Taxation Technicians
  - Chartered Institute of Taxation
  - Institute of Chartered Accountants in England and Wales
  - Institute of Chartered Accountants of Scotland
  - Institute of Indirect Taxation
  - Society of Trust and Estate Practitioners.

- 1.8 HMRC has reviewed this guidance in draft.
- 1.9 The guidance supersedes all previous editions and is based on the law as at 25 October 2010. Members should satisfy themselves that there have been no subsequent changes which impact on how this guidance applies to their particular facts and circumstances.
- 1.10 While every care has been taken in the preparation of this guidance the Institute of Chartered Accountants in England and Wales and all those involved in the preparation and approval of this guidance do not accept any responsibility for any loss occasioned by reliance on this guidance.

### **Application to all members**

- 1.11 Whilst this guidance is addressed primarily to members in a professional practice, the principles apply to all members whether or not they are in practice.
- 1.12 Where a member's employer is not prepared to follow the ethical approach set out in this guidance (despite the member's attempts to persuade him to do so) the member should take advice from his professional body. He should also consider whether he should seek legal advice. Further advice can be found at [www.icaew.com/regulations](http://www.icaew.com/regulations) and via ICAEW's Ethics Enquiry Line 01908 248250.
- 1.13 A member who, for example, is based overseas or who is acting for a client who is subject to the tax jurisdiction of another country could be subject to different legal obligations under the tax law and general law of that country. Subject to that caveat, a member should apply the principles set out in this guidance to professional activities with non UK aspects.

### **Interpretation**

- 1.14 In this guidance:
- 'Client' includes, where the context requires, 'former client'
  - 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof
  - The masculine gender imports the feminine gender, and
  - Words in the singular include the plural and words in the plural include the singular.

### **Abbreviations**

- 1.15 The following abbreviations have been used:
- |      |  |
|------|--|
| CCAB | Consultative Committee of Accountancy Bodies |
| HMRC | HM Revenue and Customs                       |
| MLRO | Money Laundering Reporting Officer           |
| SOCA | Serious Organised Crime Agency               |
| STC  | Simons Tax Cases                             |

## 2. THE FUNDAMENTAL PRINCIPLES

### Overview of the fundamental principles

2.1 A member shall comply with the following fundamental principles:

- **Integrity**

To be straightforward and honest in all professional and business relationships.

- **Objectivity**

To not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

- **Professional competence and due care**

To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.

- **Confidentiality**

To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the member or third parties.

- **Professional behaviour**

To comply with relevant laws and regulations and avoid any action that discredits the profession.

Each of these fundamental principles is discussed in more detail below in the context of taxation services.

#### **Integrity**

2.2 A member must act honestly in all his dealings with his clients, all tax authorities and other interested parties, and do nothing knowingly or carelessly that might mislead.

#### **Objectivity**

2.3 A member may be exposed to situations that could impair his objectivity. It is impracticable to define and prescribe all such situations. Relationships which bias or unduly influence the professional judgement of the member should be avoided.

## **Professional competence and due care**

- 2.4 A member is free to choose whether or not to act for a client both generally and as regards specific activities. When advising a client each member has a duty to serve that client's interests within the relevant legal and regulatory framework and provide them with appropriate advice on managing their tax affairs. Accordingly, a member has a professional duty to carry out his work within the scope of the engagement with the requisite skill and care.
- 2.5 A member must carry out his work with a proper regard for the technical and professional standards expected. In particular, a member must not undertake professional work which he is not competent to perform unless he obtains help from an appropriate specialist.
- 2.6 A member who is giving what he believes to be a significant opinion to a client should consider obtaining a second opinion to support the advice. Where the second opinion is to be obtained externally, due regard must be had to client confidentiality.
- 2.7 On occasions there may be more than one tenable interpretation of the law. Each case should be considered on its own individual facts and circumstances. In principle it is possible to put forward different tenable positions for different clients with different circumstances.

## **Confidentiality**

- 2.8 Confidentiality is both a professional principle and a legal duty. It may be an express term of the engagement letter between the member and the client. Where it is not an express term, a court would in most circumstances treat confidentiality as an implied contractual term.
- 2.9 A member may only disclose information without his client's consent when required to do so by law or in the circumstances described within paragraph 2.11 below.
- 2.10 The anti-money laundering regime provides a statutory code to determine whether, in a particular set of circumstances:
- the public interest in reporting knowledge or suspicions of criminal activity to the authorities should take precedence; or
  - the public interest in clients receiving advice in confidence should take precedence.

Members should follow the Treasury approved CCAB guidance (which includes an appendix for the tax practitioner) at <http://www.icaew.com/index.cfm?route=167513> and in particular Chapters 6 on 'Internal Reporting' and 7 on 'Role of MLRO and SAR reporting'.

- 2.11 The duty of confidentiality is rigorously safeguarded by the courts. Voluntary disclosure of confidential material concerning a client or employer should only be made where it is considered adequate, relevant and reasonably necessary for the administration of justice – in other words, when the member considers that it would otherwise impair the pursuit of his legitimate interests and rights if he was prevented from disclosing the information in all the circumstances. Only the minimum amount of information necessary to protect those interests may be disclosed. Examples of such circumstances may include, but are not limited to, the following:
- To enable the member to defend himself against a criminal charge or to clear himself of suspicion;
  - To enable the member to defend himself in disciplinary proceedings;
  - To resist proceedings for a penalty or civil proceedings in respect of a taxation offence, for example in a case where it is suggested that the member knowingly assisted or induced a client or employer to make or deliver incorrect returns or accounts;

- To resist a legal action made against him by a client or third party;
- To enable the member to sue for unpaid fees;
- To enable the member to sue for defamation.

2.12 If there is any doubt that the above principle would apply, or there is the risk of challenge by a client or employer, the member is strongly recommended to seek legal advice. In particular, in the case of potential proceedings against the member in respect of a taxation offence, it might be appropriate for the member to ask HMRC to use an appropriate statutory power to secure access to the information required, so that there is a clearer authority (as required by law) for overriding the member's normal duty of confidentiality.

### **Professional behaviour**

- 2.13 A member should comply with all relevant legal obligations when dealing with a client's tax affairs and assist his clients to do the same. Even if there is no legal duty to act in a particular way, the member should always act in a way that will not bring his professional body into disrepute.
- 2.14 A member should behave with courtesy and consideration towards all with whom he comes into contact in a professional capacity.
- 2.15 Serving the interests of his clients will, on occasion, bring a member into disagreement or conflict with HMRC. A member should manage such disagreements or conflicts in an open, constructive and professional manner. However, a member should serve his clients' interests within these constraints as robustly as circumstances warrant.
- 2.16 A member's own tax affairs should be kept up to date. Neglect of the member's own affairs could raise doubts within HMRC as to the standard of the member's professional work and could bring his professional body into disrepute.

### **3. TAX RETURNS**

#### **Responsibilities**

##### ***Taxpayer's responsibility***

- 3.1 The taxpayer has primary responsibility to submit correct and complete returns to the best of his knowledge and belief. It follows that the final decision as to whether to disclose any issue is that of the client.

##### ***Member's responsibility***

- 3.2 A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.
- 3.3 In dealing with HMRC in relation to a client's tax affairs a member should bear in mind his duty of confidentiality to the client and that he is acting as the agent of his client. He has a duty to act in the best interests of his client.
- 3.4 A member is not required, in his capacity as a tax practitioner, to audit the figures in the books and records provided or verify information provided by a client or by a third party. However a member must act in good faith in dealings with HMRC in accordance with the fundamental principle of integrity. In particular the member must take reasonable care when making statements or asserting facts on behalf of a client. A member should not be associated with the presentation of facts he knows or believes to be incorrect or misleading.
- 3.5 When a member is communicating with HMRC, he should consider whether he needs to make it clear that he is relying on information which has been supplied by the client or a third party.

#### **Materiality**

- 3.6 Whether an amount is to be regarded as material depends upon the facts and circumstances in each case.
- 3.7 The profits of a trade, profession or vocation must be computed in accordance with Generally Accepted Accounting Practice (GAAP) subject to any adjustment required or authorised by law in computing profits for those purposes. This permits a trade, profession, vocation or property business to disregard non-material adjustments in computing its accounting profits.
- 3.8 The application of GAAP does not extend beyond the accounting profits. Thus the accounting concept of materiality cannot be applied when completing tax returns (direct and indirect), for example when:
- Computing adjustments required to accounting figures so as to arrive at taxable profits;
  - Allocating income, expenses and outgoings across the relevant boxes on a self assessment tax return;
  - Collating the aggregate figures from all shareholdings and bank accounts for disclosure on tax returns.

#### **Disclosure**

- 3.9 A tax return must contain at least the minimum information required by law. If a client is unwilling to comply with this requirement, the member should follow the guidance in Chapter 5 Irregularities (including errors). Paragraphs 3.10 -3.14 below give guidance on some of the more common areas of uncertainty over disclosure.

- 3.10 In general it is likely to be in a client's own interests to ensure that factors relevant to his tax liability are adequately disclosed to HMRC because:
- His relationship with HMRC is more likely to be on a satisfactory footing if he can demonstrate good faith in his dealings with them; and
  - He will reduce the risk of a discovery or further assessment.
- 3.11 In addition, it may be desirable to make fuller disclosure than is strictly necessary. The factors involved in making this decision include:
- The terms of the applicable law;
  - The view taken by the member;
  - The extent of any doubt that exists;
  - The manner in which disclosure is to be made; and
  - The size and gravity of the item in question.
- 3.12 When advocating fuller disclosure than is strictly necessary a member has a responsibility to ensure that his client is aware of the various factors involved.
- 3.13 Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases a member ought to consider carefully what disclosure, if any, might be necessary. For example, additional disclosure should be considered where:
- There is inherent doubt as to the correct treatment of an item, for example expenditure on repairs which might be regarded as capital in whole or part, or the VAT liability of a particular transaction; or
  - HMRC has published its interpretation or has indicated its practice on a point, but the client proposes to adopt a different view, whether or not supported by Counsel's opinion. The member should refer to the guidance on the *Veltema* case (*Langham v Veltema* [2004] STC 544) (see paragraph 3.15 below and [HMRC Statements of Practice](#) (HMRC SP1/06 - *Self Assessment: Finality and Discovery*) – at [www.hmrc.gov.uk/practitioners/sop.pdf](http://www.hmrc.gov.uk/practitioners/sop.pdf)).
- 3.14 A member who is uncertain whether his client should disclose a particular item or its treatment should consider taking further advice before reaching a decision. He should ensure that the client understands the issues, implications and the proposed course of action. Such a decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including contemporaneous notes of discussions with the client or with other advisers, copies of any second opinion obtained and the client's final decision. A failure to take reasonable care may result in HMRC imposing a penalty if an error is identified after an enquiry.

### **Supporting documents**

- 3.15 For the most part, HMRC does not consider that it is necessary for a taxpayer to provide supporting documentation in order to satisfy the taxpayer's overriding need to make a correct return. HMRC's view, expressed in the notes accompanying the return, is that, where it is necessary for that purpose, explanatory information should be entered in the 'white space' provided on the return. However, HMRC does recognise that the taxpayer may wish to supply further details of a particular computation or transaction in order to minimise the risk of a discovery assessment being raised at a later time. Following the uncertainty created by the decision in *Veltema*, the HMRC view can be found at [HMRC Statements of Practice](#) (SP1/06 - *Self Assessment: Finality and Discovery*) at [www.hmrc.gov.uk/practitioners/sop.pdf](http://www.hmrc.gov.uk/practitioners/sop.pdf).
- 3.16 Notwithstanding HMRC's view, a member should discuss with the client the extent to which documents are to be submitted to accompany the return. For companies, accounts are required in almost all cases. For other types of businesses there is no such requirement

but it is likely to be good practice to send accounts in all but the simplest cases, where they supplement the self-assessment information contained in the tax return. In such cases it may also be helpful to:

- Supply computations reconciling the accounts to the figures in the tax return;
- Supply analyses of major items contained in the accounts, with explanations of disallowances; and
- Refer to these in the return.

3.17 In non-trading cases a member should consider supplying further information to clarify or explain figures in the return as necessary.

### **Reliance on HMRC published guidance**

3.18 Whilst it is reasonable to rely on HMRC published guidance, which in most circumstances HMRC will apply, a member should be aware that the Tribunal and the Courts will apply the law even if this conflicts with HMRC guidance.

### **Approval of tax returns**

3.19 It is essential that the client reviews his tax return. This is for the protection of the client, who is responsible for its contents. It is also in the interests of the member, who has almost invariably relied upon the accuracy and completeness of information provided by the client or third parties in preparing the return.

3.20 When presenting the return to the client for approval, the member should draw the client's attention to the responsibility which the client is taking in approving the return. Attention should be drawn to any judgmental areas or positions reflected in the return to ensure that the client is aware of these and their implications before he approves the return.

3.21 A member should obtain the client's approval of the return in writing, which includes via e-mail.

3.22 A member may sign tax returns in his capacity as liquidator, receiver or administrator or under a personal appointment as trustee, executor, attorney or director.

3.23 If a member is signing a tax return on behalf of a client in his capacity as agent, he should carefully consider:

- His legal authority to do so (for example, is a power of attorney required?). Legal advice may be needed on this issue;
- The process whereby the client will review and take responsibility for the contents of the return; and
- Any legal implications of signing the return for both the practice and the individual signatory.

3.24 One specific scenario in which these principles may be relevant is where a member is appointed as tax agent or tax representative for VAT purposes. These appointments empower the member to sign VAT returns on behalf of their client, which may be convenient if the client is not physically present to sign returns within the timescale required. Such appointments are principally relevant where the client is a "non established taxable person".

3.25 Appointment as tax representative for VAT means that the member becomes jointly and severally liable for his client's VAT debts. The responsibilities of a VAT representative are specified in Section 48 of the VAT Act 1994 and members should consider carefully whether they are prepared to take on such responsibilities. As an alternative, the member should consider whether appointment simply as a tax agent for VAT is preferable, as this

does not make him jointly and severally liable for his client's VAT debts. The procedures for registering for VAT as VAT agent or VAT representative are specified in HMRC's VAT Guidance Manual Volume V1 -28 at Vol 2 Section 64.6 (*VAT representatives*) and Section 64.7 (*VAT agents*).

- 3.26 If the member does decide to accept an appointment as tax representative for VAT purposes, he should consider ways of protecting his practice from the implications of joint and several liability. The risk can be mitigated, for example, by obtaining bank guarantees from the client. The member should also be aware of the possibility that his objectivity could be threatened due to the self interest arising from his role as the client's VAT representative.

## **4. ACCESS TO DATA BY HMRC AND OTHER AUTHORITIES**

### **Introduction**

- 4.1 For the purposes of this Chapter the term 'data' includes documents in whatever form (including electronic) and other information.
- 4.2 A distinction must be drawn between a request for data made informally ('informal requests') and those requests for data which are made in exercise of a power to require the provision of the data requested ('statutory requests').
- 4.3 Similarly, requests addressed to the client and those addressed to the member require different handling.
- 4.4 Where a member no longer acts for a client, the member remains subject to the duty of confidentiality. In relation to informal requests, he should refer the enquirer either to the former client or to his new agent. In relation to statutory requests addressed to the member, the termination of his professional relationship with the client does not affect his duty to comply with that request, where legally required to do so.
- 4.5 Given the complexity of the law relating to the scope of particular information powers, it may be appropriate to take specialist advice.
- 4.6 A member should be aware of HMRC's powers in relation to the access, inspection and removal of data. He may also find it helpful as a precautionary measure to have identified a lawyer or other practitioner with relevant specialist knowledge of both civil and criminal law from whom he can obtain advice in such circumstances.
- 4.7 There are a number of other statutory bodies besides HMRC which can elicit data from taxpayers and their advisers, including the police, the Revenue and Customs Prosecutions Office and SOCA.
- 4.8 Paragraphs 4.9 - 4.13 consider informal requests and paragraphs 4.14 - 4.21 look at statutory requests. Paragraphs 4.22 onwards provide a brief introduction to legal professional privilege.

### **Informal requests**

- 4.9 Disclosure in response to informal requests can only be made with the client's permission.
- 4.10 Normally, the client will have authorised routine disclosure of relevant data. However, if there is any doubt about whether the client has authorised disclosure or about the accuracy of details, the member should ask the client to approve what is to be disclosed.
- 4.11 The nature of the HMRC enquiry may not be immediately apparent and the position may need reviewing as it progresses. Where a verbal enquiry is made by HMRC, a member should consider asking for it to be put in writing so that a response may be agreed with the client.
- 4.12 Where there is a question as to whether the requested disclosure should be made, in whole or in part, a member should advise the client whether it is in the client's best interests to disclose such data.
- 4.13 Informal requests may be forerunners to statutory requests compelling the disclosure of such data. Consequently, it will often be sensible for the client to comply with such requests or to seek to persuade HMRC that a more limited request is appropriate. The member should advise the client as to the reasonableness of the informal request and likely

consequences of non-compliance, so that the client can decide on his preferred course of action.

### **Statutory requests addressed to the client**

- 4.14 A member should advise the client how to comply with the request and the consequences of non-compliance. Normally, the client will then consent to the member complying with the request on his behalf.
- 4.15 If it may not be in the client's interests to comply or the client wishes to consider alternatives, the member should advise the client on his options. There are a number of issues which may be relevant:
- Was the notice lawfully issued in accordance with the relevant legal and procedural safeguards?
  - Is it being implemented in accordance with the terms set out therein?
  - Do one or more of the pieces of data requested qualify as data which is either expressly or impliedly excluded from the ambit of the power authorising the request? In each case the relevant information power in question should be reviewed carefully.
  - Are there any overriding legal principles, which may not be directly referred to in the information power itself, which may limit the power or affect how the statutory language should be interpreted? In particular:
    - The concept of legal professional privilege arises from common law and protects certain documents from disclosure. See paragraphs 4.22 – 4.25 below for an outline;
    - Statutory information powers must be interpreted by the courts and applied by HMRC in a manner which is consistent with the client's and the member's rights under Article 8 of the European Convention on Human Rights.
- 4.16 The member should also advise the client about any relevant right of appeal against the statutory request if appropriate.

### **Statutory requests addressed to the member**

- 4.17 A lawful statutory request to the member is capable of overriding his duty of confidentiality to his client. Hence the member needs either to
- obtain his client's consent to the disclosure (see 4.18 below); or
  - satisfy himself that the statutory request is lawful and does override his duty of confidentiality (see 4.19 below).
- 4.18 If complying with the request is in the client's best interests and the member is not legally precluded from communicating with the client, the member should seek the client's permission to comply with the request.
- 4.19 However a member must comply with a lawful information request in relation to data which falls within its scope, whether or not he receives his client's consent. A statutory request addressed to the member, if valid, imposes a set of legal obligations directly upon the member and failure to comply with his legal obligations can expose the member to serious civil and criminal penalties. The issues to be considered in determining whether the statutory request is valid and overrides the duty of confidentiality are the same as those outlined in paragraph 4.15 above. Where permitted to do so by law it is advisable to keep the client informed in such cases.
- 4.20 Where any data falls outside the scope of the legally binding statutory request, the member remains under a duty to preserve the confidentiality of his client, subject to the general points in paragraph 2.11 above.

- 4.21 If a member is faced with a situation in which HMRC is seeking to enforce disclosure by the removal of data, the member should consider seeking immediate advice from a lawyer or other practitioner with relevant specialist knowledge before permitting such removal, to ensure that this is the legally correct course of action.

### **Privileged Documents**

- 4.22 Legal Professional Privilege arises under common law and may only be overridden if this is expressly or necessarily implicitly set out in legislation. It protects a party's right to communicate in confidence with a legal adviser. The privilege belongs to the client and not to the member. If a document is privileged:
- The client cannot be required to make disclosure of that document to HMRC and a member should be careful to ensure that his reasons for advising a client nevertheless to make such a disclosure are recorded in writing.
  - It must not be disclosed by any other party, including the member, without the client's express permission.
- 4.23 There are two types of legal professional privilege under common law:

#### *Legal advice privilege*

Documents passing between a client and his legal adviser<sup>1</sup> are privileged if they are prepared for the purposes of obtaining or giving legal advice.

#### *Litigation privilege*

Documents created for the dominant purpose of litigation are privileged. Litigation privilege may arise even where litigation has not begun, but is merely contemplated. Documents prepared by non-lawyer advisers (including tax advisers) may be privileged if brought into existence for the purposes of that litigation.

Other similar protections exist under statute law, including a privilege reporting exemption which applies to the reporting of money laundering in certain circumstances. See Chapter 7 of the CCAB guidance for further details.

- 4.24 Whether a document is or is not privileged and protected from the need to disclose is a complex issue, which will turn on the facts of the particular situation.
- 4.25 A member who receives a request for documentation, some of which he believes may be subject to privilege, should take independent legal advice on the position, unless expert in this area.

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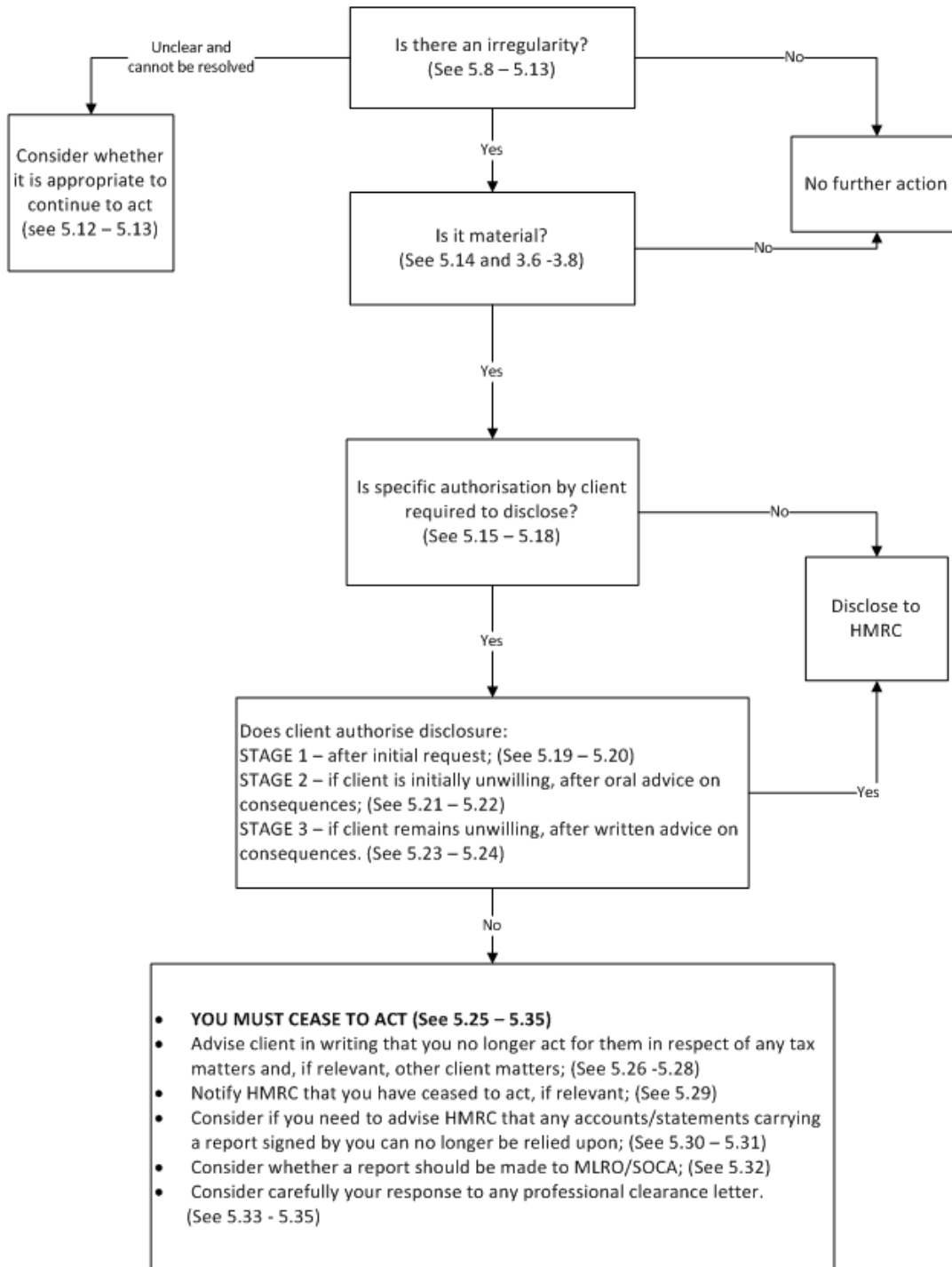
<sup>1</sup> Who must be a member of the legal profession see *R (on the application of Prudential plc & Anor) v Special Commissioner of Income Tax & Anor* [2010] EWCA Civ 1094 following the House of Lords in *R v Special Commissioner of Income Tax, ex parte Morgan Grenfell & Co Ltd* [2003] 1 AC 563 (HL).

## 5. IRREGULARITIES (including errors)

### Introduction

- 5.1 For the purposes of this Chapter, the term 'irregularity' is intended to include all errors, whether made by the client, the member, HMRC or any other party in a client's tax affairs ranging from the innocent to those that may amount to fraud.
- 5.2 In the course of a member's relationship with the client, the member may become aware of possible irregularities in the client's tax affairs. Unless already aware of the possible irregularities in question, the client should be informed as soon as the member has knowledge of them. Where the irregularity has resulted in a tax overpayment, the member should advise the client about making a repayment claim and have regard to any relevant time limits. The rest of this Chapter deals solely with situations where sums may be due to HMRC.
- 5.3 On occasions it may be apparent that a mistake made by HMRC has given rise to an under collection of tax or interest or an over repayment of tax or interest. The mistake may be one of law or may be a calculation error or a clerical error; equally it may arise from a misunderstanding on the part of HMRC of the facts as presented. Correcting such mistakes made by HMRC may cause expense to members and thereby to their clients. Members should bear in mind that, in some circumstances, clients may be able to claim for additional professional costs incurred and compensation from HMRC. See [HMRC factsheet: Complaints](https://www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf) at [www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf](https://www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf).
- 5.4 A member should act and be seen to act correctly from the outset. A member should keep sufficient appropriate records of discussions and advice. When dealing with irregularities the member's objectives are:
- To give the client appropriate advice;
  - If necessary, so long as he continues to act for the client, to seek to persuade the client to behave correctly; and
  - To ensure that he does nothing to assist a client to plan or commit any offence or to conceal any offence which has been committed, as to do so would be an unlawful act.
- At all stages it may be helpful to discuss the client's situation with a colleague or an independent third party (having due regard to client confidentiality).
- 5.5 Once aware of a possible irregularity, a member should bear in mind the legislation on money laundering and the obligations and duties which this places upon him (see CCAB anti money laundering guidance at [www.icaew.com/index.cfm?route=167513](https://www.icaew.com/index.cfm?route=167513)). He should also consider whether the irregularity could give rise to a circumstance requiring notification to his professional indemnity insurers.
- 5.6 Where a member has concerns about his own position, he should take specialist legal advice. This might arise, for example, where a client appears to have used the member to assist in the commission of a criminal offence in such a way that law enforcement agencies might doubt whether the member had acted honestly and in good faith.
- 5.7 The flowchart below summarises the recommended steps members should take where a possible irregularity arises. It must be read in conjunction with the guidance and commentary that follow it.

## STEPS TO TAKE IF THERE IS A POSSIBLE IRREGULARITY



**At all times consider your obligations under anti-money laundering legislation and whether you need to submit a Suspicious Activity Report.**

### **Is there an irregularity?**

- 5.8 A member who suspects that an irregularity may have occurred should discuss this with the client to remove or confirm the suspicion. He should take into account the fact that he may not be aware of all the facts and circumstances and may not therefore be able to reach a conclusion. Although a member is not under a duty to make enquiries to identify irregularities which are unrelated to the work in respect of which he has been engaged, if he does become aware of any irregularity in a client's tax affairs he should follow this guidance, whether in relation to a matter on which he has acted or not.
- 5.9 A member should consider seeking specialist advice if there is doubt as to whether or not an irregularity has occurred or about his competence to provide advice to his client in these circumstances. Equally the client may wish to seek a second opinion.
- 5.10 Where the client denies any irregularity to the satisfaction of the member, the member is free to continue to act for that client and he should follow the guidance in paragraph 5.13 below.
- 5.11 Where the client and member have complied with all their obligations under tax law (including providing sufficient and accurate information in a return as required by a notice to file a return) and HMRC has failed to take any necessary action to start an enquiry or amend an assessment, a member is under no legal obligation to draw HMRC's failure to their attention, nor to take any further action. This will not be relevant in the context of self assessment and therefore will be a rare occurrence. Where it is relevant a member should ensure that the client is aware of the potential for interest and/or penalties.
- 5.12 Sometimes, despite the client's denial of any irregularity, the member still has reservations. If the member concludes that the relationship of trust which must exist between the member and the client has been impaired, the member should consider whether it is appropriate to continue to act. Where the member concludes that it is appropriate to continue to act he should monitor the position carefully. In cases where a member ceases to act, he should follow the guidance in paragraphs 5.25 - 5.35.
- 5.13 Whether the member decides to continue to act for the client or not, the member should protect his position and record his compliance with this guidance by documenting:
- The discussions he has had with his client, any colleague, specialist and/or HMRC;
  - The client's explanations; and
  - His conclusion and the reasons for reaching that conclusion.

It may be appropriate to confirm the facts in writing with the client.

### **Is the irregularity material?**

- 5.14 As a general principle all known irregularities should be corrected unless they can be disregarded in accordance with guidance in paragraphs 3.6 - 3.8. However members should exercise judgement over whether the cost of remedying the error might exceed the tax involved. In the opinion of the professional bodies it is reasonable for a member to take no steps to advise HMRC of isolated errors where the tax effect is no more than minimal, say up to £200, as these will probably cost HMRC and the client more to process than they are worth to the Exchequer.

### **Is specific authorisation by client required to disclose?**

- 5.15 A member must ensure that he has authority to disclose to HMRC. If in any doubt, the member should confirm the position with the client.

- 5.16 The client may have authorised disclosure in routine circumstances. In addition, a member is recommended to include in his letter of engagement a term authorising the member to correct HMRC errors without recourse to the client. Depending on the circumstances, even where the member has authority to disclose, he should consider whether it is appropriate to discuss the matter with the client. If the client withdraws the member's authority to correct the error, the member should follow the guidance in paragraphs 5.21 - 5.35.
- 5.17 A member can agree, with the client's authority, a negotiated figure following disclosure of the facts and circumstances. In all other cases, if a member is specifically asked by HMRC to agree a figure, he is not at liberty to accept a figure that he knows to contain an error. If the member does not have the client's authority, in the engagement letter or otherwise, to correct the error he should reply saying he cannot agree the figure but offer no further comment. The member should then follow the guidance on failure/refusal to disclose.
- 5.18 If HMRC sends an excessive repayment to the member and the member is aware that it is excessive, he should return it to HMRC as soon as practicable. A member does not require his client's authority to return an excessive repayment but, as a matter of course, he should notify his client that he has done so.

### **Does client authorise disclosure? Stage 1: Asking the client for authority to disclose**

- 5.19 Subject to the circumstances set out in paragraphs 5.16 - 5.18 above, the client should be asked to authorise the member to advise HMRC of the error. A member should encourage the client to make a timely disclosure. The member should advise the client of the client's obligations under the relevant tax legislation and refer to interest, surcharges and penalties.
- 5.20 Whether the client follows the member's advice is ultimately the client's decision. If, however, the client decides not to act in accordance with the member's advice as to his obligations, the member should take the further steps detailed in paragraphs 5.21 – 5.35.

### **Stage 2: Advising the client orally of the consequences of failure to disclose**

- 5.21 Where the client is initially reluctant to authorise disclosure of the irregularity to HMRC, the member should explain to the client that HMRC has wide ranging powers to obtain information from taxpayers, their agents and third parties. He should also orally explain the consequences of non-disclosure and the benefit of making a voluntary disclosure, namely reduced penalties. This will involve the member explaining that he will:
- Be required to put his advice that disclosure is required in writing;
  - Be obliged to cease to act and in some circumstances to disassociate himself from any work done, should disclosure not be made. The client should be left in no doubt that adverse inferences could be made and that this step could result in HMRC commencing enquiries which might lead to the discovery of the non-disclosure; and
  - Comply with his professional obligations relating to the appointment of a new adviser, as it is the duty of professional advisers before accepting professional work to communicate with the person who previously acted in connection with that work.
- 5.22 Where the client is an organisation and the client contact still remains reluctant to authorise disclosure of the irregularity to HMRC, the member should raise the issue at a higher level within the client organisation. For example, where the client is a company, the member should consider conveying his advice to the directors or shareholders as appropriate.

### **Stage 3: Advising the client in writing of the consequences of failure to disclose**

- 5.23 Where the client remains unwilling to make a full disclosure to HMRC after an oral explanation of the risks and consequences of taking such a stance, the member should ensure that his conduct and advice are such as to prevent his own probity being called into question. It is essential therefore to advise the client in writing, setting out the facts as

understood by the member, confirming to the client the member's advice to disclose and the consequences of non disclosure.

- 5.24 If, after being advised in writing, the client prevaricates about making a full disclosure, the member must consider at which point the prevarication should be treated as a refusal to disclose. At that stage the member should follow the guidance in paragraphs 5.25 - 5.35.

#### **Actions where the client refuses to disclose**

- 5.25 If, despite being fully advised of the consequences, the client still refuses to make an appropriate disclosure to HMRC, the member should:
- Cease to act;
  - If relevant, inform HMRC of his withdrawal;
  - Consider withdrawing reports signed by the member;
  - Consider whether a money laundering report should be made to the firm's MLRO/SOCA; and
  - Consider carefully his response to any professional clearance letter.

These obligations are set out in more detail below.

#### ***Ceasing to act***

- 5.26 Since there is a lack of integrity on the part of the client the member should cease to act in relation to the client's tax affairs and inform the client in writing accordingly. The relationship of trust which must exist between a member and the client will have been irrevocably impaired.
- 5.27 If HMRC were to realise that the member had continued to act after becoming aware of such undisclosed errors, the member's relationship with HMRC would be prejudiced. HMRC might, in some circumstances, consider the member to be knowingly or carelessly concerned in the commission of an offence.
- 5.28 The member should consider carefully whether it is appropriate to continue to act in relation to the client's non tax affairs.

#### ***Informing HMRC***

- 5.29 Where the member had been dealing with HMRC on the client's behalf or had been formally appointed as a tax agent the member should notify HMRC that he has ceased to act for that client. Because of the obligation to maintain client confidentiality (see paragraph 2.8) a member should not provide HMRC with an explanation as to the reasons for ceasing to act.

#### ***Withdrawing reports signed by the member***

- 5.30 Where a member has undertaken work to verify or audit accounts or statements which carry a report signed by the member which is subsequently found to be misleading, the same principles of client confidentiality apply. If the engagement letter provides the member with the authority to notify HMRC in such circumstances, he should inform HMRC that he has information indicating that the accounts or statements cannot be relied upon. If the member does not have his client's consent to the disclosure, he should write to the client and explicitly ask for permission to withdraw the report; if unsuccessful he should then obtain specialist legal advice as to what action he should take.
- 5.31 A member should not explain to HMRC the reasons why the returns, accounts, etc. are defective. To do so without the client's consent is more likely than not to be considered by

a court of law as a misuse of confidential information and an unjustified breach of client confidentiality. See also paragraphs 2.8 - 2.12 on client confidentiality.

### ***Reporting to MLRO/SOCA***

- 5.32 In deciding whether a report should be made to SOCA the member (or the member's MLRO) should take into account the various requirements of the legislation and any reporting exemption which might apply. See Chapters 6 and 7 of the CCAB money laundering guidance.

### ***Professional clearance***

- 5.33 Having ceased to act the member may be approached by a prospective adviser for information relevant to the decision of whether to accept the appointment or not. The member should not volunteer information to a prospective adviser in the absence of authority from his former client.
- 5.34 Before responding to a request for information from a prospective adviser, a member should ensure that he has authority from the former client to disclose all the information needed and reasonably requested by the prospective adviser to enable him to decide whether to accept the work. To the extent that he is authorised to do so, the member should discuss freely with the prospective adviser all matters of which the prospective adviser should be made aware.
- 5.35 If the client refuses permission to the member to discuss his affairs, the member should inform the prospective adviser of this fact. It is then up to the prospective adviser to make enquiries from the client as to the reasons for such a refusal.

## 6. HMRC RULINGS AND CLEARANCES

- 6.1 HMRC requires a high degree of disclosure and it is necessary that a 'taxpayer put[s] all his cards face upwards on the table'<sup>2</sup> if he is to be able to rely on a ruling or clearance provided by HMRC in response to a request from a taxpayer or his agent.
- 6.2 The member should err on the side of caution and, where relevant, indicate to HMRC that a fully considered ruling is sought and the use he or his client intends to make of any ruling given. The taxpayer would need to indicate those areas where he is doubtful about the correct interpretation of the law or the application of HMRC practice.
- 6.3 A distinction should be drawn between situations where the client is seeking the ruling of HMRC pursuant to a statutory clearance procedure and those situations where the client is asking HMRC for a ruling on the tax treatment of a particular transaction. In the former case, the relevant information for an effective clearance will normally be prescribed by the statute creating the clearance procedure. In the latter case it may be necessary to go into more detail concerning the application of the law to the transaction.
- 6.4 If it is clear that HMRC has made an error in a ruling, a member should follow the guidance in Chapter 5 *Irregularities (including errors)*.
- 6.5 If there is no apparent error in HMRC's ruling but it is more favourable than expected, the member should check the quality of his submission to ensure that the full details of the specific transaction on which he sought HMRC's ruling were adequately and accurately presented and take corrective action if necessary.
- 6.6 If a member obtains an adverse ruling with which he disagrees, he may advise the client to consider asking HMRC to reconsider, or to appeal/ask for an internal review under the relevant procedure, if any.
- 6.7 If HMRC refuses to stand by a ruling given, whether generally or specifically to the client, there may be a remedy in Judicial Review. In this event, the member should seek legal advice as soon as possible as to the applicable time limits for such proceedings. An application may also be made to the Adjudicator or to the Parliamentary Ombudsman.

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<sup>2</sup> The meaning of 'full disclosure' was considered by Bingham LJ (as he then was) in *R v IRC ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 15-45 at 156 9E-G and endorsed by the House of Lords (Lord Jauncey of Tullichettle) in *R v IRC ex parte Matrix Securities Limited* [1994] STC 272. See also HMRC Code of Practice 10 at [www.hmrc.gov.uk/pdfs/cop10.htm](http://www.hmrc.gov.uk/pdfs/cop10.htm)

## 7. TAX AVOIDANCE

### Introduction

- 7.1 Tax avoidance is legal and is to be distinguished from evasion, which is illegal. All taxpayers have the right to arrange their affairs under the law to minimise their liability to tax.
- 7.2 Where a member is considering arrangements which may be viewed as artificial by the tax authorities, he should consider carefully the risks and merits. He should do this in the light of the client's wider interests because of the risk that the arrangements may be challenged by the tax authorities.

### Borderline between avoidance and evasion

- 7.3 For a helpful exploration of HMRC attitudes, a member may like to refer to an article in [HMRC Tax Bulletin 49](http://www.hmrc.gov.uk/bulletins/tb49.htm#new) at [www.hmrc.gov.uk/bulletins/tb49.htm#new](http://www.hmrc.gov.uk/bulletins/tb49.htm#new) issued in October 2000. The article is concerned with section 144 of the Finance Act 2000, which introduced a new criminal offence aimed at tax fraud and includes the following passage:

“The borderline between avoidance and evasion

“In the same [parliamentary] debate at least one member raised the subject of the impact of the new offence on tax advisers, especially those involved in advising on arrangements which could be characterised as tax avoidance. We do not consider that the new offence has led to any change in the law in this area.

“Where a scheme labelled as ‘avoidance’ by its participants and their advisers admittedly fails, the key issue as a matter of criminal law would be whether they have been dishonest in the unsuccessful effort to reduce the relevant tax liability. It would be for the courts to decide as a question of fact whether that is the case.

“Concern has been expressed in some quarters that as a result the decision will not normally be taken by those with professional experience of tax matters and, given the highly technical nature of much tax law, that state of affairs may lead to injustice. That is an issue well beyond the scope of this article, but it may be helpful to remember that possible dishonesty becomes a consideration in this context only in certain circumstances. That is where there is some suggestion that the participants in an avoidance scheme are not merely relying on the intrinsic technical soundness of the arrangements actually put in place to reduce the liability but also on concealment of the facts from the inspector. If so, then, if the scheme fails, it is perfectly possible that the criminal courts may find there has been an offence. But conversely, where there is no trace of any concealment of the true facts of arrangements for which there is a respectable technical case, it is hard to imagine how a criminal offence can have been committed.”

- 7.4 An intention not to pay the tax, if it is ultimately shown to be lawfully due or wilful disregard as to how the tax would be paid can, in certain circumstances, be indicative of tax fraud.

### Arrangements which may be considered to be artificial

- 7.5 Members should ensure that clients are fully aware of the risks of undertaking transactions that HMRC may regard as 'unacceptable' and that such transactions may be subject to litigation or possible changes in law.
- 7.6 HMRC may object to arrangements which they consider are set up for no purpose other than to avoid tax. They see such artificial arrangements as fundamentally different from

choosing one commercial approach which generates a lower tax bill than another, or the mere organisation of a taxpayer's affairs in such a way as to minimise the tax liability. This is a difficult and controversial area, where the approach of the courts has changed over time. Members may find it helpful to bear in mind the dicta of Lord Hoffman in *MacNiven (HMIT) v Westmoreland Investment Limited*<sup>3</sup> [2001] STC 237 at page 257:

"If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work (*HMRC Commissioners v. Duke of Westminster* [1936] A.C. 1) or they do not (*Furniss v. Dawson* [1984] A.C. 474). If they do not work, the reason, as my noble and learned friend, Lord Steyn, pointed out in *HMRC Commissioners v. McGuckian* [1997] 1 W.L.R. 991, 1000, is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes."

7.7 The government has indicated it will consider introducing retrospective legislation to counteract what it considers to be unacceptable tax avoidance, if necessary. In particular, in December 2004, the Paymaster General gave notice of the government's intention to:

"...deal with any arrangements that emerge in future designed to frustrate our intention that employers and employees should pay the proper amount of tax and NICs on the rewards of employment. Where we become aware of arrangements which attempt to frustrate this intention we will introduce legislation to close them down, where necessary from today."

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<sup>3</sup> [2001] UKHL 6.

## 8. DISCLOSURE OF TAX AVOIDANCE SCHEMES

### Introduction

- 8.1 There are two different regimes covering the disclosure to HMRC of tax avoidance schemes. Under the tax avoidance scheme for VAT (see paragraphs 8.3 and 8.4) responsibility lies with the taxpayer to make the disclosure; for other taxes (see paragraphs 8.5 – 8.13) the responsibility lies with the promoter of the scheme. Disclosure and registration of a tax avoidance scheme with HMRC is not a clearance or approval process; successful registration does not imply HMRC's acceptance of a scheme.
- 8.2 HMRC is prepared to challenge schemes that it believes have been entered into for the purpose of obtaining a tax advantage even if such schemes are not subject to formal disclosure requirements. Advisers should warn clients of the potential for such schemes to be challenged.

### VAT

- 8.3 There are specific requirements for the disclosure of VAT avoidance schemes. The client must inform HMRC if they take part in a "listed scheme" (i.e. one that is listed in Schedule 11A to the VAT Act 1994). Additionally the client, or any taxable person who participates in a scheme whose purpose is to obtain a tax advantage, must notify HMRC if it triggers certain "hallmarks of avoidance", as specified in the VAT (Disclosure of Avoidance Schemes) (Designations) Order 2004. Someone acting purely in an advisory capacity is not considered to be party to a scheme, so is not required to make the notification.
- 8.4 Advisers may consider whether their clients would benefit if any tax avoidance scheme that they were promoting on behalf of their clients was "Voluntarily Registered" with HMRC. In this way, the adviser would be issued with a scheme reference number by HMRC, which the adviser should pass on to their client. The client then is exempted from the requirement to notify such schemes to HMRC. However the Voluntary Registration scheme does not exempt the client from the requirement to notify their use of a "listed scheme".

### Other taxes

- 8.5 A different regime applies to income tax, corporation tax, capital gains tax, stamp duty land tax and national insurance contributions. Paragraphs 8.6 -8.13 address the professional conduct issues where a generic disclosure requirement falls upon a member as a promoter of tax avoidance schemes for taxes other than VAT. For technical details of the scope and application of such obligations, reference should be made to the relevant legislation and HMRC's guidance available on their website *HMRC Disclosure of Tax Avoidance Schemes* at [www.hmrc.gov.uk/aiu/guidance.htm](http://www.hmrc.gov.uk/aiu/guidance.htm).
- 8.6 A member should be aware of the type of tax advice which could trigger such disclosure and be able to identify potentially disclosable items in respect of the taxes upon which he advises. This is particularly essential since some planning which may require disclosure may not intuitively appear to be tax avoidance to which HMRC may object.
- 8.7 Under the regime applicable at the time of writing, the obligation falls upon any 'promoter' but excludes employees of promoters. A member who is an employee is accordingly not legally responsible under the applicable legislation for his employer's compliance and the rest of this Chapter should be read with this in mind. A member who is not comfortable with the approach his employer is taking to such obligations should consider seeking advice, for example, from his professional body.
- 8.8 Failure to comply with the disclosure regulations may result in penalties both for promoters and scheme users. HMRC has indicated that such failure will be viewed seriously.

- 8.9 A member must comply with the legal requirements placed upon him in all circumstances.
- 8.10 As set out in paragraph 2.9, a member should observe client confidentiality unless this is overridden by legal obligations to do otherwise. Hence no client specific information should be provided to HMRC when complying with generic disclosure requirements, unless authorised by the client or a specific legal requirement to provide client specific information applies.
- 8.11 Whilst a member may take advice from others, such as Counsel, or, where practicable, listen to the views of his client upon disclosure regime matters, the member remains responsible for the disclosure. A member should ensure that he retains control over his disclosure regime decisions and does not cede control over such decisions to his client or third parties.
- 8.12 A member should put in place instructions, systems and processes to ensure compliance with his disclosure obligations to the extent appropriate given the size of the practice and the frequency with which he is involved in areas which could give rise to disclosure obligations.
- 8.13 Where a disclosure obligation falls upon the taxpayer, and the role of the member is one of advising his clients upon disclosure obligations and drafting disclosures for client approval where instructed to do so, reference should be made to Chapter 3 for the relevant professional conduct guidance.

## 9. INVESTIGATION OF TAX PRACTITIONERS BY HMRC

- 9.1 Any approach to a member by HMRC in relation to the standards of his work should be regarded as a serious matter. HMRC has specialist units, part of whose brief is to monitor and investigate the standards of tax practitioners and consider civil or criminal proceedings against individuals or, less commonly, firms.
- 9.2 A member should consider taking the advice of a specialist in investigations of tax practitioners at an early stage. The member should also consider asking the specialist to conduct the discussions with HMRC, since a member may not always be the best advocate in his own cause.
- 9.3 A member who believes, at any stage, that proceedings may be taken against him, or who is not confident of the legal position, should take legal advice.
- 9.4 A member should not disclose confidential client information without the prior consent of the client unless there is a legal right or duty to do so. HMRC has extensive powers to obtain information. See Chapter 4 for further details of the issues to be considered.
- 9.5 A member should consider whether he has an obligation to notify his professional indemnity insurer about any HMRC investigation or whether any costs incurred by him in the course of the investigation may be covered by any insurance held by him.
- 9.6 A member should also consider whether he has an obligation to notify his professional body at any stage.

PCB

4 January 2011

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