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Change of Climate in Taxation – Extended Responsibilities for Tax Advisers? – CFE Professional Affairs Conference to be held on 22 November 2013 in Milan

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Recent initiatives against "harmful tax practices" are moving existing legal tax structures into a grey area, entailing a loss of legal certainty for taxpayers and advisers. New responsibilities for advisers are under discussion, which not only question the traditional role of tax advisers but also pose a risk to their businesses. The Confédération Fiscale Européenne (CFE) will discuss these topics at its Professional Affairs Conference on 22 November 2013 in Milan. In this note, the two chairpersons of CFE's technical committees provide a short comment. More information on the conference is available at http://www.cfe-eutax.org/node/3110.

The Risks of [Overly] Aggressive Planning

Piergiorgio Valente [*]

The international tax system is currently under pressure. It is struggling not only with the rippling effects of the financial crisis and with the resulting decrease in tax revenues, but also with internal competition between developed and developing countries, especially the BRICS.

All stakeholders, although they might sometimes have "competing interests", are deeply involved in the ongoing OECD Base Erosion and Profit Shifting (BEPS) [1]project and are also committed to reshaping the international tax order. Globalization enabled companies to expand their activities beyond borders, contributing to a reorganization and optimization of their value chains on a worldwide scale. While this helped companies maximize their returns, it also contributed to distortions and to the development of behaviours such as tax planning that, in certain instances, could be considered aggressive. Tax planning is a complex area, the borders of which are sometimes blurred. This complexity is only likely to increase in the coming years.

The risk of shifting from a legal to a moral approach in defining what is acceptable tax planning (and, of course, what is not) adds uncertainty and increases risks, which will no longer only affect taxpayers but also tax advisers personally. Considerable pressure is being put on tax advisers regarding:

(1) risk assessment (in terms of risks and benefits vis-à-vis the client's wider interests);

(2) influencing and strengthening compliance;

(3) new administrative and criminal penalties (in some cases); and

(4) technical preparation in various complex and multifaceted areas.

Is There a Risk of Not Advising Aggressively Enough?

Dick Barmentlo [**] and Rudolf Reibel [***]

The talk within the tax advisory community in recent years has centred on the fact that tax advisers are increasingly being asked, first by the public and NGOs, next in politicians' speeches and, finally, by the law, to assist the tax authorities in discouraging tax avoidance.

Against this background, the UK High Court decision in *Mehjoo* (2013) [3] caught the tax profession's attention. In that case, an accounting firm was held liable for not advising a client, Mr Mehjoo, whose non-domiciled status made him eligible for a tax avoidance scheme involving moving his assets to an offshore trust, to seek specialized tax advice. Interestingly, tax advice had not been included in the engagement letter but the accounting firm had, over the course of a longstanding business relationship, in fact, assumed responsibility for advising the client on tax issues.

Although several commentators have emphasized that the ruling is limited to the specific facts of the case (which is currently under appeal), the case raises a fundamental principle. Indeed, what may have sounded like a wake-up call to some has a very familiar ring; it is no more than a reminder of a fundamental rule, which has not been forgotten but perhaps has recently been too apologetically pronounced, that the tax adviser's main role is to serve his client's interests as his chosen, paid and trusted representative. The fact that tax advisers are bound by the law and professional ethics does not place the advisor somewhere in the middle between the taxpayer and the state, let alone make him the state's watchdog.

Tax administrations are increasingly seeking a greater commitment from tax advisers to influence and strengthen compliance and/or advise on the potential direct and collateral risks of [overly] sophisticated tax planning.

Some concerns have been raised lately in the context of the notion of "risk assessing tax advisers", [2]the application of criminal penalties to tax practitioners and, generally, the control assumed by tax authorities over the actions they carry out.

Some of the proposals, discussed within the international arena, that may have an impact on tax advisers are as follows:

(1) "naming and shaming" the promoters of tax avoidance schemes (focusing on public exposure and on reputational risks);

(2) the enactment of a code of conduct and regulations for tax advisors; and

(3) the exclusion of companies whose tax affairs are not in good standing from bidding on public procurement contracts.

In addition, there is an increasing risk that structures entered into in the past will be considered unacceptable in the future by the tax authorities. In his own and the company's interest, it is the tax adviser's duty to warn taxpayer's against the risk of [overly] aggressive tax planning. More than ever, tax advisers should stress that tax must be addressed in the boardroom as part of the overall strategy of the company. The tax adviser should ensure that his warning is well documented to avoid being considered the "orchestrator" of any aggressive tax strategy.

The law may, in some countries, oblige a tax adviser to report tax avoidance schemes to the tax authorities. Nevertheless, any rule that would oblige the tax adviser to dissuade a client from using legal planning possibilities or to withhold information foreseeably relevant to the client would tamper with the client's right to legal representation, being a corollary of his right to fair proceedings. This must be respected by professional supervisory bodies, be they self-regulated or state-controlled.

Despite the tax adviser's assistance, it is the client's money that is at stake and it is also the client that is responsible for the ultimate correctness of information presented to the authorities, thus making the client the master in deciding which (legal) tax planning strategy to follow. The duty of the tax adviser is to inform and assist his client with regard to this choice.

It should be clear, in particular from communications between the client and the tax adviser, whether the client is prepared to take the risk that his scheme will be challenged or whether he is risk averse and prefers legal certainty over a potential tax saving. In the latter case, not informing a client of a venturesome scheme might not be considered negligent.

The introduction of a duty to report tax avoidance schemes or of a general anti-abuse rule (GAAR), such as that recommended by the European Commission to EU Member States, may make some tax avoidance schemes look less attractive, which will have an impact on which available schemes a tax adviser will have to bear in mind when advising a client.

This is why the current discussion regarding GAARs and tax avoidance reporting is much more than just a tax policy discussion but will have an impact on the engagement and, ultimately, on the professional liability of tax advisers.

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1. *See* OECD Report, Addressing Base Erosion and Profit Shifting (February 2013), available at http://www.oecd.org/tax/beps.htm.

2. Australian Taxation Office, *Good Governance and promoter penalty laws* (NAT73779-12.2012).

3. UK: HC, 5 June 2013, Mehjoo, [2013] EWHC 1500 (QB).

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