Tax Mitigation Schemes and other Risks - What's next for Tax Advisors

By Karen Eckstein

It is no secret that HMRC have, over the past years, focused heavily on tax mitigation schemes in their drive to reduce tax avoidance.

This has, in turn, had a significant impact on the professional advisers, who, often inadvertently, have been caught up in these schemes.

In addition to increasing the number of schemes which are included in HMRC's "spotlights," (examples include disguised remuneration schemes – particularly those paying people via loans – those being the most popular devices which have been under increased scrutiny over the year) HMRC have been granted a number of additional weapons in their fight against tax avoidance in the last few years.

These include:

1. The GAAR – the General Anti Abuse Rule, introduced in 2013 and refined subsequently. The GAAR aims to deter taxpayers from entering into abusive arrangements and to deter promoters of schemes from promoting such arrangements.

2. APNs (Accelerated Payment Notices) were introduced in July 2014. These effectively "flipped" the benefit of any tax reliefs sought under schemes in certain circumstances, so that, instead of claiming the relief and having to pay the tax if the scheme failed, the taxpayer would have to pay the tax under an APN, and would only be able to claim the relief if the scheme was subsequently found to be valid. The use of APNs effectively therefore did away with any perceived cash flow advantage obtained by entering into schemes.

3. More recently, the introduction of an offence for the criminal facilitation of tax evasion, introduced by the Criminal Finance Act 2017, made advisers criminally liable if they facilitated tax evasion by their clients, (or if they did not have procedures in place to prevent it).

This is, of course, not a comprehensive list of the legislation in place, but it demonstrates the "direction of travel" and the increased exposure that advisers face.

So what's next for advisers? There are three areas of risk (not necessarily related to schemes) It is useful to highlight and these are:

1. The disclosure of offshore income;
2. MTD (Making Tax Digital);
3. Offshore payroll/the use of Personal Service Companies.

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1. Clients with offshore income

A new legal requirement came into force to correct non-disclosures in relation to offshore matters. The correction had to take place by 30 September 2018. Failure to make that correction would mean that substantial (in excess of 100%) penalties would arise upon the taxpayer.

It is likely that claims in relation to failure to correct will be brought, where the client will allege that his adviser should have ensured that the correction was made in time, to avoid the penalty. There will be arguments over causation and liability (not least in relation to contributory negligence by the client) but claims are a possibility.

It is hoped that all advisers with clients with potential offshore income will have been contacted in relation to the requirement to correct and appropriate steps taken but it is likely that some clients will have "slipped through the net" and that claims may arise.

2. MDT (Making Tax Digital)

This is not a tax mitigation scheme, but it is an area of risk. MTD is a fundamental change to the tax system. VAT registered businesses (those with a turnover of over £85,000) are now, on the whole, required to use MTD for their VAT aspects, and have been required to do so on the whole since 1 April 2019. Many other VAT registered businesses will be required to use MTD for their VAT affairs from 1 October 2019. MTD requires the maintenance of digital records and regular "real time" reporting, in effect to HMRC.

It is intended to bring MTD in for Income Tax and Corporation Tax, by 2021. Regular (probably quarterly) returns will be required to be filed. It is probable that penalties will be imposed for incorrect returns.
There is a substantial risk for advisers who make errors in a client's returns, if they are required to file for their clients.

Whilst this is not a "scheme", and is more a compliance issue, advisers need to be aware of clients who are likely to fall within MTD, and ensure that those clients are aware of the forthcoming obligations. If an adviser is undertaking a client's MTD obligations, they should be careful to ensure that no errors arise, in view of any likely penalties.

3. Off payroll working/PSC

This is the area where I consider there is likely to be substantial HMRC interest. There are two aspects here, the question of whether someone is employed or self-employed, and the question of working through a personal service company.

These issues have been very high profile in the press recently. HMRC have suffered a number of high profile losses, for example, the challenge to Lorraine Kelly's tax status. Lorraine Kelly and her husband set up a personal company, Albatel Limited, in 1992. Albatel provides Lorraine Kelly's services in a variety of roles, as a broadcaster, actress, model and writer to a variety of clients, including ITV. In 2012, Lorraine Kelly agreed to provide services to ITV for the TV programmes Lorraine and Daybreak. HMRC said that the services provided by Lorraine Kelly for those two programmes were provided by her in essence, as employee. HMRC chose to ignore the existence of the company, and sought to tax Lorraine Kelly as an employee for those services. This would have resulted in a far higher "tax take".

A similar case was taken in relation to the BBC Look North news presenter Christa Ackroyd. She was held to be an employee, because the BBC could direct her to present any programme of their choice. However, Lorraine Kelly won her tax appeal against HMRC, who deemed that she was not an employee for Income Tax and NIC purposes.

The two cases are worth reading in conjunction, to determine whether an individual is an employee or self-employed, as is the "Atholl house case", which looked at Kaye Adams, who was a presenter on Loose Women and other programmes. The usual "employment" factors were considered, the brand, reputation, time spent by the individuals in working for other organisations, and the "control test" the extent to which the "employer" could control the activities of the "worker" were all considered.

There have been a substantial number of "IR35" cases, cases where the employed/self-employed issue have been considered at length, and these are likely to remain an issue.

Advisers who have assisted their clients to operate through the use of a personal service company, to avoid being deemed employed, as opposed to self-employed, may face some challenging questions from their clients, in the event that their clients themselves are challenged by HMRC. It is certainly a topic on HMRC's radar.
The other aspect which is currently on the radar in the PSC environment relates to the current cases against actors which have recently resulted in a decision in favour of HMRC (the recent case involving Robert Glenister). Mr Glenister (who was always going to be deemed to be self-employed) provided services through a company, Big Bad Wolff Limited. The provision of services through a company was not to avoid being deemed to be employed as opposed to self-employed, but would minimise the amount of National Insurance Contributions that he would be required to pay on his earnings.

HMRC pursued Mr Glenister because it claimed that the personal service company should be liable to pay, not just primary class one National Insurance Contributions, but also the production company's National Insurance, a substantially higher amount.

The case was defended on the basis that that liability would not have arisen had contracts been entered into directly.

HMRC relied heavily on the "Categorisation of Earners Regulations" which had been enacted to help low paid actors access contributory welfare benefits. HMRC accepted that, if the company was ignored, Mr Glenister would have been regarded as self-employed for tax purposes. It was held that the higher level of National Insurance Contributions were payable, and therefore the imposition of the company has created a tax liability which the actors should now pay.

Those actors will inevitably pursue a claim against their advisers, either for failing to ensure that the scheme they entered into operated successfully or for failing to advise them not to enter into the scheme in the first place – the latter, for the tax, if the tax taken by HMRC (in terms of National Insurance Contributions) is higher than would have been the case had they not entered into the scheme in the first place, and in both cases, for any interest, penalties and costs incurred as a result.
In summary, HMRC now have far more powers in their armoury, not only to go against taxpayers, but also promoters and taxpayers' advisers. The areas where I think HMRC will focus going forward will be offshore assets, MTD and employment status and use of personal service companies and these are areas where advisers would be well advised to examine their client base and ensure that all appropriate steps have been taken in relation to those clients to minimise the risk of claims arising against them.

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If you have any questions relating to these topics an how they may affect your Professional Indemnity Insurance, please contact Roselin Ali or Catherine Davis, at Lockton Companies LLP

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