Responses to members' questions on PCRT

Would 'washing out' a capital gain ordinarily subject to 28% tax by reinvesting in EIS and then selling that investment which would be taxed at a lower rate be acceptable under the new standards?

We are not in this Q+A giving technical advice on EIS. However the government's guidance on EIS (https://www.gov.uk/government/publications/the-enterprise-investment-schemeintroduction/enterprise-investment-scheme) says in its introduction that relief will not be given if a scheme has a main purpose of tax avoidance but that that does NOT include getting the reliefs available under EIS itself. Indeed it is inherent in the working of statutory incentives such as EIS that those incentivised to invest are motivated to get the tax relief. Among the EIS reliefs available to an investor (para 1.2.4) is capital gains tax deferral relief. It seems clear that this relief is intended by parliament. However, broadly it is a condition of such relief that there are no arrangements for the disposal of the shares invested in at the very outset of the investment. Obviously all the conditions of the relief must be highlighted in the advice.

But what if the situation is more borderline, don't we still have to advise our clients?

In any area where the results of tax analysis produce apparently surprising and/or beneficial results, the adviser needs to advise the client dispassionately, objectively and fully (including in relation to the costs and risks of HMRC challenge and any similarly foreseeable results). This would include exploring the substantive nature (or, at the opposite end of the spectrum, artificiality) of the arrangements proposed: balanced advice, which covers such risks, as distinct from encouraging the client into such arrangements, should not amount to the creation, promotion or encouragement of arrangements that are against the clear intention of Parliament or seek to exploit shortcomings in the relevant legislation.

How do I know what the clear intention of parliament in enacting relevant legislation was?

Discerning the intention of parliament at the time that the legislation was enacted is likely only to be an issue where more complex or ground breaking planning is concerned. In such cases the legislation and any associated explanatory notes issued at the time of enactment should prove sufficient. Only rarely should it be necessary to consult Hansard.

Members will not be expected to second guess what the clear intention of parliament was. If the intention of parliament was genuinely unclear at the time of enactment then a member cannot be disciplined under part 1 of new standard 4:

> 'Members must not create, encourage or promote tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation….'

I work in Industry and Commerce. From time to time I am required to provide the Board with a view based on the tax risk involved in a transaction. Ultimately the Board will take a commercial decision that could, in theory, contradict what it should be doing from a PCRT perspective. Would that leave me vulnerable to disciplinary action for breach of PCRT by my employer?

The focus of PCRT is the behaviour of the member who is advising, whether in-house or from an external firm, acknowledging that it is the client (or employer) who gives the final decision having

heard the advice. The key new standard talks about the member not 'creating, encouraging, or promoting' certain arrangements. Generally, if the member, whether in-house or external, is focussed on giving advice which is well-balanced, thorough, dispassionate and objective, then it will not amount to the creation, encouragement, or promotion of such dubious arrangements. The danger arises when the adviser steps out of that dispassionate role into the role of a promoter, and when the things promoted – leaving aside the issue that they may well not work and may rebound to the detriment of the employer or client – are undermining to the health of the tax system. There is a particular issue that while the principles of PCRT should apply to all members, much of the specific language tends to presuppose an external adviser, and we will be looking, with the other bodies, to address that in the next edition of PCRT.

Is it acceptable under the new standards in PCRT to make referrals to another adviser whom I know offers planning which could be considered to be highly artificial or highly contrived and seeks to exploit the shortcomings within the relevant legislation?

Under the new standards a member must not 'create, encourage or promote tax planning arrangements or structures that ….are highly artificial or highly contrived and seek to exploit the shortcomings within the relevant legislation'.

If a member refers clients to another adviser expressly so that they can benefit from such planning it is quite probable that this behaviour would be considered to be encouraging behaviour which is in contravention of the above standard. (Note however that for members of the CIOT and ATT it is the Taxation Disciplinary Board who would decide the case.)

If the member is uncertain whether the planning being offered by the other adviser is highly artificial or highly contrived and decides to refer he should make the client aware of the risks associated with aggressive planning, including probable challenge by HMRC and potential damage to reputation.

Where possible, when making a referral a member should offer a choice of advisers and if any payment is received for the referral this must be disclosed to the client. These obligations are set out in more detail at 7.5 'Referrals to another professional adviser' and 8.3 'Disclosure of commission' in the pre-existing CIOT and ATT Professional Rules and Practice Guidelines.

Further guidance on PCRT can be found at PCRT FAQs CIOT and PCRT FAQs ATT