Responses to members' questions on PCRT

Working while furloughed

It has been made very clear by government and HMRC that any employees who have been furloughed must not undertake any work for their employer. The GOV.UK website says:

"You cannot ask your employee to do any work that:

- *makes money for your organisation or any organisation linked or associated with your organisation*
- *provides services for your organisation or any organisation linked or associated with your organisation*

They can take part in volunteer work or training."

Members who have been furloughed and still have access to work e mails, texts or phone calls must ensure they do not answer these. As a precautionary measure, employers should consider instructing employees to include an out of office message on e-mails and phones explaining they will not be carrying out any work until further notice. To continue working for your employer while furloughed raises the risk of the employer being suspected of fraud and being reported to the HMRC fraud line or to the National Crime Agency. You may however undertake other paid work – provided of course it is not in a furloughed role.

What should I do if my client has instructed their furloughed employees to continue working for the business?

You should advise the client that instructing employees to work while furloughed is in contravention of the terms of the Coronavirus Job Retention Scheme. If, despite your advice, the client refuses to tell their employee to stop work you must cease to act for the client – see PCRT Helpsheet C: Dealing with errors as your client is acting contrary to the law.

You will also need to consider your anti-money laundering reporting obligations. These will depend on whether there are proceeds of crime. If you believe that your client made an innocent mistake and corrected matters straightaway as soon as you advised them, then it is unlikely there are proceeds of crime and a report is not required.

If, however you believe your client was fully aware of the restrictions on employees working for them while furloughed, then you should report the matter to your firm's Money Laundering Reporting Officer because the client has knowingly claimed government funds to which they are not entitled. Money received under the scheme in such circumstances constitutes proceeds of crime.

If you are the firm's MLRO/a sole practitioner, you should submit a suspicious activity report to the National Crime Agency.

What should I do if a struggling client seeks to take unfair advantage of Government support measures during the COVID 19 emergency?

No tax adviser should engage in assisting a client to abuse any of the unprecedented Government support for businesses and individuals in this emergency, including use of 'Time To Pay'

arrangements. Advisers should fully explore what support is available for their client's actions ethically and within the law.

They must at all times act within the requirements of Professional Conduct in Relation to Taxation (PCRT) in handling the tripartite relationship between themselves, their clients (or employers in the case of in-house advisers) and HMRC. In particular they must ensure that:

- all planning advice is based on a realistic view of the facts and credible interpretation of the law (the second standard of UK tax planning advice);
- they do not create, promote, or encourage arrangements that seek to achieve results contrary to the clear intention of Parliament in enacting the legislation, or that are highly artificial or highly contrived and seek to exploit shortcomings in the legislation (fourth standard); and
- they document any difficult judgments that they make in interpreting these rules (fifth standard).

See especially PCRT paras 3.2 and 3.9-3.11.

If advisers become aware of things that give them reasonable grounds to suspect there has been a financial crime, including tax evasion, they need to consider making a Suspicious Activity Report (SAR) to their firm's Money Laundering Reporting Officer, or direct to the National Crime Agency (NCA) if they are a sole practitioner. Further guidance can be found in the AML Guidance for the Accountancy Sector on CIOT website and on the NCA website.

Tax advisers should also ensure they do not commit an offence under s 328 of the Proceeds of Crime Act when assisting a client:

"A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person." The proceeds of tax evasion constitute criminal property and the penalty for such an offence is a fine or a prison sentence of up to 14 years or both.

As a concrete example, can I help my client maximise the amount of VAT that can be deferred by recognising more output VAT in the relevant quarter?

There are very detailed VAT rules defining what constitutes a VATable supply and the time at which it is deemed to occur. Purporting to recognise output VAT on supposed supplies outside these rules is not appropriate - and indeed might constitute fraud or other financial crime. In some cases, the outcome of operating the rules can be influenced by matters within the taxpayer's control: for example where there are ongoing supplies, the timing of the supply can be affected by when invoices are issued. Advising on these rules, and matters such as the timing of issuing invoices on genuine supplies, is entirely legitimate. Professional rules require advisers to stick to giving advice, and not to create, promote, or encourage arrangements that are contrary to the clear intention of Parliament in enacting the legislation, or are highly artificial, or highly contrived, and seek to exploit shortcomings in the legislation.

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