

CFE Professional Affairs Committee Professional judgment in tax planning and Professional Conduct in Relation to Taxation (PCRT)

Professional judgment in tax planning – an ethics quality bar

In support of high professional standards in tax advice, the Professional Affairs Committee of the Confederation Fiscale Europeene, of which CIOT is a member, has formulated five key questions an adviser should to ask when undertaking tax planning, as an aid to adopting an ethical approach to tax planning. To assist members seeking to reconcile these questions to their obligations under PCRT, the CFE questions are set out below together with a link to the relevant section in PCRT which gives further guidance on the topic.

1. Is there a genuine economic purpose for the tax planning apart from achieving a tax benefit, either now or in the future?

There is a risk that tax planning designed solely to achieve a tax benefit without any genuine economic purpose may fall foul of the 4th Standard for tax planning.

- **Advising on tax planning arrangements**

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; and/or

ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.

2. Are the arrangements artificial or manipulated in a form-over-substance approach to achieve a tax benefit?

See 1 above and the FAQs in [Help sheet B Tax Advice](#) which address some of the practical concerns.

3. Is the tax planning based on interpretations of applicable international and national tax law which are likely to be considered credible by the courts and informed stakeholders?

The 2nd standard is in point here:

Lawful

At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law.

Members should draw their clients' attention to where the law is materially uncertain, for example because HMRC is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the particular case, for example where litigation is likely.

This is expanded further as follows:

Lawful

3.6 The requirement to advise clients on material uncertainty in the law (including where HMRC take a different view) applies even if the practical likelihood of HMRC intervention is considered low. Clients

should be told what would be reasonable, at the time of the transaction, to expect HMRC to believe the application of the law to be (assuming HMRC was fully apprised of all the facts of the transaction). Where the likely view of HMRC is uncertain or not known, the member should include this fact as part of their advice.

3.7 The fact that the member may disagree with HMRC on a matter is not of itself indicative of behaviour that might breach these standards. A member may reasonably believe that an HMRC view is wrong in law but, if so, the client should be alerted to the fact that HMRC holds a different view of the law and should be advised of the risks and likely costs that might be incurred in order to determine any dispute.

4. Would the arrangement be implemented if the relevant tax authority had a full overview of every aspect of the planning?

See the 3rd standard in the Standards for tax planning:

Disclosure and transparency

Tax advice must not rely for its effectiveness on HMRC having less than the relevant facts. Any disclosure must fairly represent all relevant facts.

And which is expanded as follows:

3.8 Disclosure should be made whenever required by law and fuller disclosure must be recommended to clients wherever it is appropriate given a wider relationship or dialogue with HMRC relevant to that client. What is actually to be disclosed will inevitably reflect a professional judgement taking into account all relevant facts and law specific to the case in question and what the client consents should be disclosed.

Help sheet D: Request for data by HMRC also provides helpful information. It comments separately on informal and formal requests and makes the following point

‘A member should comply with formal requests and should not seek to frustrate legitimate requests for information. Adopting a constructive approach may help to resolve issues promptly and minimise costs to all parties.’

5. Are there any other potential reasons why the tax planning could be perceived by policy makers and the general public as abusive?

The impact of planning which might be perceived as abusive can be widespread. As well as the ethical considerations the following related risks set out in PCRT Help Sheet B: Tax Advice should be noted:

- The reputational risk to the client and the member of the planning in the public arena.
- The stress, cost and wider personal or business implications to the client in the event of a prolonged dispute with HMRC. This may involve unwelcomed publicity, costs, expenses and loss of management time over a significant period.
- If the client tenders for government contracts, the potential impact of the proposed tax planning on tendering for and retaining public sector contracts.
- The risk of counteraction. This may occur before the planning is completed or potentially there may be retrospective counteraction at a later date.

- The risk of challenge by HMRC. Such challenge may relate to the legal interpretation relied upon, but may alternatively relate to the construction of the facts, including the implementation of the planning.
- The risk and inherent uncertainty of litigation. The probability of the planning being overturned by the courts if litigated and the potential ultimate downside should the client be unsuccessful.