

Anti-Avoidance Rules in the United Kingdom: The Disclosure Alternative

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UK Anti-Avoidance to 2004

- Combination of action through courts and specific counteracting legislation
- Judicial anti-avoidance doctrine: *Ramsay* and *Furniss v Dawson*
- Proposed statutory general anti-avoidance rule
- Judicial backtracking: *Westmoreland Investments*

Budget 2004 – Disclosure of Tax Avoidance Schemes

- Rules designed to provide Inland Revenue with early information about some types of avoidance schemes
- Enable swifter and more effective investigation
- Where appropriate, counteraction
- Act as disincentive to contrived and elaborate schemes that rely on confidentiality
- Compare U.S. Code Section 6111

Finance Act 2004 Part 7: Sections 306 to 319 and implementing regulations

Five questions:

1. What must be notified?
2. Who must notify?
3. How and when must notification take place?
4. What happens after notification?
5. What is effect of not notifying?

1. What must be notified?

Proposals or arrangements that:

- give rise to a *tax advantage* in relation to income tax, corporation tax or capital gains tax that is the *main benefit* or one of the main benefits of the arrangements, and
- involve certain *employment or financial products*

Tax advantage =

- obtaining a relief or deduction against profits or gains
- obtaining a repayment or increased repayment of tax
- avoiding or reducing tax charge or assessment
- deferring any payment of tax
- avoiding obligation to deduct or account for tax

Employment products =

Arrangements connected with employment, where expected reduction or deferment of tax arises by virtue of employee's employment, that involve:

- securities, interests in securities, securities options, rights derived from securities or anything whose value or amount calculated by reference to any of foregoing,
- payments to trustees and intermediaries, or
- loans

and fail one of the first two of three tests

Financial products =

Arrangements that include

- loans
- derivatives
- repos
- stock loans
- shares
- anything that is in substance a loan and fail one of three tests

The three tests:

- No promoter would be able to obtain a premium fee
 - chargeable for tax avoidance element, and
 - attributable to or contingent on obtaining tax advantage
- No tax avoidance element that promoter would be expected to wish to keep confidential from other promoters
- Terms of product not significantly different from those obtainable on open market

Exemptions from disclosure (1):

Employment products –

- approved share schemes and Enterprise Management incentives
- payments to trusts established for
 - an approved pension scheme
 - an approved share incentive plan
 - an approved SAYE scheme
 - an approved company share option plan

Exemptions from disclosure (2):

Financial products –

- where tax advantage does not arise “to a significant degree” from inclusion of product in arrangements
- assets held within an individual savings account or a personal equity plan
- anything accounted for as a finance lease

2. Who must notify?

- Promoter
 - carries on a *relevant business*
 - is responsible for design of proposal or arrangements, or
 - markets proposal, or
 - Is responsible for organisation or management of arrangements
- Client (user)
 - Non-resident promoter
 - No promoter

Relevant business =

- any trade profession or business involving provision of services relating to taxation
- bank or securities house
- company in same group as bank or securities house

Exceptions:

- Promoter is a lawyer constrained by legal professional privilege
- Another promoter has already notified
- Services provided by company to member of same group
- Employees
- Adviser does not give tax advice
- Adviser does not have sufficient information
 - to know whether notifiable, or
 - to comply with notification requirement

3. How and when must notification take place?

- By promoter (or user if offshore promoter) to Inland Revenue Avoidance Intelligence Unit:
 - name and address of promoter or person notifying
 - name (if any) and summary of arrangements
 - explanation of tax avoidance element, and
 - statutory provision on which based
- Within five days of:
 - marketing arrangements, or
 - first transaction under arrangements

4. What happens after notification?

- AIU issues reference number within 30 days
- Promoter required to provide clients with reference number within 30 days from:
 - date when became aware of first step taken
 - if later, receipt of reference number from IR
- User must inform IR of reference number when submitting tax return

5. What is effect of not notifying?

- Failure to notify arrangements to AIU or reference number to client:
 - penalty not exceeding GBP 5,000
 - if failure continues, further penalties not exceeding GBP 600 each day it continues after imposition of first penalty
- Failure to notify reference number in return:
 - penalty not exceeding GBP 100 on first occasion, GBP 500 on second occasion or GBP 1,000 on later occasions

Comparison with Sec 6111

FA 2004 Part 7

- Employment and financial products
- No lower limit
- No requirement to disclose names of clients
- Lump sum penalty

Code Sec 6111

- Tax shelter ratio greater than 2:1
- Investment greater than USD 250,000
- Organiser must keep lists of clients
- Penalty 1% of amount invested