Irish Tax Institute

Leaders in Tax

Registered Office
South Block
Longboat Quay
Grand Canal Harbour
Dublin 2

Tel.: +353 1 663 1700
Fax: +353 1 668 8387
E-mail: info@taxinstitute.ie
Web: www.taxinstitute.ie

Mr Paul Walsh
Principal Officer
Income and Capital Taxes Division
Office of the Revenue Commissioners
Stamping Building
Dublin Castle
Dublin 2

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Dear Mr. Walsh

Mandatory Disclosure – updated Draft Guidance and Regulations

I am writing to you with the comments of the Irish Tax Institute on the updated draft Guidance Notes on the Mandatory Disclosure Regime (draft Guidance) and related Regulations. Our comments below are based on feedback the Institute has received from members and discussions at the Main TALC committee meeting on 10 December 2014.

We note that Ireland has had a General Anti Avoidance Rule on our Statute Book since 1989. This has resulted in a very different commercial environment for Irish taxpayers and Irish tax advisors since 1989, compared with other jurisdictions.

Those other jurisdictions have made a number of recent policy decisions which reflected the lack of these General Anti Avoidance Rules. These policy decisions have been made on the back of real substantive consultation programmes (including reviews lead by third party external experts).

In our view, it remains unclear whether there is merit in implementing variants of legislation from other jurisdictions, bearing in mind that it has been developed taking into account a different legislative framework and a different economic environment. We believe it is very unwise that such legislative changes are made in the absence of consultation, debate, and taking into account the Irish economic environment.

While we welcome the request to comment on the draft Guidance and Regulations, we would note that this does not compensate for any real debate on the wider legislative framework.

Overview of the Mandatory Disclosure Regime

The mandatory disclosure regime is now in operation for nearly four years and tax advisers have invested significant resources in staff training and procedures to comply with the regime.

Inherent to the potential success of the regime is a clear understanding by both advisers and Revenue as to the types of transactions Revenue expect to be disclosed and those which it considers to be ordinary "day-to-day tax advice". This requires a two-way flow of information between Revenue and advisers. However, Revenue has not communicated its views on the disclosures received to date and this creates uncertainty and difficulty for advisers. This uncertainty has been further compounded by the changes in the Finance Bill, which were not consulted upon in advance, and also by the draft Guidance Notes and Regulations, upon which we have commented in detail below.

HMRC regularly release a "Spotlights" update newsletter on transactions they have examined under its Disclosure of Tax Avoidance Schemes (DOTAS) regime. A similar approach by Revenue here would be welcome.

We also note that the distinction in treatment remains between transactions involving Legal Professional Privilege (LPP) and other transactions. This is an area which needs to be addressed so that the same rules apply for all tax advisers in future.

Comments on the Draft Guidance

We have outlined below our main comments on the draft Guidance published. These relate to:

1. The changes to the confidentiality hallmark,
2. The introduction of a new hallmark for discretionary trusts; and
3. Operational aspects of the new requirement for transaction numbers.

In the appendix to this letter we have highlighted specific technical issues where clarity would be welcome.

1. Changes to the Confidentiality Hallmark

Section 88 Finance Bill 2014 imports the Confidentiality Hallmark from Regulations into the Taxes consolidation Act 1997. However, this section has also widened the scope of the hallmark insofar as it relates to confidentiality vis-à-vis Revenue. A promoter must now consider whether <u>any</u> promoter would wish to keep the scheme or transaction confidential from Revenue (to facilitate repeated use, prevent Revenue query or withholding of a refund). We have provided further comment on the technical aspects of this expanded test in the appendix.

Under paragraph 4.3.1 of the draft Guidance, the fact that a scheme is brought to the attention of, or discussed with, a Revenue official or its details are discussed with Large Cases Division (LCD) or Revenue Legislation Services (RLS) is "not a substitute" for disclosing a scheme. In our view, disclosure should not be required where a scheme has already been brought to the attention of Revenue (albeit in one particular department).

The draft Guidance now specifies that a promoter can only rely on:

1. published Revenue technical guidance; and

2. decided case law.

when determining whether a scheme is “known to Revenue”. However, Revenue guidance can be limited and may not always reflect latest developments. We would like to see a commitment from Revenue in the Guidance to a regular process to review and update its technical guidance. This should operate in conjunction with a process to highlight the types of transactions where disclosures have been made, as noted above.

2. The New Hallmark for Discretionary Trusts

The Guidance notes that the new hallmark for discretionary trusts is to target transactions that seek to gain a tax advantage through the use of a discretionary trust, wherever located (paragraph 4.3.10). There are no details in the Guidance of the types of discretionary trusts that Revenue expects to be disclosed. Appendix 2 of the Guidance excludes from the disclosure obligation only those discretionary trusts which involve special trusts for incapacitated individuals (under S189A TCA 1997) and those falling within the exemptions listed in S17 CATCA 2003.

Discretionary trusts are used widely for legal reasons and for many commercial purposes (which is not the target of the mandatory disclosure regime). They are established mainly for asset protection reasons and the age or personal circumstances of the beneficiaries are generally the influencing factors in deciding to create a trust. Discretionary trusts may also be established in corporate situations where control and flexibility is required.

Common scenarios where a discretionary trust may be in place would include:

- Trusts in connection with securitisation companies (“S110 companies”). These can be used, for example, to protect assets against possible bankruptcy actions by a third party, due to regulatory or legal obligations on the trustee, to protect debt note holders etc.
- Trusts in connection with asset financing and with the leasing sector (for example in the aviation leasing sector). A trustee may have discretionary authority so as to meet legal or regulatory obligations in the event of very exceptional circumstances arising. For the purposes of Irish tax law the beneficiaries are taxed as the beneficial owner of the assets, notwithstanding the discretionary authority of the trustee.
- Regulated unit trusts which are investment undertakings. It is not clear whether a unit trust for collective investment will or will not fall within the discretionary trust hallmark. In the interests of certainty, we would like to see the exclusion for trusts in Section 17 CATCA 2003 extended to Irish regulated funds, trusts where the beneficiaries are tax exempt and to regulated trusts for collective investment within the EEA countries with which we have a Tax Treaty.
- Will trusts. Discretionary trusts with Irish disponers are already reported to Revenue under S46(15) CATCA 2003.
- Trusts for restricted shares taxed under S128D TCA 1997.

Given the wide definition of “tax advantage” we would like to see clarity in the Guidance that no disclosure is required in relation to the types of trusts noted above. This would be best achieved by inclusion of these types of trusts in the list of exclusions in Appendix 2 of the draft Guidance.

Advisers can often be called upon to provide advice which involves foreign discretionary trust arrangements. For example:

- In relation to mobile non Irish domiciled executives. For example, advice may be required in relation to the Irish tax treatment of foreign share awards or benefits, whether the remuneration

aligns with the remuneration policy for Irish executives and variations to the arrangements that may be required, consideration of the pension arrangements re making contributions and whether tax relief is available, advice on personal tax issues to reduce exposure to double taxation for gift/inheritance tax etc.
- In relation to trusts where the only connection with Ireland is that the discretionary trust has a potential Irish beneficiary. For example, where a person is moving to Ireland and advice can be sought by the trustee on ways to reduce the administrative complexity.

This type of advice would be considered routine tax advice and we would like the Guidance to indicate that advice of this nature would not give rise to a disclosure obligation.

3. Operational Aspects of the requirement for Transaction Numbers

Part 8 of the Guidance addresses the new requirement for transaction numbers (TN). There are a number of aspects of the requirements that may present operational difficulties.

- Where Revenue requests supplemental information in order to determine whether a transaction is disclosable, the 90 day period within which Revenue must issue a TN is extended by a further 90 days. In our view, this 90 day extension should not apply in cases where all "material" information has been received by Revenue. It is important for the promoter/taxpayer to have certainty on Revenue's view about a transaction that has been disclosed and therefore a request simply for supplemental information should not further delay the issue of a TN.
- A person marketing a scheme is required by S817 TCA 1997 to provide information to Revenue where it would be "reasonable to consider" it is a disclosable transaction and the marketer has not been provided with a TN. In practice, it may be difficult for a marketer to decide whether a transaction is disclosable. They may not have full information on the scheme nor be aware whether, for example, the promoter wishes to keep it confidential from Revenue. The Guidance should reflect that once the marketer has made their "best endeavours" in considering whether a scheme is disclosable and provided information to Revenue, they should be treated as having complied with the requirements.
- A user of a scheme is required to provide certain information automatically to Revenue, if they have not included a TN on their Form 11/CT1. This presupposes that a taxpayer will be aware that the transaction is disclosable. It is not clear when this information must be provided to Revenue. For the avoidance of doubt, the Guidance should clarify whether the TN must be included on a user's tax return each year, where, for example, a loss arising under a disclosable scheme cannot be fully utilised against income in the first year of claim.
- The Guidance attempts to address the interaction between the 2011 regime and the new regime, in order to clarify when a TN must be sought. In our view, this matter would be best illustrated in the Guidance by way of examples and we have provided some suggested scenarios in the attached appendix.

Should you wish to discuss any aspects of this submission, please do not hesitate to contact Mary Healy (01 6631743) or Cora O' Brien (01 6631719).

Yours truly

Andrew Gallagher

Andrew Gallagher
President

Appendix: Mandatory Disclosure Draft Guidance – Specific Observations

Paragraph 3.3. Promoter definition

The 2011 Guidance narrowed the definition of a promoter so that a person only involved in the overall design of a scheme in a broad sense who "provides benign tax advice that does not contribute to the design of the tax advantage" will not be considered to be a promoter. A specific example of the provision of advice as to whether two companies are "connected" for the purposes of the Tax Acts is provided to illustrate this point. We think that this example is illustrative of ordinary day-to-day tax advice and should be retained in the guidance.

Paragraph 4.3.1 Confidentiality from Revenue

Under Regulation 7 of the Mandatory Reporting Regulations a promoter had to consider whether they would wish to keep "the way" the transaction gives rise to a tax advantage confidential from Revenue to facilitate repeated or continued use.

Under S817DA(2) TCA 1997, a promoter must consider whether they would or might reasonably be expected to wish to keep "the transaction" or "any element of the transaction", including the way it gives rise to a tax advantage confidential from Revenue to 1) facilitate repeated/continued use, 2) to prevent Revenue using information about the transaction to enquire into a return or 3) prevent Revenue using the information on the transaction to withhold a refund.

We are unclear how the draft Guidance in relation to schemes "known to Revenue" will interact with the new wording. However, we welcome the clarification provided at Main TALC that where a scheme is known to RLS or LCD it can to be relied upon the purposes of the 'confidentiality from Revenue' test.

The confidentiality hallmark appears to apply irrespective of whether the transaction "gives rise to the tax advantage."

Paragraph 4.3.4 Standardised products

We note that the draft Guidance on standardised tax products and precedent documents, does not include the wording in the 2011 Guidance that illustrated the routine use of precedent documents such as legal documents providing for group loans, corporate reorganisations etc. would not generally be considered to constitute precedent documents indicating a standardised product is in place. We would like to see the removed text reinstated as it provides useful clarification and is reflective of standard documentation used in normal routine tax advice.

In this paragraph of the draft Guidance we also think it would be useful to provide some clarity on the distinction between investment products on which tax advisors provide advice vis-à-vis the tax consequences for investors of investing in the product and "standardised tax products". Investment products may be considered 'standardised' e.g. the same investment product documentation is provided to the class of investors to which the product is marketed. For example where an investment product is a debt instrument such as bonds, loan notes, an interest in a fund, etc. the product materials provided to investors often have a marketing prospectus which include notes on the expected tax treatment for the investor. In the interest of clarity it would be useful to note in the Guidance that providing advice on the tax consequences of investing in such financial products is not considered to fall within scope of disclosure regime.

Paragraph 4.3.10 Discretionary Trusts

Our main comments on 4.3.10 and discretionary trusts have been made in our letter. We suggest that in like manner to other specified descriptions, it would be useful at paragraph 4.3.10 to refer the reader to the routine tax planning (Appendix 1) and excluded transactions (Appendix 2).

Paragraph 8 Transaction Numbers

It would be useful if paragraph 8.7 on transaction numbers contained a number of scenarios to illustrate the interaction of the "old" and "new" regimes, taking into account the "relevant date" for disclosure may have passed and a disclosure may or may not have been made. It would be useful to also include an example in relation to Discretionary Trusts which would not have been disclosable up-to-now.

It would be useful to illustrate what is now required for example where:

- Promoter A made a disclosure in relation to a disclosable transaction before 23 October 2014 after making a "marketing contact". Taxpayer B enters into the transaction after 23 October 2014.
- A scheme was developed "in-house" by Taxpayer B and had no promoter. Taxpayer B entered into the first transaction forming part of the scheme before 23 October 2014 and made a disclosure.
- Promoter A made a bespoke scheme available to a client before 23 October 2014. Promoter A becomes aware that the client has entered into a transaction forming part of the scheme after 23 October 2014.
- A promoter asserted Legal Professional Privilege. The client/user fails to make a disclosure in relation to a disclosable scheme, when required.
- Promoter A and Promoter B make a disclosure in relation to the same scheme. The disclosure by Promoter A was made before 23 October 2014. The disclosure by Promoter B will be made after 23 October 2014 – will the same transaction number apply?

The provisions of S817HA(2) TCA 1997 are very widely drafted. Although clearly directed at persons who implement a scheme (in the sense of managing and directing such implementation) it potentially applies more broadly *"to a person who enters into a transaction which forms part of a disclosable transaction"*. It would be useful to be clear in the Guidance that it is not intended to impose an additional obligation on persons, for example, financial institutions or other parties acting in the ordinary course of business, to obtain a transaction number and provide it to other parties who are parties to transactions, where the person is acting without knowledge of the wider scheme and its context.

Working days

We welcome the clarification in the draft Guidance that the reference to 5 days and 30 days for making a disclosure and for provision of client lists refers to "working days".