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MANDATORY DISCLOSURE RULES FOR TAX ADVISERS

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Introduction

- Governments and tax administrations are looking for new ways to obtain information in addition to traditional means such as tax returns and tax audits
- Mandatory disclosure rules means that certain forms of tax planning must be disclosed separately, either by the taxpayer or by a tax adviser

Why?

- The idea is to obtain early information on potentially aggressive or abusive tax planning - can enable an accelerated response by
  - the tax authority (reviews and audits of specific taxpayers or groups of taxpayers, new guidelines etc.)
  - the legislator (legislation that prevents revenue loss and creates a level playing field)
- Deterrence

Recent events

- Mandatory disclosure rules have been enacted in several jurisdictions, e.g. in Canada, the United States, the UK, Ireland, and Portugal
- OECD, Mandatory Disclosure Rules, Action 12 - 2015 Final Report
- EU Commission, Consultation Paper on Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes, 10 November 2016
- Some other jurisdictions are presently considering mandatory disclosure rules, e.g. Australia and Sweden

Mandatory disclosure rules raise a number of issues

- Who reports, what to report and when to report?
- What are the consequences of non-reporting?
- How does mandatory disclosure rules for tax advisers relate to concepts such as self-incrimination and legal professional privilege?
- Are mandatory disclosure rules efficient?

Who reports?

- Existing regimes apply to promoters and advisers, as defined in each jurisdiction
- Typically these terms comprise any person involved in (or providing advice in respect to) designing, marketing, organising or managing the tax advantage element of any reportable arrangement
- In this presentation such person is referred to as a tax adviser

Who reports?

- The rules may provide that the notification obligation falls only on the taxpayer where
  - there is no external tax adviser (e.g. when advice is given by in-house counsel)
  - where the tax adviser is based abroad

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What to report?

- What kind of transactions or arrangements are reportable?
- What information has to be provided in respect of a reportable arrangements?

What to report - definition of reportable arrangement

- Listing of specific schemes
  - The tax administration publishes a list of arrangements on basis of transactions that it has identified as giving rise to tax revenue risks or policy risks
  - An arrangement is reportable if it is the same as or substantially similar to one on the list
- Identification on the basis of the presence of certain specific characteristics
  - Target areas of perceived risk, such as losses, leasing and schemes giving rise to reclassification of income or involving entities in low-tax jurisdictions

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What to report - definition of reportable arrangement

- Identification on the basis of the presence of certain generic characteristics ("hallmarks"), for example one of the following
  - the tax adviser requires the client to keep the arrangement confidential
  - the amount the client pays for the advice can be attributed to the value of the tax benefit obtained
  - the use of standardised documentation that is not tailored to any material extent to the client's circumstances
- Hypothetical tests

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What to report - definition of reportable arrangement

- Under some regimes there are threshold requirements which require reporting only if
  - the tax benefit was a main benefit of the arrangement
  - the tax benefit exceeds a certain value
- One the one hand, such thresholds could be used by taxpayers and tax advisers to justify non-disclosure
- One the other hand, the absence of such thresholds could lead to a large number of disclosures, leading to costs for both the tax administration and taxpayers and making it more difficult to use the information

What to report – information that has to be disclosed to the tax administration

- Description of the arrangement and how the expected tax benefit arises
- Details of the taxpayer who uses the scheme
- The provision under which the arrangement is reportable

When to report?

- What event triggers the obligation to disclose, the rendering of the advice or its implementation?
- How soon after the event should disclosure be made?

The consequences of non-reporting

- Monetary penalty
  - May take into account or be proportionate to the level of fees or tax savings
- A taxpayer can be denied the tax benefits of a scheme as a result of the non-disclosure
- Non-disclosure may extend the time period the tax administration has to dispute a taxpayer’s claimed tax treatment

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The right against self-incrimination

- It is considered a fundamental right not to be punished for refusing to make statements that would expose oneself to an accusation or charge of crime (“the right to remain silent”)

- The types of transaction targeted for disclosure will not generally give rise to criminal liabilities, however in exceptional cases they may

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Professional secrecy / professional legal privilege

- Rule of law and the access to justice principle require that a person be able to seek legal advice without fear of disclosure to the authorities
- A lawyer who discloses information prescribed under a mandatory disclosure regime is likely both to be disclosing that the client has consulted him or her for legal advice on a particular subject and to be revealing the substance of privileged communications
- The rules can be designed so that the reporting obligation falls on the taxpayer where the tax adviser is bound by legal professional privilege

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Are mandatory disclosure rules efficient?

- The answer seems to depend on who you ask

- The only independent valuation have have found was concerned the UK mandatory disclosure rules and was made in 2012

- Do the benefits outweigh compliance costs and costs for administering a mandatory disclosure regime?

- Can the tax authority can make use of the data collected?