ETHICAL GUIDELINE
A REACTION
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The Institute of Chartered Accountants and the Institute of Taxation have issued a joint guidance note, entitled "Disclosure in Tax Returns, Computations and Correspondence with the Inland Revenue". The principal objective of the guidelines is to provide advice on these matters, and represents a sort of tax practitioner's code of practice. The issue of such guidelines is extremely welcome because the conduct of professional advisers in connection with tax matters is crucial to the proper working of the tax system. The professions are the informed voice of the taxpayer, and that voice will only be heard if they command the respect of the Inland Revenue. A proper code of practice which is observed by professional advisers is the means to create and maintain that respect.

The guidelines are lengthy, and taken as a whole represent a reasonable code, and indeed the Inland Revenue, whilst not necessarily agreeing with every view expressed, have acknowledged that they represent an acceptable basis for dealing with tax matters. However, that is not to say that the guidelines ought to be accepted blindly by practitioners, because they have some significant shortcomings. Despite their length, the guidelines are less comprehensive than might have been expected, containing rather too many generalisations of doubtful value, and rather too little critical examination of some important issues.

For example, in a statement of such importance it is difficult to understand why it is necessary to say that "a member is expected to exercise sound professional judgement" (see para 36) or "in no circumstances should a member pass to the Inland Revenue information that is known or believed to be incorrect or misleading" (see para 53). There is sometimes a case for stating the obvious, but could any reader possibly have thought, with or without a guidance note, that such conduct was acceptable?

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Similarly in paragraph 41:

> "Members in industry and commerce who are responsible for the preparation and submission of tax returns and computations should review the availability of information from companies for which they are responsible to ensure that they have access to all the data which they consider they will require to enable them to fulfil their responsibilities."

The inclusion of such paragraphs, and others like them, which either mean nothing, or add nothing, only serve to diminish the authority of the guidelines as a whole.

One of the most disappointing features of the guidelines is the lack of practical guidance on *Olin Energy Systems Ltd v Scorer* 58 TC 592 (HL) and the recent Inland Revenue Statement of Practice SP8/91 on the subject. This is clearly central to the whole subject of disclosure in tax returns, computations and correspondence and acknowledged to be so by the frequent references to *Olin* throughout the guidelines, and the reproduction of the full Statement of Practice as an appendix.

However, the subject is deliberately not dealt with in any detail. The Statement of Practice has been the subject of a good deal of critical comment, but none of the problem areas are discussed. Shortly after the Statement of Practice was published in July 1991, it was made known that the opinion of leading counsel had been sought on the subject. Those who expected the substance of counsel's opinion to be revealed as additional guidance in this note will be disappointed. We are merely told that counsel considers the Inland Revenue's interpretation to be too narrow; the decision could apply even where the point at issue is not fundamental to the agreement of the relevant figures. Counsel further advises that the Inland Revenue cannot raise a new assessment in any case where all such facts as it is reasonable to regard as relevant to considering the point at issue were disclosed and either:

(a) the particular point had previously been raised expressly by the Inspector, the taxpayer or the taxpayer's agent; or

(b) the point was so clearly presented that an "ordinarily competent Inspector" would have or ought to have taken it into account.

I would respectfully suggest that this does not take anybody much further and many tax practitioners will feel that they could have given much more detailed guidance, particularly in connection with the controversial areas in the Inland Revenue's statement. Furthermore, the above statements are made "pending further judicial guidance on the issue", which seems a funny way to describe the position following a unanimous decision of the House of Lords. What further judicial guidance do the Institutes expect?

Another significant omission relates to the position where a taxpayer is undercharged by reason of a mistake by the Inland Revenue, or more critically where he receives a tax repayment to which he knows (or the adviser knows) he is not entitled. Annex C contains a reference to dishonestly obtaining a tax repayment, and the application of s.20 Theft Act 1968, but few would have any doubts that this was unlawful. But what of s.5(4) Theft Act 1968, where a repayment arrives in the post unexpectedly (or perhaps a larger repayment than was anticipated)? What is the duty of the taxpayer and of the adviser in these circumstances? This is a matter of considerable practical importance, where the implications are immensely serious; in my view a detailed explanation would be extremely valuable, if not essential.

The first substantive part of the guidelines deals with the relevance of the disclosure provisions, and covers the matters which should be considered where there is doubt about whether disclosure should be made of a particular item. The general tenor is "if in doubt, disclose" which is a fair enough rule of thumb, but the two and a half pages of explanation are not helpful. It is suggested that when considering the information which ought to be disclosed, proper account must be taken of:

(a) "the exact terms of the legislation". (It is difficult to see the value of such a comment.)

(b) "the strength of any argument that the substance and true nature of a series of transactions can be ascertained only if the transactions are considered as a whole (for example, where there is a pre-ordained series of transactions)."

The last part of this sentence either begs the entire question, or makes the sentence circular; in any event, who is to judge the strength of the argument? Elsewhere in the statement it is explained that members should not pursue speculative enquiries without good reason or follow a course of action involving unnecessary cost to the client. Given the Inland Revenue's propensity for suggesting that pre-ordination exists, and the courts' continued reluctance to agree with their view, it is not easy to understand what the adviser is supposed to do - particularly as the relevant transactions will have been disclosed to the Inland Revenue anyway. Should the practitioner write to the Inland Revenue and say that these transactions are not a pre-ordained series, thereby prompting the very enquiries which he regards as unjustified?

It is suggested that where the taxpayer has taken advice from another adviser on whether something should be disclosed, the practitioner should assist the client in evaluating the standing of the other adviser and the strength of his opinion. Quite apart from placing the practitioner in a wholly invidious position, presumably if the practitioner disagrees with the other adviser he must say so, leaving the client with conflicting advice. Obviously there will be cases where the position is clear, but

ethical guidelines are only really concerned with areas of grey. Rather than place both the client and the adviser in an extremely difficult position, it would surely have been better to suggest that where your client has received advice from another adviser, that is something to be taken into account when framing your advice.

Paragraph 21 explains that particular care is required in connection with disclosures where the taxpayer's position is unassailable, but where the member knows from his experience that the Inland Revenue will require relevant information if it is not shown voluntarily. The example given is a schedule of directors' remuneration. It is not at all clear how the taxpayer's position is more or less unassailable by not submitting details of directors' remuneration - which he knows the Revenue will ask for, and will have to be supplied in due course. The paragraph goes on to say that care is also required where the Inland Revenue are likely to seek to challenge the position. Well, either the taxpayer's position is unassailable or it is not. It is not very helpful guidance to say that you need to take care if your unassailable position is likely to be assailed.

Paragraph 32 provides that where a gratuitous disclosure of information is thought to be appropriate, the information should be sufficient to enable an ordinarily competent Inspector to appreciate the position. That sounds reasonable enough, but if there is no obligation to disclose, what position is it that the Inland Revenue are going to appreciate? This is clearly a reference to *Olin*, but in these circumstances *Olin* would not apply. It is interesting to compare this statement with paragraph 35 in which it is suggested that although a particular matter should not be obscured, there is no obligation to specifically draw attention to it.

Paragraph 38 is one of the most interesting, and possibly useful, parts of the guidelines. It states that we are entitled to assume that an Inspector will be broadly familiar with but not an expert in:

(a) the normal terminology adopted by the accountancy profession in relation to financial accounts, as well as the books of prime record;

(b) generally accepted accounting principles and the statements of standard accounting practice;

(c) the requirements of the Companies Acts, so far as they relate to accounting matters;

(d) generally accepted auditing principles;

(e) the background to and relevance of the usual wording of audit reports; and

(f) the probability that the accounts of unincorporated businesses will not have been audited.

With the greatest respect, I doubt if there will be too many Inspectors of Taxes who will be happy with this assumption, and they risk considerable embarrassment next time they make an elementary error on any of these items. I have a degree of sympathy with them, as there must be a number of chartered accountants (myself included) who would think twice about claiming familiarity with all the SSAPs and the accounting requirements of the Companies Acts. If Inspectors are to be regarded as broadly familiar with these aspects, it must presumably represent one of the characteristics of the 'ordinarily competent Inspector' beloved by *Olin*. This is bound

to have a bearing on the degree of understanding we are entitled to assume he has of material presented to him. The Revenue may point to their disclaimer that they do not necessarily agree with every view expressed in the guidelines, but this particular paragraph can hardly have been written without, at least, their implied agreement. Even if this is not the case, it clearly has their express acceptance.

Some confusion seems to exist with the points dealing with business accounts and computations. It is said in paragraph 55 that "in the absence of specific statute law or case law on the item in question, the figures shown in the financial statements are also valid in computing income or gains for tax purposes". Paragraph 57 sets out a slightly different test with the qualification that ordinary principles of commercial accounting must have been observed. However, to say that properly prepared accounts are valid for tax purposes unless they are invalid under the law does not help anybody. What might have been helpful is some explanation about the evidential value of accounting evidence in determining the tax treatment of any particular item. For example, as every tax lawyer knows (and as every accountant would prefer not to accept), whether an item of expenditure is capital or revenue is a question of law, and not of accountancy. The ordinary principles of commercial accountancy are helpful as a guide, but at the end of the day it is a matter of law.

The purpose of any code of practice on this subject must be to ensure that, as far as possible, a consistent approach is adopted by practitioners which can be relied on by the Inland Revenue - with obvious benefits to both sides. Although various parts of the code may be unsatisfactory, this is arguably of secondary importance. It is better to have a less than perfect code rather than no code at all. However, both the participating Institutes have detailed rules of professional conduct which cover the most important points already; with more thoughtful and careful drafting, these separate and extended guidelines could have been so much more valuable.