

## Warning notice

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## Tax avoidance your duties

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## Status

This document is to help you understand your obligations and how to comply with them. We may have regard to it when exercising our regulatory functions.

## Who is this warning notice relevant to?

All those we regulate involved either directly or indirectly advising clients about tax, handling client matters or transactions involving them in the design, implementation, organisation or management of tax affairs, schemes or arrangements.

## The SRA Standards and Regulations

**Principle 1: You act in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice.**

You have obligations not only to clients but also to the court and to third parties with whom you have dealings on your clients' behalf.

**Principle 2: You act in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons.**

Members of the public should be able to place their trust in you. Any behaviour either within or outside your professional practice which undermines this trust damages not only you, but also the ability of the legal profession as a whole to serve society.

**Principle 5: You act with integrity.**

Integrity is central to your role as the client's trusted adviser and should characterise all your professional dealings with clients, the court, other

lawyers and the public.

### **Principle 7: You act in the best interests of each client.**

You should always act in good faith and do your best for each of your clients.

In addition to the above principles, relevant paragraphs in the code of conduct for solicitors, RELs and RFLs and code of conduct for firms will apply to your dealings with clients. In particular:

- Paragraphs 1.4 of the codes provide that you must not mislead or attempt to mislead others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).
- Paragraph 3.2 of the code of conduct for solicitors, RELs and RFLs says you must ensure the service you provide to clients is competent and delivered in a timely manner.
- Paragraph 3.4 of the code for conduct of solicitors, RELs and RFLs and 4.2 of the code of conduct for firms says you must consider and take account of your client's attributes, needs and circumstances.
- Paragraph 8.6 of the code for solicitors, RELs and RFLs provides that you must give clients information in a way they can understand and you ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.
- Paragraph 4.3 of the code for firms says you must make sure your managers and employees are competent to carry out their roles, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up to date. Similarly, paragraph 3.3 of the code for solicitors, RELs and RFLs provides that you must maintain your own competence to carry out your role and keep your professional knowledge and skills up to date.
- Paragraph 1.2 of both codes requires that you do not abuse your position by taking unfair advantage of clients or others.

### **Our concerns**

We have concerns about anyone we regulate facilitating tax avoidance schemes that are aggressive in ways that go beyond the intentions of Parliament.

In *SRA v Chan, Ali & Abode Solicitors Ltd* [2015] EWHC 2659 (Admin) the High Court decided that the following allegation was proved in relation to a scheme to save Stamp Duty Land Tax (SDLT):

"They involved themselves in transactions and/or facilitated, permitted or acquiesced in the promotion and/or implementation of schemes to avoid the payment of Stamp Duty Land Tax ... in circumstances where

the schemes were of a dubious nature and the respondents knew, or ought to have known concerns had been raised by both HMRC and counsel in relation to the nature of the transactions..."

The High Court also commented more widely in the case:

"In my view, the evidence and the primary findings of fact of the tribunal - all eminently justified - compel a conclusion there was here a want of integrity and a failure to act with independence. They also compel a conclusion the respondents so acted as to diminish the trust the public would place in the respondents and the provision of legal services."

The tax system is a necessary part of our economic system, raising funds for public services and making for a healthy economy that serves society. You play an important role in helping taxpayers comply with their legal obligations.

You must also act with integrity in your own dealings with HMRC. In the case of SRA v Scott it was noted by the High Court that the solicitor: "...admitted there had been financial mismanagement of his firm in breach of Principle 8 of the SRA Principles 2011 (now paragraphs 2.1-2.5 of the Code for Firms), as evidenced by the firm's debt to HMRC of £232,317, which had led to the failure of the firm."

We have also seen a solicitor struck off the roll when allegations were found proven against him including that, "he declared to ...HMRC... that he (together with his wife) had bought a property for a price lower than that which he paid ...resulting in him paying too little in stamp duty land tax..., and being subjected to a penalty by HMRC."

## **Our expectations**

### **Acting with integrity**

You are in a position of trust and not only owe duties to your client but also wider duties under the Principles. You have a duty to act in clients' interests by giving sound and competent advice while ensuring your advice does not go beyond the lawful arrangement of the clients' affairs.

We expect you to act with integrity at all times and for your dealings, and those on your clients' behalf, with HMRC are conducted on an open and honest basis and that you do not seek to rely on their lack of knowledge of your client's tax position.

When advising a client on avoidance of tax schemes you should make clear that any avoidance arrangements the client enters into might deliver tax outcomes that were never envisaged or intended by Parliament and may be challenged. You should be clear as to the legal implications, the costs and penalties of non-compliance should the arrangement fail.

You should also consider your own position in facilitating such an arrangement. Should the arrangement be found to be abusive, your conduct may be called into question. To be involved in such arrangements is likely to reflect badly on you and to damage public confidence in those delivering legal services. You will leave yourself open to the risk of disciplinary proceedings as well as committing a criminal offence. Where you believe, as a consequence of your client's instructions, you are at risk then you should advise your client you cannot comply with their instructions and unless they change instructions you should terminate your retainer.

### **HMRC and the wider context**

It is important that you are familiar with the underlying approach of HMRC which is changing rapidly. To make sure you are complying with your obligations above we expect you to familiar with the wider context of your work when dealing with tax affairs, schemes or arrangements.

HMRC will take action against what it refers to as "abusive tax avoidance schemes". This is explained by HMRC: "The General Anti Abuse Rule (GAAR) 2013 legislation comes into operation when the course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable."

HMRC has also indicated it might challenge arrangements not caught by GAAR: "There may be tax avoidance arrangements that are challenged by HMRC using other parts of the tax code, but if they are not abusive, they are not within the scope of the GAAR."

The promotion or implementation of abusive arrangements (applying the definition set out in the GAAR, PCRT or otherwise) will lead both client and adviser into difficulties with HMRC and may leave you open to disciplinary action. The most common schemes we have seen in recent years have related to avoiding SDLT. We will continue to scrutinise any of these schemes carefully.

### **Legislation and the wider context**

You might have clients who are using avoidance schemes. As a consequence of the Finance Act 2016, the Serial Tax Avoidance Regime came into force on 15 September 2016 and affected users of avoidance schemes from 6 April 2017. Under the regime sanctions and penalties are imposed on those using tax avoidance schemes. Anybody using an avoidance scheme is advised to [provide information of the scheme to HMRC \[https://www.gov.uk/guidance/serial-tax-avoidance\]](https://www.gov.uk/guidance/serial-tax-avoidance).

The Government has legislated for other anti-avoidance reform including "follower notices" and "accelerated payments" and intends to bring in a new penalty that can be applied to professionals who enable tax avoidance which HMRC later defeats. A penalty regime is already in force for those who enable offshore tax evasion or non-compliance, under s162 and Schedule 20 of the Finance Act 2016.

You must be fully familiar with all changes to ensure you comply with the Principles at all times, particularly the requirement to act with integrity.

### **Professional conduct in relation to taxation (PCRT)**

Accountancy bodies have worked with HMRC to produce a statement of Professional Conduct in Relation to Taxation (PCRT). This is published on the websites of the accountancy bodies (and is liable to change). We welcome this statement and say that: "These standards reflect our own principles, particularly that solicitors must be honest and act with integrity, and uphold the rule of law."

We therefore expect you to be familiar with the PCRT and adhere to its standards.

Where you consider that a scheme is likely to be found to be abusive, you can advise a client to this effect. Where a scheme can reasonably be argued not to be abusive, you can advise a client to this effect, facilitate the scheme where so instructed by a client properly advised as to the risks, and litigate on behalf of a client as to the legality of the scheme where you can do so in a manner consistent with your duty to the Court.

It is for the relevant courts and tribunals to adjudicate on the legality of tax avoidance schemes. However, where schemes are found to be abusive, or where there is no finding but schemes contain indicators of abuse (such as, but not limited to, misleading conduct or the indicators set out in the GAAR or PCRT), and solicitors have facilitated such schemes, whether by providing supportive advice which advocates the use of such schemes, or does not sufficiently highlight the associated risks or otherwise, we will see this, on the face of things, as evidence of breach of the SRA Principles and are likely to investigate. If a solicitor gives advice to the effect that a scheme is likely to be found to be abusive and takes no steps to give effect to such a scheme, it is unlikely that enforcement action would be taken.

### **Further help**

If you require further assistance, please contact the [Professional Ethics helpline](https://higher-rights.sra.org.uk/contactus/) [https://higher-rights.sra.org.uk/contactus/].