

Advisory SDLT Mitigation Schemes

December 2018

HMRC Guidance

HM Revenue and Customs (HMRC) acknowledge that the vast majority of people in the UK don't try to avoid paying tax. They pay their tax on time and without undue intervention from HMRC. The small minority who do try to avoid tax, will find that HMRC is determined to challenge them and to prevent their schemes from working (

<https://www.gov.uk/government/publications/spotlight-14-stamp-duty-land-tax-avoidance/spotlight-14-stamp-duty-land-tax-avoidancepotlight-14.>)

The HMRC website (<https://www.gov.uk/guidance/tax-avoidance-an-introduction>) describes tax avoidance as '*...bending the rules of the tax system to gain a tax advantage that Parliament never intended. It often involves contrived, artificial transactions that serve little or no purpose other than to produce this advantage. It involves operating within the letter, but not the spirit, of the law*'.

Irrespective of which anti-avoidance provision applies to the arrangements, HMRC believe they constitute tax avoidance and have made clear their intent to challenge the arrangements under primary legislation, a Targeted Anti Avoidance Rule (TAAR) such as section 75A Finance Act (FA) 2003 or Schedule 2A, FA 2003 or via an argument based on the *Ramsay* principle of purposive construction.

In 'Project Blue' the Supreme Court (<https://www.supremecourt.uk/cases/docs/uksc-2016-0137-judgment.pdf>) specifically commented on the effect of section 75A FA 2003.

Where schemes are successfully challenged, a charge to SDLT will arise on the full amount paid for the property.

For transactions from 16 November 2017 conveyancers may be liable to a penalty under the enablers of defeated tax avoidance legislation (s.65 and schedule 16 Finance (No. 2) Act 2017 – see also <https://www.gov.uk/guidance/tax-avoidance-enablers-of-defeated-tax-avoidance-legislation>).

An enabler is any person who is responsible, to any extent, for the design and marketing of abusive tax arrangements or for otherwise facilitating another person to enter into such arrangements.

Non-compliance with CLC's regulation

Any CLC Practice which actively promotes, facilitates or acts for clients who make use of such schemes is almost certainly acting contrary to the CLC overriding principles set out in the CLC's Code of Conduct (<https://www.clc-uk.org/wp-content/uploads/2017/12/Code-of-Conduct.pdf>):

Overriding Principle 1: Act with independence & integrity

You do not act with integrity and more specifically you are in breach of:

- Outcome 1(c) where you conduct yourself in a manner which may result in a breach of the law or in any other manner which may bring the legal profession into disrepute, and/or
- Outcome 1(l) where you take unfair advantage of any person (in this case HMRC)

when you advise about or facilitate transactions which are contrary to the letter and the spirit of the law, and result in providing false or misleading information to any other person (in this case HMRC).

You must cease to act for a client where to continue results in a breach of the CLC's Regulatory Arrangements.

Overriding Principle 2: Maintain high standards of work

In order to demonstrate that you are maintaining a high standard of work, you should advise your clients of the risks, and in particular of the monetary penalties (in the form of penalties and interest) and the risk of prosecution, associated with taking part in such schemes.

Overriding principle 3: Act in the best interests of your client

Saving your client money on their purchase may seem to be in their best interests. You do not do so where you put your client at significant risk of investigation by HMRC when the mitigation scheme is challenged.

It is not a defence for you to act for a client participating in such a scheme to assert that your role was only that of introducer. The CLC will expect you to demonstrate that you have complied with Principle 3(a) CLC Code of Conduct in that you have only accepted instructions and acted in relation to matters which are within your professional competence.

Enforcement

The CLC will investigate any CLC Practice advising or participating in such schemes, which may include alerting HMRC and starting disciplinary proceedings.

Council for Licensed Conveyancers