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THE RULES ON *'PROFESSIONAL CONDUCT IN RELATION TO TAXATION'*

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THE BABYLONIAN CAPTIVITY

PROFESSIONAL ETHICS

1.1 *" … most important of all, a profession is a pursuit which is followed not solely as a livelihood, but always subject to overriding duties, prescribed by a code of professional honour involving in an especial degree the strict observance of confidences, in which services must be rendered to the client without stint in proportion to the client's need rather than in proportion to the reward which is received."*[1]

1.2 These words of Viscount Simon's are an inspiring view of the ethical dimension of professional work. I am proud to be a member of no less than four professional bodies which impose standards of behaviour on their members requiring them to consult in their work not their own interests but the interests of their clients and of the broader public. Three of those bodies, the CIOT, the ICAEW and the STEP, are amongst the seven professional bodies (the 'Subscriber Bodies') which subscribe to the rules on Professional Conduct in Relation to Taxation (the 'Rules'), a new edition of which was issued on the 1st November 2016. In this article I concentrate on the Rules in relation to CIOT Members but similar points might be made in respect of the ICAEW and the STEP and also, no doubt, of the other Subscriber Bodies.

PUBLIC BENEFIT DUTY

2.1 Under its Royal Charter the objects of the CIOT are:-

[1] From a Speech by the Viscount Simon of Stackpole Elidor (then Sir John Simon), who was the Lord Chancellor of Winston Churchill's War Government, on 'The Profession of Accountancy' in Comments and Criticisms, ed. D Rowland Evans, 1930, Hodder & Stoughton

'(1) to advance public education in and promote the study of the administration and practice of taxation and the principles of economic and political science in relation to taxation;

(2) (i) to prevent crime and

(ii) to promote the sound administration of the law for the public benefit by promoting and enforcing standards of professional conduct amongst those engaged in the provision of advice and services in relation to taxation and monitoring and supervising their compliance with money laundering legislation.'

2.2 The Charter refers to these objects as 'charitable' and the CIOT is registered with the Charity Commission. As a Charity, it must exist for the public benefit which for these purposes does not include advancing political purposes.

2.3 Promoting and enforcing standards of professional conduct is, therefore, central to the CIOT's purpose. The first edition of the Rules was issued and brought into force within months of the granting of the CIOT's Royal Charter.

FAILURE TO STATE THEIR FUNCTION

3.1 Obtaining the agreement of a large number of professional bodies to the wording of any document is never going to be straightforward and a document which is so important to the professional practices of the members of the Subscriber Bodies is bound to be highly politically charged. It is fair to say that the Rules have never been a model of good drafting. The latest edition, however, is truly awful.

3.2 It starts badly, failing to state with precision its own regulatory function; using the word 'expected' in the Foreword when what appears to be meant is 'required'.[2] In the opening paragraphs of its introduction, its Authors seem to feel it to be impolite to state that its purpose is to set out the Rules which govern members' professional conduct and so they say instead:-

> 'The purpose of Professional Conduct in Relation to Taxation is to assist and advise members on their professional conduct in relation to taxation.'

3.3 Paragraph 1.2 further obfuscates the function of the Rules using 'explains' where, one presumes, 'sets out' or 'contains' is meant:-

> 'Part 2 explains the principles which govern the conduct of members'.

THE FUNDAMENTAL PRINCIPLES

4.1 Apart from a little tidying up in the later sections, the major changes which have been made since the last edition of the Rules are to be found in the first two parts. The changes in those parts are principally in respect of tax planning. As in the previous edition, Part 1 is an introduction and Part 2 sets out what are called the 'Fundamental Principles'.

4.2 The Fundamental Principles are unchanged from the previous edition and are:- 'integrity', 'objectivity', 'professional competence and due care', 'confidentiality' and 'professional behaviour'.[3]

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[2] The Rules, Foreword, first paragraph
[3] The Rules, para. 2.2

4.3 The Reader will see immediately that there is a large area of overlap between the Fundamental Principles. One might have thought that the exercise of competence and due care, for example, was part of professional behaviour, as was integrity.

THE STANDARDS

Subsidiary to 'Professional Behaviour'

5.1 In this latest edition of the Rules what are called the 'Standards for Tax Planning' (the 'Standards') have been added to Part 2. Rather oddly, the Standards are set out under only one of the Fundamental Principles, that of professional behaviour.[4] One might have thought that the standards a practitioner is to apply in 'tax planning' would include integrity, objectivity, professional competence and due care and confidentiality, as well as professional behaviour. No doubt that is the intention of the Authors[5] of the Rules, but it is not the structure which they have adopted.

Failure to Define Tax Planning

5.2 Although the Rules use the phrase 'tax planning' extensively, they do not define it. They give HMRC's definition[6] but only in the context of distinguishing tax planning and tax avoidance where they say, very sensibly, that:-

> 'Despite attempts by courts over the years to elucidate tax 'avoidance' and to distinguish this from acceptable tax planning or mitigation, there is no widely accepted definition.'[7]

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4 The Rules, Heading to para. 2.21 and para. 2.29

5 Paragraph 2.28 of the Rules says that the 'standards are a supplement to, and not a substitute for, the five Fundamental Principles' but the Rules do not specify how they are to supplement them

6 The Rules para. 4.10. HMRC's definition is not, therefore, the operative definition of 'tax planning' in the Rules, which is fortunate because it is hopelessly imprecise

7 The Rules, para. 4.6

5.3 This failure of the Rules to define this key phrase, 'tax planning', creates ambiguities throughout.

The Standards' Headings

5.4 The Standards are set out under the following five headings (the 'Standards' Headings):-

'Client Specific'

'Lawful'

'Disclosure and transparency'

'Tax planning arrangements'

'Professional judgement and appropriate documentation'[8]

Apply to all Advice on UK Tax Planning

5.5 The Standards are to apply when a member is 'advising on UK tax planning'.[9] They are not confined, therefore, to advice consisting of formulating a plan for a client but will extend to providing advice on a plan formulated by the client or by somebody else. It seems that these Standards would extend to transactions which have already been implemented. If that were the case, the Standards would apply to advice in respect of a dispute with HMRC about the results of transactions entered into under any plan formulated in respect of taxation.

The Guidance Discussion

5.6 Following the Standards, paragraph 2.30 says:-

'Further guidance on these Standards is discussed in more detail below.'

[8] The Rules, para. 2.29

[9] The Rules, para. 2.28. How one distinguishes UK tax planning from non-UK tax planning is unclear

5.7 There then follows a series of paragraphs[10] (the 'Guidance Discussion'), groups of which are headed with the Standard Headings. Paragraph 2.30, read literally, does not say that these succeeding paragraphs are guidance on the Standards, but rather that they are a discussion of further guidance which actually is not to be found elsewhere in the Rules. If we assume that the Authors actually meant these succeeding paragraphs to be 'guidance', what is their status? Are they binding on the member or merely helpful explanatory material? As we shall see,[11] in parts they seem to contradict the Standards. Where that is the case, should the member have regard to the Standards alone, only to the Guidance Discussion or to both and, if the last, how is he to resolve the contradictions?

The Second Standard

5.8 The Standards often confuse independent concepts. So, for example, the Second Standard says that:-

> 'At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law. Members should draw their clients' attention to where the law is materially uncertain, for example because HMRC is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the particular case, for example where litigation is likely.'

5.9 Now, of course, professionals should act with integrity but if this standard is one of lawfulness, the draftsmen should not have mixed it up with integrity, which is a distinct

[10] The Rules, paras. 2.31 – 2.39
[11] See paras. 5.12 – 5.14 below for example

quality. It is quite possible to act lawfully and yet not to act with integrity and, some might say, to act with integrity and yet not to act lawfully.

5.10 What is involved in acting 'lawfully'? All actions which are not criminal might be said to be lawful. One hopes that members of the Subscriber Bodies do not need to be told that they must not commit crimes. On the other hand, if 'lawfully' involves not committing a civil wrong, that would seem to make it a disciplinary offence to miss a minor deadline.

5.11 The word 'expect' in the first sentence should surely be 'require'. A professional who expected that his clients would always act lawfully and with integrity would be naïve indeed. The second sentence is simply a truism, but the third sentence is very peculiar. It does not say from whose view HMRC's view might differ. One presumes that the Authors intended to refer to the view of the member concerned but the Standard does not do so. The Authors assume that a member can know what HMRC's view of the law is whereas all he can actually know is what it has publicly stated its view to be, regardless of what is its actual opinion. They also assume that, if HMRC states an opinion as to the law which differs from the member's opinion, that necessarily means that the law is uncertain, whereas, of course, it is quite possible that HMRC's view is untenable. Of course, a tax adviser should always take account in his advice of HMRC's statements of the law, however inaccurate they may be. There is an enormous difference, however, between requiring an adviser to do that and requiring him to assume that any particular view of the law published by HMRC is both honestly held and tenable. As to the last sentence of this Standard, it is surely a truism which must apply to all professional work.

The First Standard

5.12 Barristers,[12] and many other tax advisers, provide advice on the affairs of the clients of their clients, and also provide advice which is generic rather than related to the circumstances of any particular client or group of clients. The 'Client Specific' Standard, read literally, would prevent members from doing so, for it says:-

> 'Tax planning must be specific to the particular client's facts and circumstances. Clients must be alerted to the wider risks and the implications of any courses of action.'[13]

5.13 The Guidance Discussion, however, says:-

> 'Generic opinions or advice that does not take into account the position of specific taxpayers (or a narrowly defined group of taxpayers such as a group of employees of the same company) pose particular risks.'[14]

5.14 It is implicit in this statement that, although it presents particular risks, generic advice may be given in some circumstances. The Guidance Discussion, therefore, contradicts the Standard's unequivocal statement that 'tax planning must be specific to the particular client's facts and circumstances'. I have been told in correspondence with a CIOT staff member that it is not the intention of the Authors to ban members from giving generic tax advice. A member concerned to comply with the CIOT's Rules, however, can hardly rely upon the opinion of a staff member of just one of the

[12] But see the discussion at paras. 8.1 – 8.12 below of the special status conferred by the Rules on barristers and solicitors

[13] This second sentence is an example of a quality of the Rules which is a cause of their imprecision, their over-compression. Important words and phrases are often omitted. No doubt the Authors of the Standard intended to refer to courses of action which are proposed by the client and in respect of which the advice is given, or which are proposed to the client by the adviser but they do not say so

[14] The Rules, para. 2.33

Subscriber Bodies given in private correspondence which he has not seen and of the existence of which, unless he has read this article, he will not know. In any event, disciplinary procedures in respect of breaches of the Rules by CIOT members are conducted by an independent body, the Tax Disciplinary Board. Neither the Subscriber Bodies nor their employees can determine the Board's construction of the Rules.

The Third Standard

5.15 The Third Standard, 'Disclosure and Transparency', is similarly opaque. It says:-

> 'Tax advice must not rely for its effectiveness on HMRC having less than the relevant facts. Any disclosure must fairly represent all relevant facts.'

5.16 It is not clear why the Standards have abandoned the phrase 'tax planning' in favour of 'tax advice' here when the Standards are standards 'for tax planning'.[15] What is involved in tax advice being effective? Surely the only quality required of advice is that it should be relevant and, within that, comprehensive, balanced and accurate. It is difficult to see how the facts of which HMRC has knowledge, could be relevant to that. Of course, if one were concerned with recommendations for actions designed to facilitate tax evasion, then HMRC's knowledge of relevant facts would be material – but that would not come within the sphere of tax planning at all, unless one assumes that the meaning of that phrase includes tax evasion as well as tax avoidance.

The Fourth Standard

5.17 So the Standards generally are imprecise, confused and, in places, contradictory. The Standard which is most controversial and which will cause most difficulties for

[15] The Rules, Heading to para. 2.28

members, however, is the Fourth Standard headed 'Tax Planning Arrangements', which is as follows:-

> 'Members must not create, encourage or promote tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.'

5.18 As it is clearly envisaged by the draftsmen that arrangements may seek to exploit shortcomings within the relevant legislation without being contrary to the clear intention of Parliament, it is unclear from whose point of view the 'shortcomings' are to be identified or what that word means. Once again, it will be seen that the draftsmen, has linked distinct concepts with the result that members may not create tax planning arrangements which do seek to exploit shortcomings within the relevant legislation, and are highly contrived even if they are within the clear intention of Parliament and are not at all artificial.

5.19 Read literally, this Standard would seem to prevent a member being involved in the design of many commercial arrangements to which tax planning is of the essence, such as property development and equipment leasing transactions and enterprise investment scheme share issues, which often involve contractual arrangements of the greatest contrivance even in respect of arrangements which, as best as one can guess, are within the intention of Parliament. Of course, one does not imagine that the Subscriber Bodies mean to prevent members advising in such circumstances but that would seem to be the effect of the Rules.

5.20 Those of us who sit on the Technical Committees and Sub-Committees of the Subscriber Bodies often criticise HMRC for producing unworkable legislation and attempting to correct it by publishing inaccurate guidance, presenting the taxpayer with an unenviable choice between following an absurd law or HMRC's untenable construction of it. It is difficult to see how, in following HMRC's deleterious example, the CIOT is fulfilling its object of promoting 'the sound administration of the law for the public benefit by promoting and enforcing standards of professional conduct' which are so imprecise and uncertain.

5.21 That is not the end of the difficulties which the Fourth Standard will present to a scrupulous member. We have already seen that the Rules contain no definition of 'tax planning'. The Fourth Standard is full of words and phrases which have no clear meaning.

5.22 What is involved in 'encouraging tax planning arrangements or structures' (one presumes that the phrase 'the use of' is to be understood)? What is the distinction between arrangements and structures? How does one determine what is the 'clear intention of Parliament'? The intention of Parliament is a legal fiction useful in its proper sphere of the judicial interpretation of statute but, even within its proper sphere, it is a fiction which must be applied with care. The outcome of cases depending upon purposive constructions of legislation are almost always unpredictable. Like all legal fictions, it is not to be unthinkingly extended beyond its particular function. There are enormous difficulties in ascribing an intention to, to give Parliament its full title, the 'Queen's High Court of Parliament', which consists of the Sovereign and the Houses of the Lords, Spiritual and Temporal, and the Commons. Even if one confines one's enquiry to the House of Commons which, in practice passes tax legislation, how do you ascribe a corporate intention to the six hundred and fifty MPs of which it is composed, most of whom will often not have read, and

normally will not have understood, the tax legislation which they pass, who certainly will not share a common intention.

5.23 One might argue that as there will never be a 'clear intention of Parliament', no tax planning arrangements or structures will satisfy the condition that they achieve results that are contrary to it but I cannot imagine the Tax Disciplinary Board, in practice, accepting such an argument. A member, therefore, is faced with the problem of ascribing some meaning to a phrase which is in reality meaningless outside its proper judicial context.

5.24 What is involved in being 'highly artificial' or 'highly contrived'? The *SOED* lists seven definitions of 'artificial', some of which clearly have opprobrious connotations and some do not. So, for example, one definition is 'cunning, deceitful' and another is 'according to the rules of art or science; technical'. If I recommend to a client that in order to minimise Inheritance Tax on his death he should make a gift for the benefit of his daughter but that, because his daughter has not yet reached the age of discretion, he should do so by settling moneys on discretionary trusts of which his daughter is a beneficial object I have, in one view, recommended a highly artificial transaction. For, after all, trusts are legally complicated arrangements and, were it not for avoiding Inheritance Tax, the father would be unlikely to make a gift when his daughter is too young to exercise absolute ownership responsibly so that it requires the cumbersome machinery of a settlement on trust. Are the results my advice is designed to achieve artificial? How does someone determine the degree of their artificiality?

5.25 Similar points might be made as to the meaning of 'contrived' and 'exploit'.

5.26 It is interesting that this Standard does not utilise the concept of 'abusive arrangements' which is used in the GAAR legislation, nor of tax avoidance, a concept which is used extensively in tax legislation. Perhaps that is understandable because, as we have seen,[16] Part 4 of the Rules (which is considerably more sensible and more accurately expressed than Part 2) admits that:-

> 'Despite attempts by courts over the years to elucidate tax "avoidance" and to distinguish this from acceptable tax planning or mitigation, there is no widely accepted definition.
>
> Publicly, the term "avoidance" is used in the context of a wide range of activities, be it multinational structuring or entering contrived tax-motivated schemes. The application of one word to a range of activities and behaviours oversimplifies the concept and has led to confusion.'[17]

5.27 If it has proved impossible to give a sufficiently precise definition to these terms which have a history of statutory usage, however, what gave the draftsmen the idea that similarly imprecise terms could be plucked from ordinary usage and used with appropriate precision?

The Fifth Standard

5.28 The impossibility of giving any precise meaning to the first four Standards, has the result that the fifth Standard will impose a major additional compliance burden on members of the Subscriber Bodies. It provides that:-

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[16] See para. 5.2 above
[17] See paras. 4.6 – 4.7 above

'Applying these requirements to particular client advisory situations requires members to exercise professional judgement on a number of matters. Members should keep notes on a timely basis of the rationale for the judgments exercised in seeking to adhere to these requirements.'[18]

5.29 Prudent tax advisers will already keep detailed notes of their conversations with, and oral advice to, their clients and they will also record, in respect of every piece of advice, the rationale of their decision whether to make a DOTAS return. Now they will have to record the rationale of their view as to whether or not their advice is in accordance with the Standards. Doing so could not be done briefly. The very imprecision of the Rules means that an adviser will have to explain why he has chosen between alternative possible views of the matter. It will not even be open to an adviser to decide to take the risk that, by not preserving evidence of his decision-making process, it will be difficult for him to prove in the future that he was not in breach of the Standards. If he fails to keep such a record, that in itself will be a breach of the Standards.

[18] The Guidance Discussion, para. 2.37, seems to impose an additional, but overlapping, record keeping requirement in respect of situations where there is some uncertainty as to whether the Fourth Standard has been breached. That paragraph says:-

'Where a member has a genuine and reasonable uncertainty as to whether particular planning is in breach of this Standard, the member should;

a) document the detailed reasoning and evidence sufficiently to be able to demonstrate why they took the view that any planning was not in breach of this Standard;
b) include in their client advice an assessment of uncertainties and risks involved in the planning see Standard Lawful above; and
c) include in their client advice an assessment of the relevant disclosures that should be made to HMRC in order to enable it, should it wish to do so, to make any reasonable enquiries – see Standard *Disclosure and transparency* above.'

This seems to confuse two matters entirely; when the adviser's behaviour might be in breach of the disciplinary standard and when there might be some uncertainty in respect of the advice given to the client. Sub-paragraph (c) is surely much too wide. There is all the difference in the world between coming to the view that it would be prudent to make disclosure to HMRC and saying that a member should have a professional duty to do so to enable HMRC, at its discretion, to make any reasonable enquiries it wishes. It may well be reasonable for HMRC to make enquiries and equally reasonable for the taxpayer, and his adviser, to resist them

5.30 The cost of complying with the Fifth Standard will be an additional cost of practising which, in the end, will be borne by clients. Is it really in the public interest to impose these further costs on clients taking tax advice?

HOW COULD THE SUBSCRIBER BODIES PRODUCE SUCH POOR MATERIAL?

Consistently Poor

6.1 How is it that the seven Subscriber Bodies, representing groups of professionals of the very highest standard, have produced a document so conceptually inadequate and so poorly drafted? It is a document the inadequacy and shoddiness of which shows itself not only in the major matters which we have examined above but in more minor ones as well;[19] in over-compression,[20] logical errors,[21] imprecision,[22] the use of jargon[23] and in poor grammar.[24]

Are the Revisions Themselves a Breach of the Rules?

6.2 Indeed, it seems that the Authors of this revision of the Rules might themselves be in breach of their own Standards for their failure to ensure that their communication to members in the Rules was carried out with the 'requisite skill and care'.[25]

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19 One of the most bizarre features of the new edition of the Rules is that, although it was published on 1st November 2016 and it is not to be effective until 1st March 2017, the Rules are stated to be based on the law as at 30th April 2015, almost two years before their effective date and in fact, the same cut-off date which applied to the previous edition of the Rules which was published on 1st May 2015. Why was it possible in that edition to take account of the law on the day before its publication and in the current edition only to take account of the law as it was almost two years before the Rules' effective date?

20 The Rules, paras. 1.1, 2.6, 2.25 and 2.36 for example

21 The Rules, Foreword page 2 and paras. 1.8, 2.11, 2.14, 2.15, 2.23, 2.26, 2.28, 2.29, 2.33 and 2.37 for example

22 The Rules, Foreword page 2 and paras. 1.1, 1.8, 1.15, 1.16, 2.6, 2.10, 2.11, 2.12, 2.13, 2.14, 2.16, 2.28, 2.31 and 2.34 for example

23 The Rules, paras. 2.6 and 2.36 for example

24 The Rules, para. 1.1 and 2.29 for example

25 The Rules, paras. 1.13, 2.8 and 2.27

HMRC Input?

6.3 Who actually drafted the revisions to the Rules is not something which the Subscriber Bodies are willing to disclose but that HMRC provided detailed input is clear. Perhaps it is no coincidence that in their poor drafting and grammar, their use of jargon and their errors of logic the Rules bear a strong family resemblance to HMRC's own publications.

Unnecessary?

6.4 The sort of highly articulated pre-packaged tax avoidance planning which was once designed and advised on by almost all the major firms of accountants and solicitors and the leading practitioners at the Revenue Bar have long since disappeared as a significant part of professional advice. This is not because, in some mysterious way, what was previously morally unexceptionable has suddenly become immoral. It is because the panoply of powers which Parliament has conferred on HMRC in recent years coupled with the tendency of modern Courts to ignore the actual words of legislation in favour of a 'purposive' construction, has changed the balance of risk and reward for taxpayers implementing such strategies. The result has been that they can no longer be recommended by responsible professionals. I doubt that there are many, or indeed any, members of the Subscriber Bodies who would now recommend that their clients should implement such schemes.

6.5 The irony is, therefore, that if tax planning of this sort is the target of the new Standards, then the Standards are unnecessary. If a member of the Subscriber Bodies were now to recommend such planning, he would in all, or almost all, cases be in breach of the Rules even if they were unchanged from the previous edition.[26]

[26] See *Professional Conduct in Relation to Taxation* 1st May 2015, paras. 2.2 – 2.13 and 4.1 – 4.53

6.6 The Standards, however, because of their imprecision, will have an effect on tax advice of a much wider class of transactions than such schemes. Indeed, they will have an effect on the provision of all tax advice by members of the Subscriber Bodies. All such members will have to consider whether their activities might be in breach of the Standards and, in many cases, the answer will be that 'they may be or they may not', or that 'I cannot tell'.

The Clues

6.7 There are clues both in the Rules themselves and in the documents which accompanied its publication as to why these latest revisions to the Rules have gone so far astray.

A naïve reliance on HMRC's good faith and competence

6.8 We have seen[27] that the Rules make the naïve assumption that HMRC public statements about its constructions of the law are always made in good faith and are tenable. Any adviser who has been involved in reviewing HMRC's public statements will know that this is not always the case.[28]

Absence of an appreciation of the importance of an independent tax profession

6.9 The Rules display no awareness by the Authors of the importance that the Subject, in dealing with the Government and its officials, should have access to expert, independent and unbiased advice on revenue, and related administrative, law.

6.10 For, although the Foreword states that:-

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[27] See para. 5.11 above and also the Rules, para. 2.34. Indeed, there is only one paragraph, para. 2.24, in Parts 1 and 2 of the Rules which suggests that HMRC might be mistaken in any of its actions or statements (para. 2.24)

[28] *McKie on Statutory Residence* (pub. CCH – 2014) which I co-wrote with my wife, Sharon McKie, is full of examples of misleading statements made, and untenable constructions asserted, by HMRC in respect of the Statutory Residence Test

> ‘A strong, competent and self-disciplined tax profession is vital to [the tax system’s] successful operation and serves the public interest by allowing the citizen proper and effective representation in one of their most significant interactions with the State.’[29]

the Rules do not mention the tax adviser’s important role in allowing taxpayers to resist illegitimate demands from the Government for documents and information or for the payment of tax or of penalties.

6.11 So the Rules show no understanding of the importance of the independence of the tax profession or of the dangers to individual freedom which are inevitable in the exercise of large powers by Government departments if the public is not to have access to robustly, independent professional advice.

A failure to understand the concept of the Public Interest

6.12 Perhaps this is because the Authors of the Rules do not seem to show an understanding of the concept of the Public Interest.

6.13 Paragraph 2.28 of the Rules says:-

> ‘In order to … ensure that public interest concerns are met, the *PCRT* bodies have developed further Standards[30] that members must observe when advising on UK tax planning.’

[29] The Rules, Foreword

[30] Actually there have not been any prior statements of the Standards for tax planning so it is not clear why the adjective further is used

6.14 This seems to be the root cause of the mistaken attitudes which have led to this disastrous revision of the Rules. It confuses the things in which the public are interested with the public interest. It is true that the public media have been full, in recent years, of ill-informed discussion of our tax system and that wild assertions about tax avoidance are the common currency of internet discussion. We have seen,[31] however, that the Rules themselves acknowledge that the public discussion of tax avoidance has been over simplified and conceptually confused. The professional bodies, including the Subscriber Bodies, must take some part of the blame for this, for when the storm over tax avoidance first broke shortly after the financial crash, they took the decision to lie low in the hope that it would blow itself out. The professional bodies have chosen not to inform public discussion of the tax system, but to be led by it.

A Damascene conversion of guilty men?

6.15 Implicit in the Foreword is a weak acceptance of the idea that the regulatory bodies have previously given an insufficient lead and taken insufficient responsibility in setting and enforcing clear, professional standards. If that were true, which I am sure it is not, then those who were officers and senior employees of the Subscriber Bodies at the time of the publication of the previous edition of the Rules, on 1st May 2015, must surely themselves have breached the Fundamental Principle of 'professional behaviour' by discrediting the tax profession.

6.16 For what has changed in the practice of taxation over the last eighteen months to require the introduction of these Standards when they were not required before? The answer is, surely, nothing at all. The change, as we shall see,[32] has not been in the ethical demands of professional tax practice but in the sphere of politics.

[31] See paras. 5.2 & 5.27 above
[32] See paras. 7.1 – 7.7 below

A compendium of errors

6.17 When the latest edition of the Rules was published, an email announcing the publication (the 'President's Email') was sent to the CIOT's members describing itself as a 'Message from the CIOT President'. That email displayed the very qualities of a lack of awareness of the importance of the independence of the tax profession, of the danger of assuming that Government officials will necessarily act correctly and of a confusion of the public interest with public opinion which is at the heart of the incoherence of the revised Rules. It said:-

> '… what it means to behave with integrity and professionalism in the context of tax planning has changed over time and … we must take account … of this or else risk falling out of step with what is expected of us by the public and consequently forfeiting trust and respect.
>
> We have also been asked to act in this area by the Government. On March 19th last year Treasury ministers challenged the professional bodies to "take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good". This was not a challenge we could lightly ignore even had we wished to.
>
> The task of producing guidance which addresses legitimate concerns about avoidance without preventing advisers from providing full and correct advice to their clients has not been easy. This has been painstakingly debated within CIOT, including by the Institute's Council, between the seven bodies concerned, and in discussions between the profession and HMRC, before settling on the agreed wording.'

6.18 It is really extraordinary that before reaching a conclusion on what ethical rules are required for an independent profession to protect taxpayers from the abuse of its powers by the Government, the Subscriber Bodies should have waited on the agreement of HMRC. Of course the professional bodies should take account of HMRC's view but they should not allow their standards of behaviour to be determined by it.

6.19 Attached to the President's email was a set of 'Frequently Asked Questions' (the 'FAQs'). These FAQs explain that:-

> 'Public interest concerns about behaviours [sic] in relation to tax planning have evolved significantly in recent years ....'

APPEASEMENT

Government Pressure

7.1 The FAQs referred to what it called 'The Government's Challenge to the Profession on 19th March 2015' which was a reference to a passage in a paper published at the time of the March 2015 Budget by the then Chief Secretary to the Treasury[33] in which he demanded that the professional bodies should:-

> '… take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good.'

[33] 'Sir' Danny Alexander, now mercifully released into the obscurity of private life by the electors of Inverness

7.2 That was, in effect, a demand for the Government to set, through political pressure, the Subscriber Bodies' professional standards.

7.3 The CIOT website includes a link to the new Rules and immediately under it a letter from the current Financial Secretary to the Treasury (the 'Financial Secretary's Letter') in which she patronisingly congratulated the CIOT on the publication of the new Rules saying that she had:-

> '… been impressed with the commitment demonstrated by all the seven PCRT professional bodies, both to good tax compliance and to responsible tax planning, and with how you have engaged with HM Revenue and Customs (HMRC) officials and Ministers over the last 18 months or so.'

7.4 Was the Financial Secretary's pat on the head sufficient compensation for the Subscriber Bodies' submission to HMRC and their abandonment of their duty to make an independent judgement of what the public interest requires?

Just a First Step?

7.5 When one surrenders one's independence, one places oneself at the mercy of the person to whom it is surrendered. The signs for the future are not good. The Consultation Document '*Strengthening Tax Avoidance Sanctions and Deterrents: A Discussion Document*' referred to this revision of the Rules as simply:-

> ' … a significant first step in meeting the Government's challenge.'

7.6 Ominously, the Financial Secretary's Letter said:-

'I know that the publication of the revised PCRT is not the end of the process. I know that you will continue to work with HMRC to ensure the new principles are advertised and promoted widely, and that robust action is taken against any members who decide to ignore them.

There is a shared goal between us on this matter and in this context we should do our utmost to ensure there is a continued shift in attitudes. We will need to keep the PCRT under review to check the extent to which the revised principles are having the impact we are all seeking. In the meantime, HMRC officials will work with the other professional bodies, the regulators of the legal professions, and agents who are not members of any professional body, to ensure that all those involved in tax planning adopt standards that match your principles.'

7.7 We can, therefore, expect further pressure from the Government to be exerted on the Subscriber Bodies, to impose even more restrictive rules on the advice which members can give to their clients and penalties on members who dare to advise their clients on the law in ways of which the Government disapproves, or who differ from the Government's view as to how professionals should behave. It is to be expected that, in the future, HMRC officials involved in disputes with CIOT members acting on behalf of their clients will find a new weapon in making complaints to the Tax Disciplinary Board.

7.8 Appeasement always stimulates more exactions and demands for more concessions.

Subservient Instruments of Government?

7.9 Of course, when the Government puts pressure on the professional bodies to take a course of action, particularly when that pressure is, at least on the face of it, supported by a movement of popular feeling, those bodies need to take that pressure seriously. No doubt the Subscriber Bodies felt that it was better to introduce the changes themselves than to risk being directly regulated by the Government. The effect of their acquiescence, however, is that they have allowed the Government to dictate their professional standards, becoming, in effect, the mere instrument of Government regulation. If they had taken the public interest seriously, however, they would not have assumed that their only option in the face of Government pressure was abject submission.

Two Professional Bodies who have Stood Firm

7.10 To their credit, two professional bodies, many members of which practise taxation, did not do so. I understand that the Law Society and, I am proud to say as a member of it, the Bar, which had not subscribed to previous editions of the Rules, resisted pressure from HMRC to subscribe to the revised edition.

A DIVIDED PROFESSION?

Lawyer Members

8.1 That, however, has created a very difficult position for the Subscriber Bodies, a substantial minority of the members of which, particularly of the CIOT and the STEP, are lawyers. A number of barristers of my acquaintance had said that they would have to resign their membership of the CIOT and the STEP if the Rules were to apply to them. In their view, the effect of the Rules would be that they would be forbidden to offer advice to clients which they would have a professional duty as lawyers to provide.

Paragraph 1.8

8.2 In order to prevent an exodus of members, para. 1.8 has been included in the Rules. Paragraph 1.8 provides that:-

> 'Nothing in PCRT [sic] overrides legal professional privilege. Similarly nothing in PCRT [sic] shall override a member's professional duties or be interpreted so as to give rise to any conflict under general law, statutory regulation, or professional regulation of solicitors or barristers, and in the event of any conflict general law, statutory regulation or such professional regulation shall prevail. For these purposes a conflict shall be considered to arise at least where such law, statutory [sic] or such professional regulation to which members are subject would prevent compliance with what would otherwise be required by PCRT [sic].'

8.3 The FAQs explain in respect of this:-

> '*I am a lawyer. Is there a risk this will conflict with my professional duties?*
>
> We understand that lawyers have a duty to act for their clients.[34] We have listened to feedback and have discussed this issue at great length and while we don't feel there is a conflict, for the avoidance of doubt we have introduced paragraph 1.8 of the Introduction to address these concerns. We consider this provision provides the necessary reassurance.[35] In the event that you identify

[34] A non-lawyer member of the Subscriber Bodies might well ask whether he too does not have a duty to act for his clients

[35] 'Necessary reassurance' is the sort of vague and nonsensical phrase which has become familiar from the Government's responses to submissions to its Consultations. A regulatory provision's function is to state applicable rules with precision. It is not to provide reassurance to the unnecessarily anxious, a view of the concerns of its lawyer members, which is implicit in the CIOT's answer to the FAQs

a conflict, any regulatory requirement will take precedence as will your overriding duty to the Courts. CIOT and ATT will not take any action against you for following your primary professional duties.'

8.4 I find it very difficult to understand what para. 1.8 actually means.

8.5 In one part it is a rule as to priority ('nothing in PCRT shall override …') and in another it is a rule of construction ('or be interpreted so as to give rise to any conflict …'). To the extent that it is a rule of construction, it is not clear whether it means that the Rules are to be construed in one way in respect of a barrister or solicitor and in another in respect of members who are not barristers or solicitors or it means that the Rules are to be so construed so that there is no conflict between the Rules and barristers' and solicitors' duties determined under the rules of those professions (and the law) and that that construction is to apply in respect to all members.

8.6 Nor does the phrase 'at least' have any clear meaning. It may be that it is meant to provide a margin for judgement so that a member who makes a reasonable judgement, even if, subsequently, a disciplinary panel disagrees with that judgement, will not be found to be in breach of the Rules. If so, it does not appear as a matter of construction to achieve that.

8.7 Even if one construes para. 1.8 as providing that a member will not be in breach of the Rules where otherwise he would be to the extent that, if he were to have complied with the Rules, he would have been in breach of the Rules of the Law Society or of the Bar or of a general legal duty, a lawyer member of the Subscriber Bodies, in deciding whether he is in breach of the Rules, would still be in the position of gambling that his interpretation of his own professional rules will allow the override. In doing so, he will be taking a position in opposition to the CIOT's position set out in the FAQ's

that there is no such conflict. One doubts whether para. 1.8 will, in practice, provide much protection for lawyers caught between two sets of conflicting professional rules.

A Three-Tier Profession and a Two-Part Membership

8.8 In any event, the Subscriber Bodies, and this applies most severely to the CIOT, have created, in respect of relative competitive advantage, a three-tier tax profession and a two-part membership.

8.9 Tax advisers who are lawyers but not members of a Subscriber Body will not have to deal with the uncertainties inherent in the Rules and will not have to bear the cost of documenting the rationale of their judgements in relation to them. That is the first tier of the tax profession. Those members of the Subscriber Bodies who are lawyers will have to bear the risks of the uncertainties of construction of the Rules and the costs of complying with the requirement to document the rationale of their judgements in relation to them but will not be subject to the Rules to the extent that they can demonstrate that the Rules conflict with the demands of their own professional body or the law. That is the middle tier of the tax profession. Members of the Subscriber Bodies who are not lawyers will be fully subject to the *PCRT* and will therefore form the bottom tier of the tax profession.

8.10 One part of the membership of the Subscriber Bodies, those who are not practising lawyers, will be placed at a competitive disadvantage to another part, those who are.

8.11 It is difficult to see how it is in the public interest to create a three-tier tax profession where each tier is subject to different sets of rules or how it is in the interests of the members of the Subscriber Bodies to create two groups of members with one group being at a significant competitive disadvantage to the other.

IMPROVING THE RULES

9.1 Instead of acting as HMRC's poodle in the way they have, the Subscriber Bodies might have taken the opportunity to really improve the Rules for, as we have seen, they are so badly drafted that they need to be entirely redrafted by an experienced legal draftsman so as to state with precision the Rules which apply to a member and to clearly distinguish advice and explanation from prescriptive and proscriptive regulation. In addition to improving the quality of the drafting, however, there is also a need to improve the quality of their substantive content.

Ethical Requirements for Members who work for HMRC

9.2 For some years now, HMRC has been putting its employees through the ATT and CIOT examinations. HMRC has increased its recruitment from the private sector and, in particular, of various types of accountants, including members of the Subscriber Bodies. One cannot determine how many employees and officers of HMRC are members of the Subscriber Bodies but it is likely that the number is substantial and will increase.

9.3 The Rules provide that they are to apply to 'professional conduct in relation to taxation, and particularly in the tripartite relationship between a member, client and HMRC'.[36]

9.4 As we have seen,[37] however, they also provide that:-

[36] The Rules, para. 1.1. It will be noticed that this assumes that the member is not an employee of HMRC

[37] See para. 6.4 above

'Whilst the content of this guidance is primarily applicable to members in professional practice, the principles apply to all members who practise in tax including:

- Employees attending to the tax affairs of their employer or of a client; and
- Those dealing with the tax affairs of themselves or others such as family, friends, charities etc whether or not for payment; and
- Those working in HMRC or other public sector bodies or government departments.'

9.5 It is clear, therefore, that the Rules apply to members in all their activities in relation to taxation; in their personal affairs, in their practices and in their work as employees or other officers of legal persons or other bodies. Paragraph 1.14 provides that:-

'Where a member's employer is not prepared to follow the ethical approach set out in this guidance (despite the member's reasonable attempts to persuade him to do so) the member may contact his professional body and/or seek legal advice. Further advice can be found at www.tax.org.uk and www.att.org.uk.'

9.6 So where a member of one of the Subscriber Bodies is an employee of HMRC he is under a professional duty to attempt to persuade HMRC to follow the ethical approach set out in the Guidance, including standards of honesty, integrity and the avoidance of bias and undue influence.[38] If he is unable to do so, he may[39] be under a duty either to contact his professional body or to seek legal advice on the matter.

[38] The Rules, para. 2.2
[39] The rule in para. 1.14 is expressed as permissive but it must surely have some regulatory force

9.7 Numerous cases in recent years have revealed seriously unethical behaviour by HMRC and judges in the Tribunals and in the Courts have made substantial and serious criticisms of HMRC's behaviour and of the behaviour of its staff. That professional duty, therefore, must create severe ethical dilemmas for such members.

9.8 Yet when one looks at the Rules they are almost entirely concerned with the ethical dilemmas which occur in private practice. So, for example, there are sections of Part 4 of the Rules dealing with access to data by HMRC, Voluntary Disclosures to HMRC under the Disclosure Facilities, the DOTAS Regime, HMRC's Rulings and Clearances and other interactions with HMRC. None of these, however, consider the behaviour of members who are employees of HMRC. The Fundamental Principles set out in para. 2.2 do not take account of the fact that a member might exercise statutory powers and nowhere in the Rules is there any consideration of what a member should do when a statutory body of which he is an employee abuses its powers or exercises them oppressively or without regard to the purpose for which Parliament has conferred them.

9.9 Now, of course, the HMRC officers involved in those cases may not have been members of any of the Subscriber Bodies but it seems unlikely that none of these officers will have been such members. Surely, it is time for the Rules to take seriously the ethical responsibilities of members who are employees and officers of HMRC.

9.10 At the beginning of this year I pointed out to the relevant staff member of the CIOT that the Rules were seriously inadequate in dealing with the ethical issues which will arise for members employed by HMRC and suggested that the review which has led to this latest revision of the Rules was an opportunity to repair that weakness. Nothing has been done about it.

9.11 Although the particular ethical dilemmas which arise in relation to HMRC employees and officers are not dealt with in the Rules, the general duties of members of the Subscriber Bodies to act honestly and with integrity and not to discredit the profession[40] apply to members acting in their employment with HMRC just as much as they apply to members working or practising in the private sector. It is, therefore, possible even now, for complaints to be made to the appropriate disciplinary bodies where an employee of HMRC is a member of the Subscriber Bodies. The CIOT was unable to inform me whether any such complaints have ever been made.

9.12 One reason why they may not have not been made is that HMRC employees who are CIOT members, unlike CIOT members in private practice, are not under a professional duty to inform the members of the public with whom they deal of the fact that they are subject to the disciplinary rules of the Institute or of how a complaint to the Institute as to the member's behaviour may be made. Surely, that situation ought to change.

GIVE YOUR VIEWS TO THE INSTITUTE'S PRESIDENT

10.1 Although the President's Email claimed that the revision to the Rules had been 'painstakingly debated within CIOT' as far as I am aware the majority of the members of its technical sub-committees have not been consulted on them. According to an article by Sara White, published last March,[41] the Subscriber Bodies intended to send out the revised Rules 'to the members of the various institutes in advance of the publication of the final conduct [sic] for feedback'. In the event, however, this was not done.

[40] The Rules, para. 2.2

[41] *Tougher Code of Conduct for tax advisers at advanced stage to address aggressive tax planning* (CCH Daily 15th March 2016)

10.2 The FAQs say, in respect of the new edition of the Rules, that the CIOT:-

> '… will be providing support through webinars and branch visits. Any member who still has concerns or questions should contact the member services team ….'

10.3 So the CIOT does not appear to be, or to have been, interested in learning its members' views about this revised edition of the Rules until, at some time in the future, it has completed a programme of webinars and branch visits giving its view of the matter. Those of my readers who think that this is too important a matter to wait for the expiration of this indeterminate period might contact the CIOT President, Bill Dodwell, on 020 7007 0848 or email him on bdodwell@deloitte.co.uk to give him their views.

Simon McKie