Self-control

General Features



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Stephen Coleclough explains how the tax profession is already regulated

During my presidency of the CIOT I tried to ban the ‘r’ word, regulation. The issue of regulation arose because HMRC queried, through the tax agent process, whether the profession should be regulated. I thought it was. Yet I was always being told by members that we do not need regulation. I would reply: ‘But we already have regulation so what regulation do you not want?’

Regulation has far too many meanings to be useful in a discussion and, rather than have these debates again, I thought I would set out some thoughts in the hope that

they might help calm and steer the debate.

What is regulation in a professional context?

Regulation is a means by which the activities and behaviour of a group of people are controlled and constrained.

The regulator enforces the rules and regulations that it sets, and a disciplinary body hears allegations of their breach and, if upheld, imposes sanctions. Where sanctions for breach can be serious, the disciplinary body should, in order to comply with the Human Rights Act, be independent of the regulator.

Applying the terms, I hope to make it clear that the tax profession is already heavily regulated. Let me start by restating by whom and to what extent and also by ignoring those tax advisers regulated by other professions such as accountancy or legal.

Who can be a tax adviser?

First, anyone can set up in business as a tax adviser. There is no requirement to have insurance, qualifications, or even access to a Yellow Book (or even to know what colour it is). In that respect one could say that the profession of tax adviser in the UK is not regulated, in contrast to, say, Germany where you have to be a member of the state government-run chamber to have a licence to practice.

Regulation by CIOT and ATT

CTAs and ATT members are regulated. Regulation by the CIOT or ATT is known as self-regulation. Those who remember the launch of the Financial Services Act 1986 will remember that SROs (self regulatory organisations) such as the Investment Management Regulatory Organisation (IMRO) were all the rage.

CIOT has its member regulations. These require important things such as professional indemnity insurance (PI), continuing professional development (CPD), adherence to professional conduct in relation to taxation (PCRT) and so on. The CIOT also has its bye-laws, but these are more about how the organisation runs itself.

Although PCRT is prepared by its sponsoring bodies (ACCA, ATT, CIOT, ICAEW, ICAS, STEP) and discussed with HMRC (and any attempt by them to impose a duty which the profession thinks is incompatible with our role or our client's interests is omitted), it has been held by the High Court in *Mehjoo v Harben Barker* [2013] EWHC 1500 to be the standard applicable to all tax advisers, whether they are a member of a professional organisation or not. If only the courts could extend the requirement for PI insurance and CPD to all tax advisers too.

PCRT is not the law; it is about professional conduct. Breach of it is not a matter for the courts, whereas a negligence claim is. Instead the matter should be referred to the Taxation Disciplinary Board (TDB), which can fine or even expel members. I do not propose to explain the processes here but the TDB's rules are set out at www.tax-board.org.uk

Regulation of tax advisers by HMRC

This already exists in these areas:

- If you are not a member of a recognised professional body for anti-money laundering (AML) purposes, you have to register with HMRC. Further, AML is the only area where you are statutorily required to override your professional duty to your client in respect of notifying suspected money laundering and not tipping off.
- All tax advisers must consider the application of the rules on disclosure of tax avoidance schemes (DOTAS), which are now being updated in the 2015 Finance Bill, and report directly to HMRC. Failure to do so renders the tax adviser liable to penalties.
- Provisions in the Finance Bill introducing the concept of high-risk promoters. These are those whose compliance with DOTAS is regarded by HMRC as sub-optimal.
- hose filing tax returns online – the relationship with HMRC is regulated by the department's terms and conditions, which change over time. I am sure that all of you have read these thoroughly (then again, perhaps not).

EU regulation

Being a UK tax adviser is a liberal profession in EU terms. AML is a creature of EU law but other laws apply too. For example, the CIOT was appointed by the Department for Education and Skills (DfES) to monitor the mutual recognition of tax adviser qualifications for those tax advisers from other EU member states who wish to practise in the UK and be recognised as CTAs. In that respect, the CIOT is a statutory regulator.

Regulation of the profession

Apart from the above, which is a high-level summary, and the general laws relating to businesses such as employment law, advertising rules and restrictions in FSMA, the tax adviser profession is not regulated at all (ignoring the fact that many members of the profession are also ACAs, solicitors, barristers and the like).

When some say they don't want regulation, or regulation is coming, what are they talking about? HMRC have stated they are not interested in regulating the profession beyond where they already do. There are no plans to repeal AML or DOTAS.

One obvious area of possible regulation is a law that says that only regulated tax advisers can practise (constraint). This clearly has consumer choice issues, would need a transitional period for those not members of a professional body to find a suitable one and perhaps pass some exams. It also begs the question of who the regulator would be (control) (not HMRC obviously!). The CIOT has looked at these areas already and is prepared should this come on to the agenda.

What I believe is the right approach would be to level the playing field. We hear a lot from our members about the unfairness of paying insurance premiums of hundreds of pounds a month when unqualified tax advisers do not have to, plus the cost of CPD (although branch events are often excellent value – even more so our residential conferences with their top-class speakers, two days of CPD and a range of topics). Not only would all people giving tax advice for monetary reward need to be AML-registered and abide by PCRT (thank you Mr Justice Silber), they must also have PI insurance and keep up to date with CPD. This raises the usual issues of friends and family giving advice, enforcement (how and by whom, and, if the TDB, who funds it?) and also whether insurers would even offer insurance (which could be seen as a back-door way to restricting who can give tax advice).

Would this help HMRC who want to assign more of their work in the name of cost reduction (or cost reallocation, as I call it) to members of the profession by giving

them direct access to HMRC systems and indeed more access than their clients have? Probably not. But I see many benefits for the profession and HMRC in achieving this. The question is how? Whatever the answer, let’s not call it regulation; enhanced access is my suggestion.