

Your ref
Our ref

T [Enter direct line]
E catherine.hardinge@pricebailey.co.uk
W pricebailey.co.uk

18 May 2023

KenSiong@ethicsboard.org

Dear Ken

PROPOSED REVISIONS TO THE CODE ADDRESSING TAX PLANNING AND RELATED SERVICES

Price Bailey is a top 40 UK accountancy practice specialising in providing audit, accountancy, tax and business advice to enable the growth of regional, national and international businesses. We audit a number of entities within the SME sector and also listed companies.

We have 8 offices in the UK. We employ over 350 professionals and have a group turnover of over £30million.

The policy paper is important to Price Bailey as we currently provide a wide range of tax services.

We acknowledge IESBAs objective to develop a substantive and practical principles-based framework, to guide professional accountants in behaving ethically when providing tax planning and related services to clients. Our responses to the consultation questions are in the attached appendix.

Yours faithfully



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Our Promise

At Price Bailey - it's all about you.

Causeway House 1 Dane Street Bishop's Stortford Herts CM23 3BT
Telephone 01279 755888 Fax 01279 755417 E-mail stortford@pricebailey.co.uk Website www.pricebailey.co.uk
Price Bailey DX 311001 BISHOPS STORTFORD 4



APPENDIX

Proposed New Sections 380 and 280

1. Do you agree with the IESBA's approach to addressing TP by creating two new Sections 380 and 280 in the Code as described in Section VI of this memorandum?

This would appear to be consistent with the current structure of the Code.

Description of Tax Planning and Related Services

2. Do you agree with IESBA's description of TP as detailed in Section VII.A above?

We agree that tax efficiency is more neutral than tax minimisation and therefore preferable. We also agree with IESBA's proposal to not reference the intended purpose of reliefs, which sometimes lack clarity that is also variable by jurisdiction.

Role of the PA in Acting in the Public Interest

3. Do you agree with IESBA's proposals as explained in Section VII.B above regarding the role of the PA in acting in the public interest in the context of TP?

Price Bailey believe firmly in our responsibility, and that of the wider accountancy profession, to act in the public interest. It is an important mandate for us as a profession. The ICAEW Code of Ethics has an overriding public interest requirement we also adhere to the Criminal Finances Act re: non-facilitation of tax evasion and the UK Professional Conduct in Relation to Taxation Guidance (PCRT)¹.

We note however that, given the 200+ references to the concept of public interest in the IESBA Code, nowhere is it actually defined. Nor does it appear to be defined elsewhere, though there have been efforts to assist in its analysis².

Public interest is a particularly difficult concept when it comes to tax planning, as many discussions on the topic are inherently politically charged. For example, it is difficult to completely ignore concepts of tax justice as it is these that tend to inflame public opinion the most.

This is not helped by the fact that tax is generally reported upon poorly in the media which can further inflame public opinion, perhaps more in fact than poor advisers or lack of regulation. Just because the public might be interested does not necessarily mean that a matter is in the public interest.

¹ <https://www.icaew.com/technical/tax/pcrt>

² <https://www.icaew.com/technical/trust-and-ethics/ethics/the-public-interest>

We therefore welcome IESBA's distillation of the concept in this context to two main threads:

- Complying with laws and regulations
- Giving high quality advice

We also welcome IESBA's acknowledgement that assessing public interest will be an 'impossible task' in some circumstances, particularly those that involve cross-border transactions.

Basis for Recommending or Otherwise Advising on a Tax Planning Arrangement

4. Do you agree with the IESBA's proposals regarding the thought process for PAs to determine that there is a credible basis in laws and regulations for recommending or otherwise advising on a TP arrangement to a client or an employing organization, as described in Section VII.E above?

We believe the guidance on actions that a professional accountant might take to determine that there is a credible basis in relation to a particular tax planning arrangement is helpful.

However, it may be more helpful to articulate 'credible basis' by reference to some of the expected % success rates that were suggested during the roundtables. Whilst we understand IESBA's reluctance to include a threshold or indeed a range of threshold there are some helpful comments in the explanatory memorandum that don't make it into the exposure draft, namely an acceptance that the threshold for 'credible basis' is lower than 'likely' (50%) and possibly significantly lower (20%) in some jurisdictions. We suggest, at the end of Para 380.11 A2, adding "in many jurisdictions credible basis is lower than likely or 50% probability and where sufficient disclosure is made in accordance with the local requirements could be significantly lower."

5. Are you aware of any other considerations, including jurisdiction-specific considerations, that may impact the proper application of the proposed provisions?

Developing jurisdiction neutral guidance in this area is challenging.

Much of a professional accountant's analysis in this area could end up relying on both objective and subjective assessments of the intentions of a jurisdiction's tax administration functions as well as the legislature itself. Also, it is not unusual for different government departments to operate at cross purposes to one another, e.g. one government department might be keen to allow reliefs for overseas investment whilst the tax authorities will be keen to maximise tax income. This has significant implications for an analysis of the 'legislature's intent' as part of credible basis.

The exposure draft contains some useful examples of circumstances where such uncertainty might arise (380.15 A2) but paragraph 50 of the explanatory memorandum also makes reference to identifying "specific scenarios to understand the extent to which PAs consider the legislature's intent". We hope that IESBA receives some useful responses to its request below

for specific examples / comments, which it can further develop and publish alongside the revisions, given the specific and unique nature of the new provisions.

We have an anti-abuse rule (the GAAR) in the UK which looks at tackling highly contrived arrangements and which as a fundamental gateway has the “double reasonableness test” - this sort of ‘stand back’ test is entirely reasonable and requires HMRC to show that the arrangements “cannot reasonably be regarded as a reasonable course of action”. This recognises that there are some arrangements which some people would regard as a reasonable course of action while others would not. The ‘double reasonableness’ test sets a high threshold by asking whether it would be reasonable to hold the view that the arrangement was a reasonable course of action. It considers the actual planning in the round. If one were to focus instead just on “likelihood of success” and wider stakeholder perceptions (for example of the impact on the tax base of a single or multiple jurisdictions) this may create difficulties because some arrangements may be contrived and likely to succeed and some not contrived but unlikely to produce a subjectively assessed ‘fair’ tax outcome.

Does IESBA have a view on how the new provisions will apply in the context of special economic zones such as free ports? In some jurisdictions such zones may not be commonly encountered but it might be helpful to view these as analogous to a cross border scenario where it will be difficult to assess a credible basis for tax planning by reference to normal rules in a geographic zone where the normal rules don’t apply.

Consideration of the Overall Tax Planning Recommendation or Advice

6. Do you agree with the proposals regarding the stand-back test, as described in Section VII.F above?

We agree that including a stand-back test is useful. In this exposure draft it requires a professional accountant to “consider the reputational, commercial and wider economic consequences that could arise from the way stakeholders might view the arrangement” yet IESBA is also of the view “that this is not about tax morality, tax justice or tax fairness”. It is difficult to see how one can consider reputational or in some cases wider commercial consequences without in some way considering tax morality, tax justice or tax fairness. The explanatory memorandum cites the Starbucks case, what is that case about if not tax fairness? One could see a potential for perceived conflicts of interest once framed alongside one of the primary ‘public interest’ considerations in the document being that of providing high quality advice.

See our comments above regarding the UK GAAR.

Additionally IESBA have said that there is no expectation of hindsight in assessing the professional accountants behaviour under the new proposals, however if a professional accountant is found at a later date to have breached tax legislation then they will by default have breached the fundamental principle of professional behaviour.

Describing the Gray Zone and Applying the Conceptual Framework to Navigate the Gray Zone

7. Do you agree with the IESBA's proposals as outlined in Section VII.G above describing the gray zone of uncertainty and its relationship to determining that there is a credible basis for the TP arrangement?

Yes, and it makes logical sense that any such uncertainties should be discussed with the client.

8. In relation to the application of the CF as outlined in Section VII.H above, is the proposed guidance on:
- (a) The types of threats that might be created in the gray zone;
 - (b) The factors that are relevant in evaluating the level of such threats;
 - (c) The examples of actions that might eliminate threats created by circumstances of uncertainty; and
 - (d) The examples of actions that might be safeguards to address such threats sufficiently clear and appropriate?

Much of the guidance to assist the professional accountant in navigating the 'gray zone' is welcome, subject to our comments above re: credible basis.

Disagreement with Management

9. Do you agree with the proposals outlined in Section VII.I above which set out the various actions PAs should take in the case of disagreement with the client or with the PA's immediate superior or other responsible individual within the employing organization regarding a TP arrangement?

This would appear to be a sound approach and indeed in line with PCRT.

Documentation

10. Do you agree with the IESBA's proposals regarding documentation as outlined in Section VII.J above?

Yes. We would expect all professional accountants to obtain and document knowledge and understanding of the client, its owners, management and those charged with governance, and

its business activities; along with the purpose and circumstances of the tax planning arrangement; and the relevant tax laws and regulations.

Tax Planning Products or Arrangements Developed by a Third Party

11. Do you agree with the IESBA's proposals as detailed in Section VII.K above addressing TP products or arrangements developed by a third party provider?

We think that the guidance could go further in this respect. Some jurisdictions (including the UK) have issues with unregulated and/or unqualified R&D claim 'factories'. We believe it would be helpful if IESBA went beyond focussing on duty of care and self-interest threats in respect of commissions on referrals, to look more broadly at considerations concerning the quality or credibility of TP provided by a third party, about which the professional accountant may have concerns.

Considerations might include:

- The legal basis of the advice
- Whether the person giving the advice is appropriately qualified
- Circumstances in which the member might have to caveat their compliance responsibility or obtain a second opinion

Multi-jurisdictional Tax Benefit

12. Do you agree with the IESBA's proposals regarding a multi-jurisdiction tax benefit as described in Section VII.L above?

Yes

Proposed Consequential and Conforming Amendments

13. Do you agree with the proposed consequential and conforming amendments to Section 321 as described in Section VII.M above?

Yes

In addition to the request for specific comments above, the IESBA is also seeking comments on the matters set out below:

- (a) SMEs and SMPs – The IESBA invites comments regarding any aspect of the proposals from SMEs and SMPs.

A number of our clients are SMEs where we may also be advising the owner of the entity. For example, a client might be selling their business and be looking to minimise a tax burden on the capital gain. One solution might be non-residency. This might be subject to meeting many

conditions, in particular moving to another country, which may involve considerable upheaval and adjustment on the part of the individual concerned. This solution might be entirely legitimate, yet many might regard such a solution as unfair as a.) such a solution will not realistic for everyone and b.) it may deprive one tax jurisdiction of tax revenues, whilst potentially boosting those of another. Would such a scenario pass the stand back test proposed by IESBA?

- (b) Tax Authorities – The IESBA invites comments on the proposals from a regulatory perspective from members of the tax regulatory community.
- (c) Developing Nations – Recognizing that many developing nations have adopted or are in the process of adopting the Code, the IESBA invites respondents from these nations to comment on the proposals, and in particular on any foreseeable difficulties in applying them in their environment.
- (d) Translations – Recognizing that many respondents may intend to translate the final changes for adoption in their own environments, the IESBA welcomes comment on potential translation issues respondents may note in reviewing the proposals.