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SEMINAR C SESSION REPORT

TAX PLANNING, AVOIDANCE AND EVASION: LIABILITY OF INTERMEDIARIES

Tuesday, 7 October 2025 | 13:15 – 15:15

Chair
Philippe Malherbe (Belgium)

Panel members
María Amparo Grau Ruiz (Spain)
René Matteotti (Switzerland)
Ricardo da Palma Borges (Portugal)
David Pitaro (Italy)
Gabriela Rigoni (Argentina)

Prepared by Secretary
David Tipping (United Kingdom)

1. Introduction

In this session, panellists presented case studies of criminal prosecutions brought against tax advisers and other intermediaries in relation to the services they had provided to their clients. Panellists then analysed a number of emerging trends relating to the criminal liability of intermediaries across different jurisdictions.

The panel highlighted that, in principle, tax avoidance is not a criminal offence (it can even be considered lawful in some countries), whilst tax evasion is a criminal offence, and aggressive tax planning is in a grey zone. Tax advisers are increasingly at risk of various types of liabilities, notably for avoided taxes, and professional or criminal sanctions.

This session explored the boundaries between explaining the law and assisting in violating it. Panellists considered how and why such sanctions are imposed on intermediaries, and what they can do to protect themselves from criminal liability.

2. Main Topics Discussed

2.1. Topic 1: What is the difference, conceptually and in terms of consequences (penalties), between lawful tax avoidance, criminal tax evasion and "tax abuse"?

Gabriela Rigoni discussed the differences between tax avoidance, tax evasion and "tax abuse". The discussions revealed that tax avoidance is lawful and not subject to sanctions in Argentina, whereas tax evasion might constitute a criminal offence and be subject to prosecution.

She explained that, in Argentina, the tax authorities had attempted to erode the distinction between these concepts by introducing a new mandatory disclosure regime for lawful tax avoidance, but that this had been held to be unconstitutional and consequently abandoned. Further, Argentina distinguishes between evasion that is merely unlawful and criminal evasion by reference to a *de minimis* threshold.

The panel considered that 'tax abuse' (i.e., artificially acting in conformity with the letter of the law but not with the intent or purpose of the law) should not be invoked cases of criminal prosecution, because in such cases the law has not actually been violated.

2.2. Topic 2: What are the various types of intermediaries, the various types of liabilities and the triggering events?

María Amparo Grau Ruiz examined the different types of liabilities that intermediaries, and particularly tax advisers, can face, distinguishing between administrative liability (i.e., liability for any under-paid taxes), criminal liability and civil liability (i.e., liability in private law to the client, or a third party). Amparo identified different levels of severity of criminal liability, ranging from advisers who are mere instigators of a crime committed by the taxpayer to those who are the primary authors of their own criminal conduct. While advisers should be safe so long as they adopt a reasonable interpretation of the rules, external pressures on revenue authorities have increased the number of criminal prosecutions being brought. A lack of consistency across jurisdictions creates significant uncertainty for advisers.

David Pitaro discussed whether the definitions of "intermediary" from the EU's DAC6 and the OECD's Mandatory Disclosure Rules helped to identify the relevant people who should be subject to such liability. Those rules focus on the actual activities carried out by the person, rather than their specific qualifications. Such a definition is therefore very wide and flexible. Comparisons were also made to Portugal, where the authorities have expressly defined who is not an intermediary for the purposes of domestic legislation: advisers who do no more than describe the law to their clients, or who exercises a mandate in relation to tax-related procedures.

2.3. Topic 3: What is the behaviour expected from the intermediaries? What are best practices and legitimate practices?

Ricardo da Palma Borges examined what advisers can, and cannot do, in order to protect themselves from potential criminal liability. An important takeaway from this discussion, which was also picked up by Gabriela Rigoni, was that it is an adviser's duty to advise their client, and the client's role to make decisions. The adviser must inform the client of the different options available to them, and their comparative advantages and disadvantages. It is ultimately for the client to make the decision about how to proceed. If errors are identified in a client's existing tax position, the panel's view was that an adviser should not recommend against a voluntary correction of the error by the taxpayer, but that the adviser is generally not required to recommend voluntary correction (unless such an obligation exists in domestic law).

Examples of professional standards were identified from the UK and Portuguese domestic law. David Pitaro analysed the OECD Mandatory Disclosure Rules and DAC6 to identify three factors which are important in determining whether the adviser's involvement is legitimate: (1) the activity carried out by the intermediary; (2) what the intermediary can reasonably be expected to know, in light of their actual knowledge, their competence and the information available to them; and (3) whether the arrangements possess certain hallmarks of abusive transactions.

2.4. Topic 4: Is DAC6 inspired by the Anti-Money Laundering (AML) model?

AML rules operate by targeting intermediaries and requiring them to report suspicions of criminal activity. The mandatory disclosure rules in DAC6 appear to operate somehow in a similar way, by placing the obligation on intermediaries to report certain transactions of their clients. David Pitaro explained how mandatory disclosure rules are used by tax authorities to challenge offshore opaque structures and other arrangements that would otherwise enable taxpayers to conceal assets overseas.

Ricardo da Palma Borges identified a number of both similarities and differences between the two regimes. Both regimes serve a preventive function and are intended to combat criminal activity (in the case of AML rules) and abusive tax schemes (in the case of DAC6). They both rely on intermediaries to act as 'gatekeepers' and override professionals' duties of confidentiality in favour of a duty of disclosure. The two regimes are not identical. It was emphasised that DAC6 is not targeted towards criminal behaviour but towards hallmarked (but potentially legal) arrangements.

2.5. Topic 5: Does the existence of an advance ruling system make any difference?

Concluding the seminar, René Matteotti discussed what he saw as the advantages of an advanced rulings system: greater certainty for taxpayers; protection from criminal prosecution for taxpayers and intermediaries; and greater transparency for tax authorities, given taxpayers are required to disclose all the relevant facts to the authorities. He presented a case study from his own practice in Switzerland of a ruling that had gone wrong, as a result of an undisclosed company within the structure. This led to the potential threat of criminal prosecution for tax evasion for the taxpayer and their advisers.

This prompted much discussion from other panellists, who were less optimistic about the advantages of advanced rulings. Ricardo observed that Portugal also operates a rulings procedure, which can protect taxpayers and advisers from possible sanctions, and comparisons were also made to Advance Pricing Agreements (APA), which serve a similar function. However, both these regimes have uneasy relationships with the domestic mandatory disclosure rules. Without a carve-out for transactions that have already been disclosed as part of a ruling or APA, multiple regimes place further burdens on taxpayers and their advisers.

Other panellists also questioned whether advance rulings were as advantageous for taxpayers or their advisers as René suggested. Advisers and taxpayers needed to think carefully about whether the additional work created by requesting a ruling was worth the potential benefits, particularly if it was likely to prompt unnecessary investigations by the tax authorities.

3. Conclusions and Key Takeaways

The key takeaways of this seminar were that, while taxpayers and advisers continue to enjoy the freedom to choose to arrange transactions in the least-taxed manner (among equally legal options), there were clear limitations being imposed on them. It is beyond doubt that there cannot be freedom to engage in evasion, and advisers must be careful not to facilitate such behaviour. There are a number of areas that are much less certain, such as the growing reliance on general anti-abuse rules; mandatory disclosure regimes and punitive sanctions for intermediaries. The main overarching message was that, although common themes are emerging as a result of recent international co-operation, there remains a significant amount of divergence between national practices.

The panel concluded that advisers must take increasing care to follow best practices from around the world in order to ensure that they do not find themselves the unwitting subject of a criminal prosecution as a result of differences of professional opinion between the tax authorities and themselves.