

# WEAK TRANSMISSION MECHANISMS

**Taxation**  
December 2014

## **Disclaimer**

Tolley® takes every care when preparing this material. However, no responsibility can be accepted for any losses arising to any person acting or refraining from acting as a result of the material contained in these notes.

All rights reserved. No part of these notes may be reproduced or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of Tolley®.

# Weak transmission mechanisms

**JOLYON MAUGHAM** thinks a small number of tax barristers are harming the overwhelming majority.

I have on my desk an Opinion – a piece of formal tax advice – from a prominent QC at the Tax Bar. In it, he expresses a view on the law that is so far removed from legal reality that I do not believe he can genuinely hold the view he says he has. At best he is incompetent. At worst, he is criminally fraudulent: he is obtaining his fee by deception. And this is not the first such Opinion I have seen; they pass across my desk all the time.

**“ They are the Boys Who Won’t Say No, and we all know who they are. ”**

The “he” in question, I shall not name. But the brief description in the above paragraph will be sufficient to enable the part of the tax profession that regularly uses tax counsel to narrow the possibilities down to slightly under half a dozen names. These are the “Boys Who Won’t Say No” – the “Boys” for short – and we all know who they are.

## The House and the Boys

Assume you are a seller of tax planning ideas: and let’s call you a “House”. You have developed a planning idea that you wish to sell to taxpayers. But your customers will typically want independent corroboration from a member of the Bar that your

### KEY POINTS

- A few barristers will sign off wrongly on tax schemes.
- Providers then use this opinion to sell to clients.
- Barristers are not fully exposed to the risk they create.
- Impose a higher standard for tax advice as in the US?



idea works; that is to say it delivers a beneficial tax treatment (or, to use the preferred euphemism, that it mitigates your tax liability).

The fees that can be generated from bringing a planning idea to market are substantial. I am aware of instances where a single planning idea has generated fees of about £100m for the House. But without barrister sign-off, you have nothing to sell.

This fact creates predictable temptations for the Bar. If you are prepared to sign off a planning idea, the House will pay you handsomely; in some instances hundreds of thousands of pounds for a few days’ work. But the tax code is not made of Swiss cheese; planning ideas that actually deliver are rare. Their supply is constrained far beyond demand.

All of this is trite. It is what happens if you allow your independence to be swayed by your desire to collect the fee that I wish to explore. And the answer is, “not enough”.

Obviously, Houses want the best “name” QC available. But if those with a good reputation won’t sign off, some Houses will just go down the list until they find someone else who will. The House typically collects its fee whether the product works or not.

Assume that you are one of the Boys. You write an Opinion of the type I have sitting on my desk. You collect your large fee, and you establish yourself in the mind of the House as an accommodative sort of professional. The sort of chap they might like to come and see again in the future. What happens next?

The House will then go out and sell that idea to taxpayers. In the case of individual taxpayers, they will sell it, typically, through IFAs to whom they will pay a sales commission. That sales commission, too, can be very substantial, running in some cases into hundreds of thousands of pounds for a single client. So the IFA can be strongly incentivised to persuade their clients that the idea works, and – should the taxpayer client care about such things – that it is not aggressive tax planning.

In the archetypal case the taxpayer will then make their tax

return, HMRC will disallow the beneficial tax treatment, and the taxpayer will challenge that disallowance in the tax tribunal (causing years of uncertainty and substantial professional fees). Should that challenge fail, the taxpayer will lose whatever money he put into the idea, face an unexpected tax charge and, very often, be publicly pilloried into the bargain.

Some especially sophisticated or well advised taxpayers will see this coming, and they may feel the game is worth the candle. But one should not deny the existence of a sizeable rump of taxpayers who have no way of knowing what lies in store. That many feel aggrieved at their treatment (eg Katie Melua and Gary Barlow) is clear; and that some of those pilloried as tax avoiders have been missold is, to me, beyond question.

## Lack of controls

Where do the controls lie? What stops the IFAs and the Boys from banking, uninhibited, their fat fees for bad advice? The IFA, having a direct contractual relationship with the client, can be sued for negligence or mis-selling. But the Boy? What of him?

Barristers are, of course, regulated by the Bar Standards Board. But their duties, by and large, are owed to their client (in the example above, the House) not to third parties (in my example, the taxpayers). This is true both of their regulatory duties and of their contractual ones: it's not easy for a barrister to be sued otherwise than by the party to whom he gave his advice. That fact protects them from the real victims, those who buy from the House.

When the barrister is sued, he benefits from a mutual insurance fund. All barristers contribute to the fund from which the first £2.5 m of any claim against a barrister is paid. If claims are made against the fund, premiums rise to meet those claims. But, because the fund is a mutual, those premiums rise for all, not just the person responsible for making the claim. So the practice of the Boy is subsidised by the rest of the Bar. He picks up his large cheques for giving advice he cannot believe to be right, and his insurance premiums rise no more than mine.

So when I talk of "weak transmission mechanisms" as I do in the title to this article, this is what I mean. The mechanisms that transfer tax risk from those who bear it to those who should do are too weak. Those who bear it are the individuals in my example above. As I have said, in many cases they have no way of knowing whether they are engaging in "good" or "bad" tax planning. Yet they bear all the risk. Those who should bear, or at least share, it are the Boys. They grow rich saying "yes", when no one is better placed than them to know they

should be saying "no". Sadly tax is no exception to the general rule that risk rolls downhill and falls on the little man.

## What is to be done?

There is a degree of policing in the market. The Boys, known as they are, are little consulted by the highest-quality solicitors and accountants: those professional clients know that they do not get a serious answer for their lay clients to the question at hand. But while this limits their practice, it only modestly reduces the harm that the Boys do.

I have considered my own obligations. To report the Boys to the Bar Standards Board would involve me breaching my duties of confidentiality to my clients (through whose instructions I see the Opinions). And this trumps my obligation to report serious misconduct. I also wonder whether the Bar Standards Board is the best forum to resolve these issues.

## “To report the Boys to the regulator would involve me breaching confidentiality.”

A solution that seems to me to have its attractions is to place on UK barristers (and other tax advisers) a similar obligation to that placed on tax advisers in the US by IRS Circular 230, §10.37(a)(2). Written tax advice must not be based on unreasonable factual or legal assumptions or unreasonably rely upon representations of the client or others, and it must consider all relevant facts and law. Where written advice does not meet those standards, the practitioner would face direct financial penalties. These would give him better reason to say "no".

I do not claim expertise in the operation on the ground of that circular, and nor do I wish to advance policy making on the hoof. Plainly the experience in the US of the operation of the circular has been mixed. It is beyond the scope of this article to conduct an in-depth review of its operation, and what lessons the UK authorities might learn, but the principle seems sound to me.

A further solution might be to adopt a new drafting technique for tax reliefs that sought to explain in terms intelligible to a reasonably interested non-professional what obtaining that relief involved. Such a technique would be designed to shrink the size of the "sizeable rump". If you then chose to take a punt, at least you would be doing it with your eyes wide open.

Most of my colleagues at the Revenue Bar act properly and scrupulously. But it saddens me that a number, whose names are well known to us all, do not. Their behaviour makes victims of the general body of taxpayers, whose tax take is reduced. It makes victims of those taxpayers to whom the schemes are missold. And it besmirches my profession. ■

**Jolyon Maugham** is a barrister at Devereux Chambers, tel 020 7353 7534, or at [Maugham@devchambers.co.uk](mailto:Maugham@devchambers.co.uk). This is an edited version of an article originally published on his *Waiting for Godot* blog at [www.waitingfortax.com](http://www.waitingfortax.com).

### LexisNexis Webinars

**Planning tips for high net worth individuals**

**Date:** 20 November 2014

**Location:** At your desk on your laptop/PC  
Book online at [www.lexisurl.com/taxwebs](http://www.lexisurl.com/taxwebs) or call 0845 520 5500

