Spotlight on tax planning

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UK taxation policy is under the microscope, as never before. The mainstream press highlights a 'moral' position for businesses and taxpayers to pay their 'fair share' with high profile stories including; Starbucks, Amazon, Apple and comedian Jimmy Carr. Tax avoidance (legitimate tax planning) and tax evasion (always dubious, often illegal) have been 'morphed' by many commentators into a 'single' grey, yet complex area of the law.

Property investors should always be taking account of tax in their investment strategies, whether income tax, corporation tax, capital gains tax (CGT), VAT, inheritance tax (IHT) or stamp duty land tax (SDLT) – although often those payable upfront, VAT and SDLT, are the ones that tend to get early attention! Too often in the past, tax being 'below the line' was seldom given the attention it deserves and seen as a compliance issue. In the current climate, effective tax strategies can significantly impact overall performance and turn marginal projects into successful, profit generators. Factoring capital allowances, for example, into the after-tax position on a large investment property can improve the investment yield, often by as much as 0.5% to 1.0%, occasionally more.

Paying too little tax clearly carries reputational risk; irrespective of the legality, but what is the right amount of tax? Why pay more tax than necessary? This was the sentiment of Lord Clyde in the case of Ayreshire Pullman Motor Services v IRC (1929) 14 TC 754 "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest shovel into his stores". Although an old case, the courts have repeatedly supported this view that taxpayers, should follow the tax legislation, but are within their rights to minimise the tax payable, within these complex and convoluted rules.

General anti-abuse rule

The recent National Audit Office report on HMRC highlighted "that tax avoidance is not illegal" and the Government seems finally to be correcting the misinterpretation of tax avoidance and now using the term 'anti-abuse'. Respected QC, Graham Aaronson, has been leading an independent Advisory Panel helping HM Treasury and HM Revenue & Customs with the introduction of a new general anti-abuse rule (GAAR) to clarify the boundaries of legitimate tax planning and abusive activities.

The GAAR is expected to be in Finance Bill 2013 and effective from April 2013.

Senior accounting officer requirements

Reputational risks aside, businesses also face risk management issues in tax with the senior accounting officer (SAO) requirements (the individual now taking legal responsibility for tax compliance of large corporates), which means that tax is now much more of a boardroom issue, deserving of careful consideration and corporate energy in managing effective tax strategies. Businesses must now demonstrate they have adequate procedures in place to ensure comprehensive record keeping and accurate assessment of their tax liabilities and allowances in arriving at their tax computations.

Changes to REITs?

The REIT is, of course, a tax-efficient structure and many of the larger investment landlords have opted for this structure. This does not mean they no longer consider tax as there are complicated rules that must be complied with to ensure they do not create an unintended tax liability. The forthcoming Autumn Statement is expected to announce further changes to the REIT legislation, with the aim to continue their appeal to investors and improve flexibility, whilst protecting HM Treasury from inappropriate use of tax planning.

Whilst tax can cause some to glaze over, the potential for creating value, improving yields or maximising cash flow benefits (be it from optimising the available capital allowances or safeguarding the VAT treatment on a major transaction is correct or ensuring the 'right' entities [LPs, LLPs, GPs, SARLs, SAs, PLCs] and jurisdictions are involved at the right time), is a legal duty of directors to optimise returns for shareholders – enforced through the specific and general duties set out by the Companies Act 2006.