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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 146 – PROPOSED HMRC CODE

Response to the June 2009 HM Revenue & Customs Consultation Document on a Code of Practice for Banks

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FINANCIAL MARKETS LAW COMMITTEE

ISSUE 146 WORKING GROUP

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1. Introduction and Executive Summary

A) Introduction

1.1 The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

1.2 Following the Chancellor of the Exchequer's statement on 16 March, the 2009 Budget announced that HM Revenue & Customs ("HMRC") would publish a Code of Practice on tax for the banking sector (the "Code") to encourage banks to comply with both the letter and the spirit of the law.

1.3 On 29 June 2009 HMRC issued a consultation document headed "A Code of Practice on Taxation for Banks" (the "Consultation Document"), which seeks to explain why the Code is needed, considers the scope of the Code, explores specific issues relating to the administration of the Code, and looks at implementation and enforcement. The Code is included as an Appendix to the Consultation Document.

1.4 This paper is not a direct response to the questions raised in the Consultation Document, as the issues discussed cover questions of policy, upon which it is not within the remit of the FMLC to comment. Instead, this paper is intended to assist those involved in the policy decisions by drawing attention to elements of significant uncertainty that arise out of the Consultation Document and the drafting of the Code.

B) Executive Summary

1.5 The stated purpose of the Code is to ensure that banks and their customers pay their fair share of tax. The Code may have its roots in the global financial crisis, during which significant taxpayer support was provided to stabilise the banking system. However, it is probably better understood as part of an ongoing and general programme of "changing behaviours and attitudes towards tax avoidance". Whilst supportive of the objective of eradicating tax evasion, the FMLC is critical of some aspects of the Code in its current form; in particular, the FMLC has considered the Code in the context of certain axioms which are conventionally thought of as encapsulating values closely associated with the rule of law.

1.6 The Code is described as voluntary, but it is made clear that there will be consequences for those banks which do not adopt it, and that HMRC will police its operation. These consequences are set out in section 4 of the Code and include "greater scrutiny" by HMRC of banks which do not adopt the Code and reporting non-compliance to the professional body of which the officer who signed up to the Code is a member. It is unclear exactly what is meant by "greater scrutiny" and/or whether HMRC expects the professional body in question to pursue its complaint in a disciplinary process but, to the

extent that either of these consequences is intended to be—or to be experienced as—a punitive one, it can be objected that HMRC is going beyond the mere exercise of an administrative discretion. In this case the Code serves as more than simply notice of how that discretion is to be used: it appears to be a potentially coercive framework for the relationship between a bank and HMRC and, in that respect, the question arises whether it should be subject to the same kind of critical assessment as legislation. In any event, it can certainly be said that the terms of any code, breach of which has serious consequences for the signatory (about which more is said in section 3), should be set out with the highest possible degree of clarity and ascertainability.

1.7 Accordingly, the FMLC's principal objections to the Code are as follows:

(a) The Code is couched in indefinite and ambiguous language. Concepts such as "genuine commercial activity", "the intentions of Parliament" and "the proper amount of tax" are used without any elaboration as to their meaning; nor is it clear which organisations are intended to fall within the scope of the Code, since no definition of a "bank" is provided and reference is made, in different places, to (i) "banks", (ii) "banking groups, their subsidiaries, and their branches operating in the UK", and (iii) "all banks operating in the UK, and any similar organisations undertaking banking activities".

(b) The Code is designed to impose a different, presumably higher, standard of conduct on one group of taxpayers than applies to all other taxpayers, which—to the extent the Code can be seen as quasi-legislative—sits uneasily with the fundamental principle that the law should apply equally to all citizens.

(c) Throughout the Code, obligations are imposed on banks to discern the "intentions of Parliament". For example, paragraph 3.1 provides that even in circumstances where there is direct legislative authority for a particular tax treatment, it will not be sufficient for banks to base their conduct simply on the law as written. The courts have consistently opposed any notion of this kind.

(d) The terms of the Code against engaging in tax planning which does not support a "genuine commercial activity" gives the impression that there is an overriding legal principle which overrides the language or purpose of any particular provision.

(e) The signatories to the Code are obliged to ensure that bank employees pay the "proper amount of tax". This appears to refer to some wider concept than that which is prescribed by the rules laid down by Parliament in legislation. Again, to the extent that the Code is intended to be enforced coercively, i.e. through the imposition of sanctions, this reference to "the proper amount of tax" effectively serves to given HMRC some leeway to determine the amount of tax a person or firm can be obliged to pay. This is a proposition which the courts have specifically described as unconstitutional.

2. The HMRC Code and its Context

2.1 The aspects of the Code which relate to the management of tax collection and the enforcement of tax obligations are, of course, within the management powers of HMRC and have long been recognised by the law. The general principles of management contained in the Code are uncontroversial.

(a) A bank should have a formal documented policy in relation to its strategy and governance processes in relation to tax, that this should be documented.

(b) Accountability for the policy should lie at a senior level – the board of directors, for a UK company.

(c) The Code makes recommendations in relation to the use of approvals committees, and the role and status of a bank's group tax department in managing and controlling tax risk. (This focus on board level responsibility for tax risk policy chimes with the recommendations of the Walker review in relation to risk management in financial institutions generally.)[1].

(d) The Code stresses prompt disclosure and open dialogue (including in "real time"), with a view to efficient focussing of resource by both parties according to the level of risk arising from particular issues.

2.2 Apart from the terms of the Code, HMRC already applies a risk-based approach in dealing with large corporate taxpayers.[2] A group with good tax governance arrangements and transparent dealings with HMRC may be regarded as "low risk". This should carry with it the benefits of reduced interventions by HMRC and a relationship based on the provision of "real time" support to the business. On the other hand, "high risk corporates" attract much more detailed scrutiny,[3] and may find it harder to secure HMRC assistance in resolving questions as to tax liability.

2.3 In general, HMRC is required to act fairly, and not to discriminate as between taxpayers; but it also has a responsibility for "collection and management of revenue",[4] and a broad discretion as to how it performs that duty.

> *the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and*

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1 "A review of corporate governance in UK banks and other financial industry entities", 16 July 2009

2 See [illegible]

3 In evidence to the Public Accounts Committee on 28 January 2008, Dave Hartnett (then acting chairman of HMRC) explained that HMRC had been "taking a taskforce approach to the biggest risks, recently applying more than 150 of our officers, plus outside counsel and others, on just one case".

4 Section 5(1) Commissioners for Revenue and Customs Act 2005.

> *another does not arise, to ensure that there are no favourites and no sacrificial victims.* [5]

2.4 The risk-based approach to large corporate taxpayers, including banks, would seem to fall squarely within HMRC's discretion as to good management.

3. The Status of the Code

3.1 The principal objection to the Code is that it appears to blur the boundaries between notifying signatories in advance of the way in which HMRC's administrative discretion will be used and setting new (and uncertain) rules for compliance with the general law on taxation.

3.2 The Code is, of course, described as voluntary, but it is made clear that there will be consequences for those banks which do not adopt it, and that HMRC will police its operation. Paragraph 4.7 of the Consultation Document states, in the context of its discussion of the role of the Code in the annual risk review which HMRC carries out with each bank, that banks "not adopting the Code can expect greater scrutiny from HMRC". Where there is concern about proper compliance with the Code, it is stated that HMRC will raise the issues with the board of directors of the bank or, where appropriate, the senior non-executive director, and where non-compliance is found to be deliberate it is suggested that HMRC may consider reporting the bank officer who signed the Code to any professional body of which he is a member.

3.3 It is unclear exactly what is meant by "greater scrutiny" and/or whether HMRC expects the professional body in question to pursue its complaint in a disciplinary process but, to the extent that either of these consequences is intended to be—or to be experienced as—a punitive one, it can be objected that HMRC is going beyond the mere exercise of an administrative discretion. In this case the Code serves as more than simply notice of how that discretion is to be used.

3.4 It is noted in this context that the list of professional bodies which can be notified includes the FSA. If HMRC intends the inference to be drawn that it will pursue the matter with the professional body in question in the expectation that disciplinary action will ensue, it is not hard to see that the potential outcome for the individual concerned would be particularly devastating, since it may result, in effect, in a complete ban on working in any FSA-regulated institution in anything other than a support role.[6] Such action

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5 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260 at 279, per Lord Scarman.

6 The FSA has two sanctions against individuals. One of them is a prohibition order which prevents a person from performing any function in relation to any regulated activity carried on by an authorised or exempt person or exempt professional firm. This has to be applied for through the Financial Services and Markets Tribunal. However, it can also withdraw "approved person" status on the grounds that "approved person" status is a positive affirmation by it of suitability, and can be withdrawn on any grounds that it sees fit. If a person's approved status is withdrawn, that person cannot perform any activity which would require them to be approved including, for example, any customer facing, management or control function within an FSA-regulated institution. Thus withdrawal of "approved person" status is equivalent to a complete ban on working anywhere in the UK industry in anything other than a support role. This is a considerably more draconian

would also clearly be likely to involve reputational damage to the bank. Furthermore, whilst it is true that a professional body would not necessarily pursue a complaint of breach of the Code, there may in practice be great pressure on such a body to pursue such matter if urged by HMRC to do so.

3.5 It is at least arguable, therefore, that the Code is a potentially coercive framework for the relationship between a bank and HMRC and, in that respect, should be subject to the same kind of critical assessment as legislation.

4. Constitutional Principles affecting Tax Law

4.1 In light of this understanding about the potential severity with which a breach will be tackled, the paragraphs which follow are premised on a concern that signatories will experience the Code as a coercive framework akin to new tax law. If this premise is correct, it is appropriate to consider the significant constitutional principles which affect tax law. They require that taxation is imposed by Parliament, and that the liability of the taxpayer is certain and foreseeable.

4.2 Lord Cairns in *Partington v Attorney-General*[7] said:

> As I understand the principle of fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

4.3 Having cited that statement, Lord Macmillan in *Duke of Westminster v IRC*[8] said:

> If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of Secretary of State in Council of *India v Scoble*; that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine.

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penalty in this context than withdrawal of professional recognition, which almost by definition will be irrelevant to those working in a bank (and, by implication, outside private practice within the profession concerned).

7 (1869) LR 4 HL 100, 122

8 [1936] AC 1

4.4 This principle was reflected in the pithy comment of Walton J in *Vestey v Inland Revenue Commissioners*[9] approved by Lord Wilberforce in the House of Lords: "One should be taxed by law, and not be untaxed by concession."

4.5 The passage in which Lord Wilberforce expressed his approval should be carefully considered in relation to the drafting of the Code and, in particular, the concept of a "proper" share of the tax burden which it includes:

> Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined. A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle. It may be that the revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it: but, unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot, validate it...
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> When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it upon and from those who are liable by law. Of course they may, indeed should, act with administrative commonsense. To expend a large amount of taxpayer's money in collecting, or attempting to collect, small sums would be an exercise in futility: and no one is going to complain if they bring humanity to bear in hard cases. I accept also that they cannot, in the absence of clear power, tax any given income more than once. But all of this falls far short of saying that so long as they do not exceed a maximum they can decide that beneficiary A is to bear so much tax and no more, or that beneficiary B is to bear no tax.
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> This would be taxation by self-asserted administrative discretion and not by law. As the judge well said [1979] Ch. 177, 197: "One should be taxed by law, and not be untaxed by concession."

4.6 Lord Wilberforce refers to the possibility that Parliament might be persuaded to enact that a tax liability might be determined by administrative action. This remark is directly applicable to the Code, which purports to invite agreement by the taxpayer banks to a pure value judgment, namely whether a transaction or a series of them should or should not give rise to a tax liability on anyone, independently of any judicial determination on the precise terms of the statute in question. Lord Wilberforce is making no more than the basic constitutional point that the making of law is for Parliament and that the law must be sufficiently certain for the courts to give effect to it.

4.7 Lord Wilberforce's comment in *Vestey*, about the need for tax liability to be "clearly defined" in a taxing Act, has since been echoed by the the UK Parliament Joint Committee on Human Rights ("JCHR") which, in its Twelfth

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9 [1980] 1 AC 1148

Report, noted that, while States have a wide discretion under article 1 of Protocol 1 of the ECHR to impose taxes, the legislation must satisfy the principles of legal certainty and proportionality.[10] The JCHR then went on to add that:[11]

> For an interference to be lawful under the second paragraph of Article 1 of Protocol No.1, it must satisfy the qualitative requirements of accessibility and foreseeability: the law which imposes the tax must be published, intelligible and generally available in a form which enables individuals to organise their affairs knowing with reasonable certainty of the consequences of acting in different ways.

4.8 This clear articulation of the constitutional principles that circumscribe tax legislation by the JCHR must, it seems to the FMLC, also be, at the very least, desirable objectives in the publication of an administrative tax code. If that code serves in effect to impose sanctions for non-compliance and thereby indirectly to increase the tax liability of the signatory institution, these objectives become not so much desirable as essential.

4.9 It is against the background of these issues that the Committee has identified the following aspects of the Code which appear to be objectionable or problematic.

5. Objections to the Code

A) The application of the Code

5.1 The Code is expressed to apply to banks operating in the UK, and to certain associated entities (as to which, please see the comments below). It is thus designed to impose a different, presumably higher, standard of conduct on one group of taxpayers as opposed to other taxpayers.

5.2 The rationale is that banks occupy a "unique position", related to their ability to facilitate tax avoidance by their customers as well as in relation to their own business, which imposes on them "a particular responsibility" to "comply with the spirit as well as the letter of the law and to do so in a way which is transparent and open". Secondly, the significant taxpayer support which has recently been provided to stabilise the banking system is cited as a reason why taxpayers are "entitled to expect that banks, important taxpayers in their own right, and their customers pay their fair share of tax"

5.3 Neither argument would justify a departure from the fundamental principle that the law should apply equally to all citizens. An administrative code may not be "law", but one to which severe penalties attach must, surely, adhere to "rule of law" values of this kind. If the Code is truly "enforceable" as contemplated, it should not include a departure from such a fundamental principle.

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10 The UK Parliament Joint Committee on Human Rights, Twelfth Report, paragraph 1.46 – [illegible]

11 Ibid, paragraph 1.47

5.4 The Code also contains significant ambiguity in its drafting. The Consultation Document states that HM Government intends the Code to be adopted "by all banks operating in the UK, and by any similar organisations undertaking banking activities" (paragraph 3.9). The Code, on the other hand, refers, in its first paragraph, to "banking groups, their subsidiaries, and their branches operating in the UK". Throughout the rest of the Code, in setting out the standards of conduct which the Code requires an entity to adopt, the references are simply to "the bank".

5.5 It is not clear how various formulations are to be interpreted and, therefore, which organisations are intended to fall within the scope of the Code. The formulation in the first paragraph of the Code itself appears to be significantly wider than the formulation in paragraph 3.9 of the Consultation Document, which expressly refers only to those entities carrying on "banking activities" (although that concept is undefined). In the context of the type of complex groups of which many UK banks form part, the Code formulation would suggest that, for example, an insurance or investment firm which is part of a banking group would be required to comply with the Code although such entities would not be carrying on what would normally be regarded as "banking activities". It is not clear whether "bank", as it is used throughout the Code, is intended to refer to an entity carrying on regulated deposit-taking business, which would perhaps be the usual interpretation of that word, or whether it is also intended to apply more widely, for example to entities conducting activities which might be characterised as investment banking.

5.6 To an extent, these issues may be clarified for individual entities and groups at the stage where they formally adopt the Code (although confusion will of course remain for those entities and groups which decide not to do so and which may therefore be subject to "greater scrutiny"). In any event, this Committee does not believe that it would be acceptable or workable for taxpayers effectively to be placed under an obligation to comply with provisions containing such indefinite and ambiguous language. The dictum of Lord Wilberforce, quoted above, that a "citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer" amply demonstrates this point. Certainly, legislation which possessed the uncertainty of the Code might well be unlawful under Protocol 1 of the ECHR. If, therefore, the Code is intended to represent a real obligation on relevant business, which will be enforced by HMRC, the Committee suggests that it is essential that these ambiguities are resolved.[12]

B) The "intentions of Parliament"

5.7 Throughout the Code obligations are imposed on banks to discern "the intentions of Parliament". Banks are required not to undertake tax planning that "aims to achieve a tax result that is contrary to the intentions of Parliament" (paragraph 1.1). Where banks are relying on specific legislation in relation to a particular piece of tax planning, they should "reasonably believe that the transaction is structured in a way that gives a tax result which

[12] The ambiguities in question also include the terms "genuine commercial activity", "the intentions of Parliament" and "the proper amount of tax".

is not contrary to the intentions of Parliament" (paragraph 3.1). A bank is required to explain in advance to HMRC any proposed transaction which it believes "may be contrary to the intentions of Parliament", and to disclose immediately any transaction or arrangement already entered into if it discovers that the tax result "may be contrary to the intentions of Parliament" (paragraphs 4.2 and 4.3).

5.8 Implicit in the Code is the suggestion that its purpose is to create generalised provisions which will have the effect of deterring banks from entering into tax schemes which are within the law. For example, paragraph 3.1 provides that even in circumstances where there is direct legislative authority for a particular tax treatment, it will not be sufficient for banks to base their conduct simply on the law as written. Rather, they are apparently to be required to look beyond the law and to base their approach to tax planning on the "intentions" of the legislature. This presumably means that, even where it is clear that the particular proposed transaction is permissible as a matter of strict application of the statutory provision, a bank will be required not to proceed with it if it is thought that Parliament, although it has not legislated against the transaction, would have done so if the point had been raised.

5.9 As a matter of practice, of course, it is in most cases extremely difficult to discern the "intentions of Parliament" in relation to any particular provision of legislation. A review of Parliamentary debates in respect of a particular statutory provision will very rarely provide a consistent and readily discernible voice. It seems to this Committee, in fact, to be fundamentally unlikely that HMRC, in promulgating the Code, is suggesting that it should become normal practice for any bank's tax group to pore over Hansard when formulating its plans, and that the actual meaning of the authors of the Code, in referring to the intentions of Parliament, is in fact to direct banks to the policy considerations of the government of the day in introducing legislation and, in particular, to the views of HMRC in seeking to enforce it.

5.10 It does not appear to this Committee that there are any other circumstances in which it would be considered legitimate for an agency of the executive to require citizens to comply, not just with the law as it exists, but with the law as the executive would like it to be and to police this requirement with potentially stringent sanctions. While it is recognised that tax planning and tax avoidance are currently emotive political issues, it does not appear to the FMLC that these are sufficient grounds to justify such a significant departure from well-established "rule of law" values such as: a) the law must be clear and ascertainable so that citizens can govern their conduct according to its precepts; and b) citizens are entitled to expect that administrative decisions will be applied to them on the same basis.

C) "Genuine commercial activity"

5.11 Given the significance of taxation to any commercial organisation, it is inevitable that tax planning will have a significant role to play in the way in which it conducts its business. It seems unlikely that the senior management of any organisation could claim to be conducting their business properly if

they did not devote resources to considering ways in which the tax burden on the organisation could legitimately be minimised.

5.12 The Consultation Document itself recognises that tax is an important factor in many business decisions and that tax planning in support of commercial transactions is normal and appropriate (paragraph 3.15). It then goes on to say, however, that HM Government does not condone tax planning "which goes beyond support for genuine commercial activities". It does not explain this concept but states, purportedly by way of example, that "exploiting loopholes in the legislation, or combining the use of parts of the tax code that were never intended to be used together, go beyond what is acceptable" (although this "example" seems to be addressing the rather different question of what types of tax planning are acceptable, rather than the circumstances in which tax planning is acceptable).

5.13 Paragraph 3 of the Code states only that a bank should not engage in tax planning other than that which supports "genuine commercial activity" without any elaboration as to the meaning of this concept. The lack of clarity in this respect is likely to prove problematic, in particular, in circumstances where there is no specific and discrete transaction to which the tax planning relates; is it the case that the day-to-day conduct of the business of the entity is in itself "genuine commercial activity"? If not, is it the view of HMRC that tax planning which addresses, for example, the corporate structure of a group with a view to ensuring that profits are not subject to tax where that can legitimately be avoided, is completely prohibited, notwithstanding that there is no provision of any tax law which produces that result? This would conflict with the values referred to in the sections above; yet, in the absence of any guidance as to what is meant by the phrase, there must be a strong argument that this is the intended outcome.

5.14 Paragraph 3.1 of the Code deserves particular attention in this context. It requires that, where the bank is principal, transactions should not be structured in a way that will have tax results that are inconsistent with the underlying economic consequences "unless there exists specific legislation designed to give that result". This paragraph is, in fact, expressed in terms very similar to a particular formulation of the judicial doctrine of anti-avoidance in taxation, a principle of construction applicable to tax statutes.[13] Today, the courts have roundly rejected that formulation. In *McNiven v Westmorland Investments Ltd*[14] at 325, Lord Hoffmann stated:

> Everyone agrees that *Ramsay* is a principle of construction. The House of Lords said so in *Inland Revenue Comrs v McGuckian* [1997] 1 WLR 991. But what is that principle? Mr McCall formulated it as follows in his printed case:
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> "**When a court is asked (i) to apply a statutory provision on which a taxpayer relies** for the sake of establishing some tax advantage (ii)

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[13] The judicial doctrine of anti-avoidance was developed by the Courts in *WT Ramsay v Inland Revenue Commissioners* (1982) 54 TC 101.

[14] [2003] 1 AC 311

> in circumstances where the transaction said to give rise to the tax advantage is, or forms part of, some pre-ordained, circular, self-cancelling transaction (iii) **which transaction though accepted as perfectly genuine (i.e. not impeached as a sham) was undertaken for no commercial purpose other than the obtaining of the tax advantage in question then (unless there is something in the statutory provisions concerned to indicate that this rule should not be applied) there is a rule of construction that the condition laid down in the statute for the obtaining of the tax advantage has not been satisfied."**
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> **My Lords, I am bound to say that this does not look to me like a principle of construction at all. There is ultimately only one principle of construction, namely to ascertain what Parliament meant by using the language of the statute.** All other "principles of construction" can be no more than guides which past judges have put forward, some more helpful or insightful than others, to assist in the task of interpretation. But Mr McCall's formulation looks like an overriding legal principle, superimposed upon the whole of revenue law without regard to the language or purpose of any particular provision, save for the possibility of rebuttal by language which can be brought within his final parenthesis. This cannot be called a principle of construction except in the sense of some paramount provision subject to which everything else must be read, like section 2(2) of the European Communities Act 1972. But the courts have no constitutional authority to impose such an overlay upon the tax legislation and, as I hope to demonstrate, they have not attempted to do so. *(Emphasis added)*

5.15 As noted above, Lord Hoffmann's description of Mr McCall's formulation of the anti-avoidance principle in *Ramsey* appears to be very similar to the language of paragraph 3.1 of the Code. Each would seek to superimpose upon the whole of revenue law an overriding legal principle, which goes beyond the plain terms of the relevant statutory provisions, prohibiting certain transactions (except where specific legislation itself permits the taxpayer's approach).

5.16 The Code goes further than the formulation of the anti-avoidance principle criticised by Lord Hoffmann, by stating that the application of the exception in paragraph 3.1 (*viz.* that there exists specific legislation designed to give that result) is subject to the condition that the bank should reasonably believe that the transaction is structured in a way that gives a tax result which is not contrary to the "intentions of Parliament". This would suggest that the intentions of Parliament are not always reflected in the strict application of statutory provisions; yet, as the judicial decisions show, only if the principles of construction of the statute are set aside can a tax result envisaged by the legislation be said not to embody the intentions of Parliament.

5.17 The reference to the "reasonable belief" of the bank in paragraphs 3.1 and 3.2 of the Code also appears to this Committee to be an odd one. If the bank does not have a reasonable belief that the tax result which it asserts is consistent with the statute (i.e. with the intention of Parliament as manifested in the

statute), it will at best be reckless (and at worst fraudulent) in making returns of its affairs and in presenting its financial statements to the public, its regulator and its shareholders. This would be a serious breach of the duties of the directors and auditors of the bank in question.

D) "The proper amount of tax"

5.18 A similar lack of certainty appears in paragraph 3.3 of the Code, which states that remuneration packages for bank employees should be structured so that the "proper" amount of tax and national insurance contributions is paid. If this simply means that banks must ensure that tax and national insurance contributions are paid in accordance with the rules laid down by Parliament in legislation, then that is no more than a truism. The Code presumably refers to some wider concept of what is "proper", presumably the "fair share" which is referred to in the Consultation Document.

5.19 To the extent that the Code is intended to be enforced coercively, i.e. through the imposition of sanctions, this reference to the "the proper amount of tax" effectively serves to give HMRC some leeway to determine the amount of a person's tax liability. This is a proposition that has been specifically identified by Lord Wilberforce as "a radical departure from constitutional principle" (see above).

6. Conclusion

6.1 It is not the role of this Committee to comment on policy questions in relation to the substance or application of tax legislation. The FMLC does, however, note with concern that the Code represents a potentially very significant departure from the approach to tax law which has traditionally been adopted by Parliament and the Courts in this country. It seeks to introduce, through non-statutory means and for one section of the tax paying community only, an obligation to comply with what is presumably regarded as a more exacting standard of behaviour than is currently provided for in legislation. It appears to be specifically designed to side-step the usual process by which an activity which is regarded by Parliament as objectionable is outlawed by legislation and then, if pursued in breach of the legislation, prosecuted through the courts.

6.2 The FMLC does not express any view as to the merits either of tax planning (by the banks and others) or of legislative measures to control it. However, the FMLC considers that aspects of this Code run the risk of undermining the certainty and rigour which the FMLC believes to be at the heart of the legal process in this country and which must be retained if taxpayers are to be able to conduct their business within a known and certain framework.

6.3 The Code appears to create real risks that the application of a very important aspect of the law affecting commercial enterprises in this country will become increasingly uncertain and inconsistent, with a loss to clarity of the rules and relationships with the agencies involved. The justifications which are offered in the Consultation Document for what is in fact a very significant departure from the normal approach adopted in the case of tax legislation and the judicial provision in this country appear to this Committee to be insufficient

and to fail to recognise the potential consequences, not only in terms of what have been referred to as "rule of law" values but also in relation to the very practical questions which legitimate businesses face in seeking to do business.

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