



香港稅務學會
THE TAXATION INSTITUTE OF HONG KONG



Guidance on Professional Tax Practice

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GUIDANCE ON PROFESSIONAL TAX PRACTICE

Guidance on Professional Tax Practice (GPTP) sets out the fundamental principles and standards of behaviours that Chartered Tax Advisers (CTA) of The Taxation Institute of Hong Kong (the Institute) shall observe as international best practice when dealing with different tax issues. Non-CTA members of the Institute are also encouraged to observe the GPTP.

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FOREWORD

The Guidance on Professional Tax Practice (GPTP) sets out the Fundamental Principles and Standards for Tax Planning all members of The Taxation Institute of Hong Kong (the Institute) are recommended to observe as international best practice when dealing with different tax issues.

Tax advisers operate in a complex business and financial environment and a core purpose of the tax system is to fund public services and to ensure the good health of our economy and society. Tax advisers therefore have a responsibility to serve their clients' interests whilst upholding the profession's reputation and the need to take account of the wider public interest.

The GPTP is intended to guide members in their behaviour, to assist them and to ensure that they undertake work effectively and appropriately, and act in the public interest. If concerns are raised about members, we will take account of these Principles and Standards when deciding whether or not to take action.

Purpose of the Principles and Standards

The GPTP describes behaviour required of members, consisting of five Fundamental Principles and five Standards. The issues addressed in Parts 4 to 8 are intended to help members understand and be able to meet the Principles and Standards and provide guidance on issues which are not covered by legislation.

This document has a range of stakeholders covering members, clients, the Institute, the public and agencies including the IRD.

We acknowledge that members and those affiliated with the Institute work in different environments, both in Hong Kong and overseas, and the GPTP has been developed to apply to a wide variety of work settings. The GPTP applies to all members providing advice on Hong Kong tax matters regardless of, contracts of employment, membership of other professional organisations or where in the world they work and reside (see 1.7 for further advice).

If we are notified of concerns about a member's behaviour involving tax matters, we will take the GPTP into consideration to determine whether disciplinary action is required and whether the member continues to uphold the high standards required for membership with the Institute. Members are professionals, able to make informed decisions relating to their work and therefore the GPTP is designed to support this.

Tax evasion A member must never be knowingly involved in tax evasion, although, of course, it is appropriate to act for a client who is rectifying their affairs.

Development of this document

The GPTP has been developed based on the Professional Conduct in Relation to Taxation (PCRT) and its associated Help Sheets jointly produced by:

- Association of Accounting Technicians (AAT)
- Association of Chartered Certified Accountants (ACCA)
- Association of Taxation Technicians (ATT)
- Chartered Institute of Taxation (CIOT)
- Institute of Chartered Accountants in England and Wales (ICAEW),
- Institute of Chartered Accountants of Scotland (ICAS)
- Society of Trust and Estate Practitioners (STEP)

The Institute is deeply grateful to the PCRT bodies for allowing the Institute to adopt their PCRT and associated Help Sheets. Members are recommended to observe the GTP alongside the Institute's existing Code of Professional Conduct (COPC), taking into account good practice guidance.

It is not practical to establish guidance that applies to all situations and circumstances members of the Institute may encounter. While every care has been taken in the preparation of the GTP the Institute does not undertake a duty of care or otherwise for any loss or damage occasioned by reliance on this guidance. Practical guidance cannot and should not be taken to substitute appropriate legal advice.

PART 1 – INTRODUCTION

Scope

- 1.1 The purpose of the Guidance on Professional Tax Practice (GPTP) is to assist and advise members on their professional tax practice, and particularly in the tripartite relationship between a member, client and the Inland Revenue Department (IRD). The GPTP consists of the Fundamental Principles and the Standards for Tax Planning, and guidance on issues which are not covered by legislation.
- 1.2 Members have a responsibility to attain and thereafter at all times to observe the Fundamental Principles and the Standards for Tax Planning in the GPTP
- 1.3 The issues addressed in Parts 4 to 8 provide guidance on the application of the Fundamental Principles and Standards for Tax Planning when dealing with day-to-day work but they are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by a member which may pose threats to compliance with the Fundamental Principles and Standards. Consequently, members are recommended to observe the GPTP Fundamental Principles and Standards across all their professional activities.
- 1.4 If in doubt about the ethical or legal considerations of a particular case, a member should seek advice from the Institute and, where appropriate, their legal advisers. The Institute takes no responsibility for failure to seek advice where appropriate.
- 1.5 Members are expected to have in place adequate “know your client” procedures and arrangements for maintaining documentation to minimise any risk of involvement in money laundering (ML) and terrorist financing (TF) activities. They are advised to develop their own policies and procedures on anti-money laundering and counter-terrorist financing (AML/CTF) appropriate to their business for identifying and, where appropriate, reporting suspicious transactions. AML/CTF issues are not covered in detail in the GPTP; members are referred to the guidance on HKSAR Government’s website on countering money laundering and terrorist financing <https://www.fstb.gov.hk/fsb/aml/en/legislation/legislation.htm>. A member who is one of the four categories of professionals (viz. legal professionals, accounting professionals, estate agents, and trust or company service providers) is also referred to the guidelines on AML/CTF issued by their profession.
- 1.6 Nothing in the GPTP overrides legal professional privilege. Similarly, nothing in the GPTP shall override a member’s professional duties or be interpreted so as to give rise to any conflict under general law, statutory regulation, or professional regulation of solicitors or barristers, and in the event of any conflict general law, statutory regulation or such professional regulation shall prevail. For these purposes a conflict shall be considered to arise at least where such law, statutory or such professional regulation to which members are subject would prevent compliance with what would otherwise be recommended by the GPTP.

Application to all members

- 1.7 While the content of the GPTP is primarily applicable to members in professional practice, the Fundamental Principles and Standards apply to all members who practise in tax including:
 - Employees attending to the tax affairs of their employer or of a client; and
 - Those dealing with the tax affairs of themselves or others such as family, friends, charities etc. whether or not for payment; and
 - Those working in the IRD or other public sector bodies or government departments.

1.8 The Fundamental Principles and Standards will also apply to dealings with the Hong Kong tax authority. A member who is based overseas or who is acting for a client who is subject to the tax jurisdiction of another country could be subject to different legal obligations under the tax law and/or general law of that country. Subject to that caveat, a member must apply the Fundamental Principles and Standards to professional activities with non-Hong Kong aspects.

Interpretation

1.9 In the GTP:

- 'Client' includes, where the context requires, 'former client'.
- 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof.
- Words in the singular include the plural and words in the plural include the singular.

Abbreviations

1.10 In the GTP the following abbreviations have been used:

AML	Anti-money laundering
AMLO	Anti-money Laundering and Counter-Terrorist Financing Ordinance
COPC	Code of Professional Conduct
CTF	Counter-terrorist financing
DTRPO	Drug Trafficking (Recovery of Proceeds) Ordinance
GAAP	Generally Accepted Accounting Principles
GAAR	General Anti-avoidance Rules
GDPR	General Data Protection Regulation
IRD	Inland Revenue Department
IRO	Inland Revenue Ordinance
JFIU	Joint Financial Intelligence Unit
LegCo	Legislative Council
ML	Money laundering
MLRO	Money Laundering Reporting Officer
OSCO	Organized and Serious Crimes Ordinance
PCRT	Professional Conduct in Relation to Taxation
STR	Suspicious transaction reporting
TF	Terrorist financing
UNATMO	United Nations (Anti-Terrorism Measures) Ordinance

PART 2 – THE FUNDAMENTAL PRINCIPLES

- 2.1 Ethical behaviour in the tax profession is critical. The work carried out by a member needs to be trusted by society at large as well as by clients and other stakeholders. What a member does reflects not just on themselves but on the profession as a whole.
- 2.2 The Fundamental Principles of ethics establish the standard of behavior expected of a professional tax adviser. A member of the Institute must comply with the following Fundamental Principles.
- **Integrity**
To be straightforward and honest in all professional and business relationships.
 - **Objectivity**
To not allow bias, conflict of interest or undue influence of others to override professional or business judgements.
 - **Professional competence and due care**
To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques, to comply with continuing professional development requirements from time to time prescribed by the Institute and act diligently and in accordance with applicable technical and professional standards.
 - **Confidentiality**
To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the member or third parties.
 - **Professional behaviour**
To comply with relevant laws and regulations and avoid any action that discredits the profession.
- 2.3 Each of these Fundamental Principles is discussed in more detail below in the context of taxation services.

Integrity

- 2.4 A member must act honestly in all their dealings with their clients, all tax authorities and other interested parties, and do nothing knowingly or carelessly that might mislead either by commission or omission.

Objectivity

- 2.5 A member may be exposed to situations that could impair their objectivity. It is impracticable to define and prescribe all such situations. Relationships which bias or unduly influence the professional judgement of the member must be avoided.
- 2.6 A member must explain to their client the material risks of the tax planning or tax positions and the basis on which the advice is given.
- 2.7 A member must always disclose to their client if they are receiving commission, incentives or

any other advantage and the amounts they receive from a third party relating to the matter upon which they are advising their client.

Professional competence and due care

- 2.8 A member has a professional duty to carry out their work within the scope of their engagement and with the requisite skill and care. A member should take care not to stray beyond the agreed terms of the engagement; if they do exceed the scope they should agree revised terms with their client and check that their professional indemnity insurance covers the enhanced work.
- 2.9 A member is free to choose whether or not to act for a client both generally and as regards specific activities. However, where a member chooses to limit or amend the scope of services they provide to a client they should make this clear in writing.
- 2.10 When advising a client a member has a duty to serve that client's interests within the relevant legal and regulatory framework.
- 2.11 A member must carry out their work with a proper regard for the technical and professional standards expected. In particular, a member must not undertake professional work which they are not competent to perform unless they obtain appropriate assistance from a suitably qualified specialist.
- 2.12 A member who is giving what they believe to be a significant opinion to a client should consider obtaining a second opinion to support the advice. Where the second opinion is to be obtained externally, due regard must be had to client confidentiality.
- 2.13 Advice should be given in the context of the commercial and other non-tax objectives and the facts and circumstances of the client.
- 2.14 On occasions there may be more than one tenable interpretation of the law. Each case should be considered on its own individual facts and circumstances.

Confidentiality

- 2.15 Confidentiality is a professional principle and is also a legally enforceable contractual obligation. It may be an express term of the engagement letter between the member and the client. Where it is not an express term, a court would in most circumstances treat confidentiality as an implied contractual term.
- 2.16 A member may only disclose information without their client's consent when there is an express legal or professional right or duty to disclose.
- 2.17 The duty of confidentiality is rigorously safeguarded by the courts. Disclosure of confidential material in a member's own interest must be made only where it is considered adequate, relevant and reasonably necessary for the administration of justice - in other words, when a member considers that it would otherwise impair the pursuit of their legitimate interests and rights if they were prevented from disclosing the information in all the circumstances. Only the minimum amount of information necessary to protect those interests may be disclosed.

Examples of such circumstances may include, but are not limited to, the following:

- To enable a member to defend themselves against a criminal charge or to clear themselves of suspicion;

- To enable a member to defend themselves in disciplinary proceedings;
 - To resist proceedings for a penalty, or civil or criminal proceedings in respect of a taxation offence, for example in a case where it is suggested that a member knowingly engaged in dishonest conduct with a view to bringing about a loss of tax revenue;
 - To resist a legal action made against them by a client or third party;
 - To enable a member to sue for unpaid fees;
 - To enable a member to sue for defamation.
- 2.18 If there is any doubt that the circumstances in 2.17 would apply, or there is the risk of challenge by a client or employer, a member is strongly recommended to seek legal advice. See also Part 6 – Dealing with Errors for more guidance.
- 2.19 Under sections 25A(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (DTRPO)/ Organized and Serious Crimes Ordinance (OSCO), a member must disclose to an authorised officer (any police officer, any member of the Customs & Excise Service, and any other person authorised by the Secretary for Justice) as soon as it is reasonable for them to do so, if they know or suspect that any property:
- in whole or in part, directly or indirectly, represents the proceeds of;
 - was used in connection with; or
 - is intended to be used in connection with,
- drug trafficking or an indictable offence.
- 2.20 Under section 12(1) of the United Nations (Anti-Terrorism Measures) Ordinance (UNATMO), a member must disclose to an authorised officer (a police officer, a member of the Customs & Excise Service, a member of the Immigration Service, or an officer of the Independent Commission Against Corruption) if they know or suspect that any property is terrorist property, the information or other matter:
- on which the knowledge or suspicion is based; and
 - as soon as practicable after that information or other matter comes to their attention.
- 2.21 The AML/CTF regime provides a statutory code to determine when a disclosure must be made to the Joint Financial Intelligence Unit (JFIU). The Anti-money Laundering and Counter-Terrorist Financing Ordinance (AMLO) provides for the statutory requirements relating to customer due diligence (CDD) and record-keeping for specified financial institutions and designated non-financial businesses and professions.
- 2.22 Members are expected to have in place adequate “know your client” procedures and arrangements for maintaining documentation to minimise any risk of involvement in ML/TF activities. A member who is one of the four categories of professionals should follow the guidelines on AML/CTF issued by their profession, in particular the guidelines on internal reporting, the role of Money Laundering Reporting Officer (MLRO) and suspicious transaction reporting (STR). See also Part 7 – Request for Data by IRD.

Professional behaviour

- 2.23 A member must always act in a way that will not bring them or the Institute into disrepute.
- 2.24 A member must behave with courtesy and consideration towards all with whom they come into contact in a professional capacity.

- 2.25 A member must comply with all relevant legal and regulatory obligations when dealing with a client's tax affairs and assist their clients to do the same. A member who has reason to believe that proposed arrangements are, or may be, tax evasion must strongly advise clients not to enter into them. If a client chooses to ignore that advice, it is difficult to envisage situations where it would be appropriate for a member to continue to act other than in rectifying the client's affairs.
- 2.26 Serving the interests of their clients will, on occasion, bring a member into disagreement or conflict with the IRD. A member should manage such disagreements or conflicts in an open, constructive and professional manner. However, a member should serve their clients' interests as robustly as circumstances warrant whilst applying these principles.
- 2.27 A member should consider whether any tax arrangements with which they might be associated on their own behalf or on behalf of a client might bring the member and the profession into disrepute. In this regard, members are referred to the Standards for Tax Planning set out in 3.2 in Part 2 (see also Part 5 – Tax Advice for more detail).
- 2.28 A member's own tax affairs should be kept up to date. Neglect of a member's own affairs could raise doubts within the IRD as to the standard of the member's professional work and could bring them or the Institute into disrepute.
- 2.29 A member should ensure that their internal and external communications including those using social media are consistent with the principles in this guidance and in particular confidentiality.

PART 3 – THE STANDARDS FOR TAX PLANNING

3.1 In order to protect the reputation of members, the wider profession, and ensure that public interest concerns are met, the Institute has developed further Standards that members are recommended to observe when advising on Hong Kong tax planning. These seek to build on the Fundamental Principles set out in Part 2, focussing in particular on integrity, professional competence and behaviour. The Standards are a supplement to, and not a substitute for, the five Fundamental Principles.

3.2 The Standards are set out below:

- **Client Specific**

Tax planning must be specific to the particular client's facts and circumstances. Clients must be alerted to the wider risks and the implications of any courses of action.

- **Lawful**

At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law. Members should draw their clients' attention to where the law is materially uncertain, for example because the IRD is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the particular case, for example where litigation is likely.

- **Disclosure and transparency**

Tax advice must not rely for its effectiveness on the IRD having less than the relevant facts. Any disclosure must fairly represent all relevant facts.

- **Advising on tax planning arrangements**

Members must not create, encourage or promote tax planning arrangements or structures that: i) set out to achieve results that are contrary to the clear intention of the Legislative Council (LegCo) in enacting relevant legislation; and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.

- **Professional judgement and appropriate documentation**

Applying these requirements to particular client advisory situations requires members to exercise professional judgement on a number of matters. Members should keep notes on a timely basis of the rationale for the judgments exercised in seeking to adhere to these requirements.

Further discussion on the Standards is set out below.

Client Specific

3.3 The risks referred to in this Standard are those which are directly attributable to the planning and could be reasonably foreseeable by the member. There would not normally be a duty to comment on, for example, the commercial risk of the underlying transaction. The obligations of the member to the client continue to be governed by the engagement letter.

3.4 Where wider risks should be highlighted, the member may either advise on them, or identify them as matters on which separate advice should be sought by the client, depending on the scope of the member's practice and of the engagement.

- 3.5 Generic opinions or advice that does not take into account the position of specific taxpayers (or a narrowly defined group of taxpayers such as a group of employees of the same company) pose particular risks. Members are entitled to make reasonable assumptions in giving advice (for example, where it would be reasonable on the facts to assume that the taxpayer(s) is/are Hong Kong resident(s)), but assumptions should not be relied upon which are known to be unrealistic or unreasonable. If advice is generic, and/or depends on certain assumptions, this fact and the need for specific advice to be taken before acting should be highlighted with sufficient prominence to prevent any misunderstandings arising. Members should consider including in their advice the potential impact of a change in the assumptions made and/or the circumstances which might require specific or updated advice to be obtained.

Lawful

- 3.6 The requirement to advise clients on material uncertainty in the law (including where the IRD takes a different view) applies even if the practical likelihood of IRD intervention is considered low. Clients should be told what would be reasonable, at the time of the transaction, to expect the IRD to believe the application of the law to be (assuming the IRD was fully apprised of all the facts of the transaction). Where the likely view of the IRD is uncertain or not known, the member should include this fact as part of their advice.
- 3.7 The fact that the member may disagree with the IRD on a matter is not of itself indicative of behaviour that might breach these standards. A member may reasonably believe that an IRD view is wrong in law but, if so, the client should be alerted to the fact that the IRD holds a different view of the law and should be advised of the risks and likely costs that might be incurred in order to determine any dispute.

Disclosure and transparency

- 3.8 Disclosure should be made whenever required by law and fuller disclosure must be recommended to clients wherever it is appropriate given a wider relationship or dialogue with the IRD relevant to that client. What is actually to be disclosed will inevitably reflect a professional judgement taking into account all relevant facts and law specific to the case in question and what the client consents should be disclosed.

Tax planning arrangements

- 3.9 Where a member has a genuine and reasonable uncertainty as to whether particular planning is in breach of this Standard, the member should:
- document the detailed reasoning and evidence sufficiently to be able to demonstrate why they took the view that any planning was not in breach of this Standard;
 - include in their client advice an assessment of uncertainties and risks involved in the planning – see Standard *Lawful* above; and
 - include in their client advice an assessment of the relevant disclosures that should be made to the IRD in order to enable it, should it wish to do so, to make any reasonable enquiries – see Standard *Disclosure and transparency* above.

Professional judgement and appropriate documentation

- 3.10 Members are not required to complete paperwork for its own sake, but they should be prepared to identify, support and where appropriate defend the judgements they made in applying these requirements to their work.
- 3.11 Where the judgements made are reasonable, notes taken on a timely basis are likely to be the most convincing way of demonstrating compliance with the principles after the event, to the benefit of the member and the client and to satisfy any wider public concerns.

PART 4 – SUBMISSION OF TAX INFORMATION AND ‘TAX FILINGS’

Part 4 provides guidance on the application of the GPTP Fundamental Principles and Standards for Tax Planning when dealing with the day-to-day work of filing tax information and completing tax filings, including the issues of: responsibilities, materiality, disclosure and approval.

If appropriate, please also refer to Part 5 – Tax Advice.

Definition of filing of tax information and tax filings (filing)

- 4.1 For the purposes of this guidance, the term ‘filing’ includes any online submission of data, online filing, or other filing, that is prepared on behalf of the client for the purposes of disclosing to any taxing authority details that are to be used in the calculation of tax due by a client or a refund of tax due to the client or for other official purposes. It includes all kinds of taxes and duties.
- 4.2 A letter, or online notification, giving details in respect of a filing or as an amendment to a filing including, for example, any voluntary disclosure of an error should be dealt with as if it was a filing.

Making tax digital and filing

- 4.3 Tax administration systems, including the Hong Kong’s, are increasingly moving to digital filing of tax information and returns.
- 4.4 Except in exceptional circumstances, a member will explicitly file in their capacity as agent. A member is advised to use the facilities provided for agents and to avoid knowing or using the client’s personal access credentials.
- 4.5 A member should keep their access credentials safe from unauthorised use and consider periodic change of passwords.
- 4.6 A member is reminded not to open any suspicious emails and delete them. It is also important to avoid clicking on websites or links in suspicious emails, or opening attachments.
- 4.7 Firms should have policies on cyber security, AML/CTF, protection of personal data (privacy) and General Data Protection Regulation (GDPR).

Responsibilities: Taxpayer’s responsibility

- 4.8 The taxpayer has primary responsibility to submit correct and complete filings to the best of their knowledge and belief. The final decision as to whether to disclose any issue is that of the client but in relation to your responsibilities see 4.11 below.

Responsibilities: Member’s responsibility

- 4.9 Section 51(5) of the Inland Revenue Ordinance (IRO) provides that any returns or statements submitted by or on behalf of any person shall be deemed to have been submitted by them or by their authority unless they prove the contrary. Members are recommended to ensure that they are acting under an appropriate authority when submitting accounts to the IRD in connection with the ascertainment of a client’s liability to tax, and that the client has signed or otherwise approved the accounts.

- 4.10 A member who prepares a filing on behalf of a client is responsible to the client for the accuracy of the filing based on the information provided.
- 4.11 In dealing with the IRD in relation to a client's tax affairs a member should bear in mind their duty of confidentiality to the client and that they are acting as the agent of their client. They have a duty to act in the best interests of their client.
- 4.12 A member should act in good faith in dealings with the IRD in accordance with the fundamental principle of integrity. In particular the member should take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client.
- 4.13 Where acting as a tax agent, a member is not required to audit the figures in the books and records provided or verify information provided by a client or by a third party. However, a member should take care not to be associated with the presentation of facts they know or believe to be incorrect or misleading, not to assert tax positions in a tax filing which they consider to have no sustainable basis.
- 4.14 When a member is communicating with the IRD, they should consider whether they need to make it clear to what extent they are relying on information which has been supplied by the client or a third party.

Materiality

- 4.15 Whether an amount is to be regarded as material depends upon the facts and circumstances of each case.
- 4.16 The profits of a trade, profession or business should be computed in accordance with Generally Accepted Accounting Principles (GAAP) subject to any adjustment required or authorised by law in computing profits for those purposes. This permits a trade, profession or business to disregard non-material adjustments in computing its accounting profits.
- 4.17 The application of GAAP, and therefore materiality does not extend beyond the accounting profits. Thus, the accounting concept of materiality cannot be applied when completing tax filings.

Disclosure

- 4.18 If a client is unwilling to include in a tax filing the minimum information required by law, the member should follow the guidance in Part 6 – Dealing with Errors. The paragraphs below (4.19 – 4.23) give guidance on some of the more common areas of uncertainty over disclosure.
- 4.19 In general, it is likely to be in a client's own interests to ensure that factors relevant to their tax liability are adequately disclosed to the IRD because:
- Their relationship with the IRD is more likely to be on a satisfactory footing if they can demonstrate good faith in their dealings with them. The IRD notes in 'Taxpayer's Charter' that 'You can expect us to act in an impartial, professional and fair manner'; and
 - They will reduce the risk of an additional assessment and may reduce exposure to interest and penalties. The IRD notes in its 'Penalty Policy' that the 'scale of penalty to be imposed on a taxpayer is basically a function of the nature of omission or understatement of income or profit, the degree of his co-operation or disclosure and the length of the offence period'.
- 4.20 It may be advisable to consider fuller disclosure than is strictly necessary. Reference to 'The

Standards for Tax Planning' in Part 3 may be relevant. The factors involved in making this decision include:

- A filing relies on a valuation;
- The terms of the applicable law;
- The view taken by the member;
- The extent of any doubt that exists;
- The manner in which disclosure is to be made; and
- The size and gravity of the item in question.

4.21 When advocating fuller disclosure than is necessary a member should ensure that their client is adequately aware of the issues involved and their potential implications. Fuller disclosure should only be made with the client's consent.

4.22 Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases a member ought to consider what additional disclosure, if any, might be necessary. For example, additional disclosure should be considered where:

- There is inherent doubt as to the correct treatment of an item, for example, expenditure on repairs which might be regarded as capital in whole or part; or
- The IRD has published its Departmental Interpretation and Practice Note or has indicated its practice on a point, but the client proposes to adopt a different view, whether or not supported by Counsel's opinion. The member should refer to the guidance in 4.24 – 4.25 below.

4.23 A member who is uncertain whether their client should disclose a particular item or of its treatment should consider taking further advice before reaching a decision. They should use their best endeavours to ensure that the client understands the issues, implications and the proposed course of action. Such a decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including timely notes of discussions with the client and/or with other advisers, copies of any second opinion obtained and the client's final decision. A failure to take reasonable care may result in the IRD imposing a penalty if an error is identified after an enquiry.

Reliance on IRD published guidance

4.24 Whilst it is reasonable in most circumstances to rely on IRD published guidance, a member should be aware that the courts will apply the law even if this conflicts with IRD guidance.

4.25 Notwithstanding this, if a client has relied on IRD guidance which is clear and unequivocal and the IRD resiles from any of the terms of the guidance, a Judicial Review claim is a possible route to pursue.

Approval of tax filings

4.26 The member should advise the client to review their tax filing before it is submitted.

4.27 The member should draw the client's attention to the responsibility which the client is taking in approving the filing as correct and complete. Attention should be drawn to any judgemental areas or positions reflected in the filing to ensure that the client is aware of these and their implications before they approve the filing.

4.28 A member should obtain evidence of the client's approval of the filing in electronic or non-

electronic form.

Exceptions

- 4.29 Where a filing is not reviewed by the client before submission, then, because of the risk to the adviser, the terms of the engagement should make clear that filings are completed on the basis of the information provided by the client and the client is no less responsible for errors in filings which have been prepared on the basis of that information than if they had approved and signed the filings personally.
- 4.30 A member may approve tax filings in their capacity as liquidator, receiver or administrator or under a personal appointment as trustee, executor, attorney or director. If a member is approving a tax return on behalf of a client, the member should carefully consider:
- Their legal authority to do so (for example, is a power of attorney required?);
 - The process whereby the client will review and take responsibility for the contents of the return; and
 - Any legal implications of approving the return for both the practice and the individual signatory.

Referrals/ Second opinions

- 4.31 A member needs to be mindful of the COPC requirement regarding professional competence and due care. For example, a member who generally advises on annual tax compliance but receives a request from a client regarding tax planning should consider whether they have the relevant skills and knowledge to properly service the client on that matter. If not, the member should refer the client to another member who is a specialist in this area.
- 4.32 Where a second opinion is sought on any tax advice, it should be from a suitably qualified and experienced professional who is subject to the requirements of the COPC or its equivalent.

Support

- 4.33 A member may wish to put in place arrangements with another firm or a member of the Institute to be able to seek support when necessary and to ensure that there would be a minimum of disruption, in the event of the incapacity or death of the sole practitioner.

Third party advice involving tax planning arrangements

- 4.34 If a member, acting in their capacity as an agent submitting a tax filing on behalf of a client, is asked by the client to include in their tax return specific items of tax planning based on third party advice, the member may have concerns. The member should satisfy themselves that such third party advice is reasonable by considering:
- Does it accord with their understanding of the law?
 - Is the person giving the advice appropriately qualified and a member of the Institute or an equivalent regime?
- 4.35 For more complex planning, and with the GTP Standards for Tax Planning in mind, the member should consider:
- Do the background facts set out in the advice agree with their understanding of the client?
 - Do any legal opinions in the advice relate specifically to the advice?
 - Is the advice current?

- Does the tax planning provided by the third party appear to involve contrived avoidance?
- Might this scheme be caught by the General Anti-avoidance Rule (GAAR)?
- If the member has concerns about the third party advice, is it so significant that the member needs a second opinion rather than caveating their compliance responsibility?

These points are discussed further in Part 5 – Tax Advice.

PART 5 – TAX ADVICE

Part 5 provides guidance on the application of the GPTP Fundamental Principles and Standards for Tax Planning. This includes the Standards for Tax Planning, further discussion of the Standards, and FAQs which are designed to illustrate the practical application of the Standards.

The Standards for Tax Planning

5.1 The Standards for Tax Planning are critical to any planning undertaken by members. See Part 3 for a detailed discussion of the Standards.

Guidance

5.2 The paragraphs and the FAQs below provide guidance for members when considering whether advice complies with the Fundamental Principles and Standards for Tax Planning.

Tax evasion

5.3 A member should never be knowingly involved in tax evasion, although, of course, it is appropriate to act for a client who is rectifying their affairs.

Tax planning and advice

5.4 In contrast to tax evasion, tax planning is legal. However, under the 4th Standard for Tax Planning – Advising on tax planning arrangements, members ‘must not create, encourage or promote tax planning arrangements or structures that (i) set out to achieve results that are contrary to the clear intention of the LegCo in enacting relevant legislation; and/or (ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation’.

5.5 Things to consider:

- Have you checked that your engagement letter fully covers the scope of the planning advice?
- Have you taken the Standards for Tax Planning and the Fundamental Principles into account? Is it client specific? Is it lawful? Will all relevant facts be disclosed to the IRD? Is it creating, encouraging or promoting tax planning contrary to the 4th Standard for Tax Planning – Advising on tax planning arrangements?
- How tax sophisticated is the client?
- Has the client made clear what they wish to achieve by the planning?
- What are the issues involved with the implementation of the planning?
- What are the risks associated with the planning and have you warned the client of them?
For example:
 - o The strength of the legal interpretation relied upon.
 - o The potential application of the GAAR.
 - o The implications for the client, including the obligations of the client in relation to their tax return.
 - o The reputational risk to the client and the member of the planning in the public arena.
 - o The stress, cost and wider personal or business implications to the client in the event of a prolonged dispute with the IRD. This may involve unwelcomed publicity, costs, expenses and loss of management time over a significant period.
 - o If the client tenders for government contracts, the potential impact of the proposed tax planning on tendering for and retaining public sector contracts.
 - o The risk of counteraction. This may occur before the planning is completed or

- o potentially there may be retrospective counteraction at a later date.
- o The risk of challenge by the IRD. Such challenge may relate to the legal interpretation relied upon, but may alternatively relate to the construction of the facts, including the implementation of the planning.
- o The risk and inherent uncertainty of litigation. The probability of the planning being overturned by the courts if litigated and the potential ultimate downside should the client be unsuccessful.
- o Is a second opinion necessary/ advisable?
- Are the arrangements in line with any applicable COPC or ethical guidelines or stances for example the Code of Banking Practice?
- Are you satisfied that the client understands the planning proposed?
- Have you documented the advice given and the reasoning behind it?

FAQs on Tax Advice

FAQ 1. My job is to advise clients on the law. Can I still do that under the Standards for Tax Planning?

Yes. The Standards for Tax Planning are designed to address behaviours which are damaging our profession, not to stop members from giving bona fide tax advice to clients based on an analysis of tax law as it applies to their situation, even if as sometimes may happen this might lead to surprising results. The concern is over advisers who create schemes to exploit loopholes and frustrate the will of the LegCo, or who promote them to clients, or encourage clients into them.

It is the behaviour of the adviser that is the focus of the GPTP, not the tax outcome for the client.

FAQ 2. What if the situation is more borderline, don't I still have to advise my clients?

In any area where the results of tax analysis produce apparently surprising and/or beneficial results, the adviser needs to advise the client dispassionately, objectively and fully (including in relation to the costs and risks of IRD challenge and any similarly foreseeable results). This would include exploring the substantive nature (or, at the opposite end of the spectrum, artificiality) of the arrangements proposed: balanced advice, which covers such risks, as distinct from encouraging the client into such arrangements, should not amount to the creation, promotion or encouragement of arrangements that are against the clear intention of the LegCo or seek to exploit shortcomings in the relevant legislation.

FAQ 3. How would I know if the planning was contrary to the clear intention of the LegCo?

Discerning the intention of the LegCo at the time that the legislation was enacted is likely only to be an issue where more complex or ground breaking planning is concerned. In such cases the legislation and any associated explanatory notes issued at the time of enactment should prove sufficient. Only rarely should it be necessary to consult Hansard. If the intention of the LegCo was genuinely unclear at the time of enactment then you would not be expected to second guess what was the clear intention of the LegCo.

FAQ 4. Do I need to have an engagement letter in place to cover tax planning advice?

An appropriately worded engagement letter sets out the scope of any engagement and the responsibilities of both the tax adviser and the client. It protects both the client and the adviser and the Institute strongly recommends you have an engagement letter in place for all tax work.

You should understand your client's expectations around the tax planning advice and ensure that the engagement letter reflects your role and responsibilities, including limitations in or amendments to that role.

FAQ 5. I am considering introducing my client to another adviser's planning arrangement. What should I consider?

You should appraise the planning and form a view on its effectiveness and risk.

- Is it compatible with the Standards for Tax Planning? See also FAQ 11 below.
- Is it client specific rather than a generic packaged scheme?
- Is it lawful? Does it accord with your understanding of the law? The fact that the IRD

may not agree with the legal position adopted is not of itself indicative of behaviour that would breach the standards. You may reasonably believe that an IRD view is wrong in law but you should alert the client to the fact that the IRD holds a different view.

- Is the legal advice current?
- Have there been any recent challenges to similar planning?
- Might the GAAR apply?
- Are there any restrictions on full disclosure of the relevant facts to the IRD? Planning should not rely for its effectiveness on the IRD having less than the relevant facts.
- Is the planning highly artificial or highly contrived or contrary to the clear intentions of the LegCo? See also FAQ 3 above.
- Do you wish to be associated with the planning both from a technical and a reputational perspective?

If you do not have sufficient understanding of the proposed planning to enable you to alert the client to the risks, as well as the merits, you should make the client aware of the limitations of your advice. You should consider very carefully whether you are comfortable introducing a client to planning where you are uncertain of its effectiveness.

FAQ 6. If I do introduce my client to the planning arrangement in FAQ 5 above I will receive commission. Do I have to tell my client about this?

You must disclose and account for any commission received for making such an introduction. You need to take care that by receiving commission you are not compromising your objectivity (see Fundamental Principles). See also FAQ 11 below.

FAQ 7. Can I receive commission if I am asked to give a second opinion on another adviser's tax planning arrangement?

You should not accept commission in these circumstances as that would compromise your objectivity. See also FAQ 11 below.

FAQ 8. What is my responsibility if a client wishes to engage in planning which I do not consider to be appropriate or does not sit comfortably with my business principles and ethics?

You do not have to advise on or recommend tax planning which you do not consider to be appropriate or otherwise does not align with your own business principles and ethics. However, in this situation you may need to ensure that the advice you do not wish to give is outside the scope of your engagement letter. If you owe a legal duty of care to the client to advise in this area, you should ensure that you comply with this by, for example, advising the client that there are opportunities that they could undertake, even though you are unwilling to assist, and recommending that they seek alternative advice. You should document any such discussions with your client.

Ultimately it is the client's decision as to what planning is appropriate having received advice. However, you should ensure that the client is made aware of the risks and rewards of any planning, including that there may be adverse reputational consequences.

FAQ 9. What is the position if my client tells me that they will go ahead with a tax planning arrangement without taking full advice from me?

You should make your client aware of the potential risks of proceeding without full advice and ensure that the restriction in the scope of your advice is recorded in writing.

FAQ 10. The tax planning arrangement my client is considering has Counsel's opinion which says the planning is effective. Can I/my client rely on that?

It should be noted that any legal opinion provided, for example by Counsel, will be based on the assumptions stated in the instructions for the opinion and on execution of the arrangement exactly as stated. The IRD and the courts will not be constrained by these assumptions.

Points to consider include:

- Does the opinion seem reasonable in your view? Does it accord with your understanding of the law?
- What is Counsel's reputation? Have they been associated with aggressive tax planning?
- Has their opinion been overruled by the courts in other tax planning cases?
- Has Counsel considered whether the GAAR could apply to the transaction?

The generic opinion given by Counsel may be based on an assumption that the participant in the planning is, for example, 'trading' in used cars or that a film lease partnership is trading or that a gilt strip investment is not part of a trading activity. As your client's adviser you will be familiar with their circumstances and be able to offer some insight as to whether the assumption held true in your client's circumstances.

FAQ 11. Would it be acceptable under the 4th Standard – Advising on tax planning arrangements, to make a referral to another adviser whom I know offers planning which could be considered to be highly artificial or highly contrived and seeks to exploit the shortcomings within the relevant legislation?

Under the 4th Standard a member must not 'create, encourage or promote tax planning arrangements or structures that are highly artificial or highly contrived and seek to exploit the shortcomings within the relevant legislation'. If you refer clients to another adviser expressly so that they can benefit from such planning it is quite probable that this behaviour would be considered to be 'encouraging' behaviour which is in contravention of the 4th Standard.

If you are uncertain whether the planning being offered by the other adviser is highly artificial or highly contrived and still decide to refer it to them you should make the client aware of the risks associated with aggressive planning, including probable challenge by the IRD and potential damage to reputation. You should document your reasons for making the referral.

FAQ 12. Unbeknown to me, my client has undertaken planning with another adviser and has now asked me to enter it on his tax return. What should I do if I am not sure whether the planning is effective or not?

You should not include within the tax return a claim for a tax advantage which you consider has no sustainable basis based on the information provided to you.

The questions at FAQ 5 should help you assess whether there is a sustainable filing position and these can broadly be summed up in the following:

- Do I believe I have sufficient understanding of the planning to be satisfied that there is a sustainable filing position, or do I need to take a second opinion? Is it so significant that I should caveat my compliance responsibility?

If the client provides inadequate information for you to form an opinion as to the sustainability of the filing position, then you should ask for further information. If no further information is forthcoming, you should not include a claim for a tax advantage on the tax return, document your decision and explain your reasons to the client.

If you do receive additional information but you are unable to draw a reasoned conclusion you should seek specialist support (either within your firm or externally) or recommend that the client obtains advice elsewhere.

FAQ 13. What should I do if I believe the planning implemented by my client on the advice of another adviser constitutes evasion?

You cannot make a claim on the tax return. You should advise the client of your concerns and recommend that they take action to rectify matters. See Part 6 – Dealing with errors. If the client refuses you should cease to act. You cannot inform the IRD because of client confidentiality but you will need to consider whether you have any AML reporting obligations in respect of the original adviser and the client.

FAQ 14. What are the consequences if I create, encourage or promote tax planning which is contrary to the Standards for Tax Planning and the Fundamental Principles?

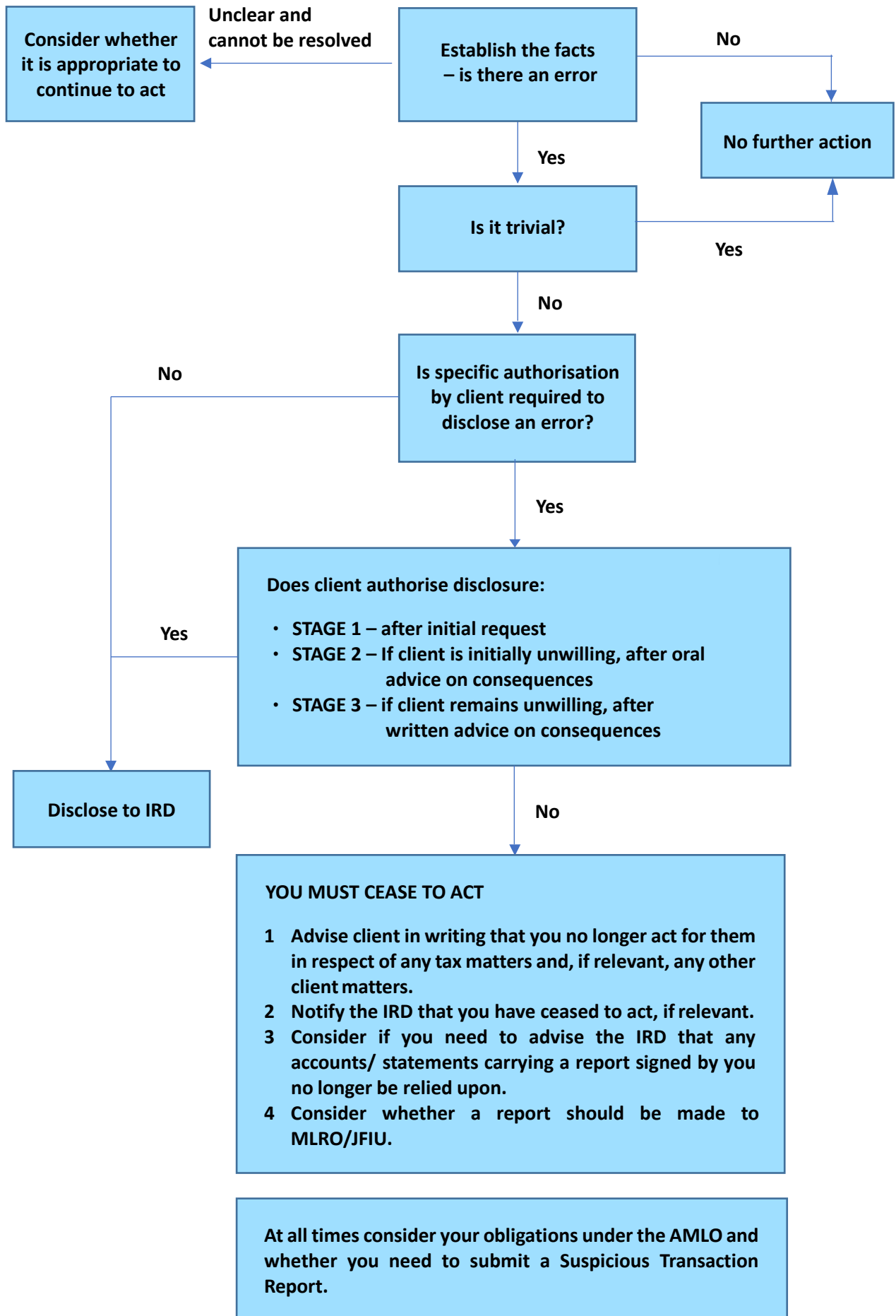
The Institute deals with all complaints made against its members. If you were found to have breached the Standards for Tax Planning or the Fundamental Principles, the sanctions may range from a reprimand to exclusion.

PART 6 – DEALING WITH ERRORS

Part 6 provides guidance on the application of the GTP Fundamental Principles and Standards for Tax Planning when dealing with errors that arise in tax. This includes establishing the facts, whether client authorisation is needed to disclose an error and actions to take where a client refuses to disclose.

Introduction

- 6.1 For the purposes of this guidance, the term ‘error’ is intended to include all errors and mistakes whether they were made by the client, the member, the IRD or any other party involved in a client’s tax affairs, and whether made innocently or deliberately.
- 6.2 During a member’s relationship with the client, the member may become aware of possible errors in the client’s tax affairs. Unless the client is already aware of the possible error, they should be informed as soon as the member identifies them.
- 6.3 Where the error has resulted in the client paying too much tax the member should advise the client to make a repayment claim. The member should advise the client of the time limits to make a claim and have regard to any relevant time limits. The rest of this guidance deals with situations where tax may be due to the IRD.
- 6.4 Sometimes an error made by the IRD may mean that the client has not paid tax actually due or they have been incorrectly repaid tax. There may be fee costs as a result of correcting such mistakes.
- 6.5 A member should act correctly from the outset. A member should keep sufficient appropriate records of discussions and advice and when dealing with errors the member should:
- give the client appropriate advice;
 - if necessary, so long as they continue to act for the client, seek to persuade the client to behave correctly;
 - take care not to appear to be assisting a client to plan or commit any criminal offence or to conceal any offence which has been committed; and
 - in appropriate situations, or where in doubt, discuss the client’s situation with a colleague or an independent third party (having due regard to client confidentiality).
- 6.6 Once aware of a possible error, a member must bear in mind the AMLO; and the obligations and duties which this places upon them.
- 6.7 Where the member may have made the error, the member should consider whether they need to notify their professional indemnity insurers.
- 6.8 In any situation where a member has concerns about their own position, they should consider taking specialist legal advice. For example, where a client appears to have used the member to assist in the commissioning of a criminal offence and people could question whether the member had acted honestly and in good faith.
- 6.9 The flowchart below summarises the recommended steps a member should take where a possible error arises. It must be read in conjunction with the guidance and commentary that follow it.



Establishing the facts

- 6.10 A member is not required to make enquiries to identify errors which are unrelated to the work they have been engaged to perform. However, if they become aware of any error in a client's tax affairs they should follow this guidance, whether or not the error related to a matter they have acted on.
- 6.11 A member who suspects that an error may have occurred should discuss this with the client to remove or confirm the suspicion. They should take into account the fact that the client may not be aware of all the facts and circumstances and the member may not, therefore, be able to reach a conclusion.
- 6.12 Where the client provides an explanation for the apparent error to the satisfaction of the member, the member is free to continue to act for that client.
- 6.13 Where the client fails to explain the apparent error to the satisfaction of the member, the member should consider whether it is appropriate to continue to act. Where the member concludes that it is appropriate to continue to act they should monitor the position carefully. Should it later become apparent that there is an error despite the client's previous assurances to the contrary, the member should follow the advice in the flowchart above. In cases where a member ceases to act, they should follow the guidance below (see sections: Ceasing to act; Informing the IRD; Withdrawing reports signed by the member; and Reporting to MLRO/JFIU).
- 6.14 If a member is unsure whether there is an error the member should consider seeking specialist advice. Likewise correcting more serious errors may also require specialist help. In some situations, the client may wish to seek, or advise the client, to seek a second opinion.
- 6.15 Whether the member decides to continue to act for the client or not, the member should protect their position by documenting:
- The discussions they have had with their client, any colleague, specialist and/or the IRD;
 - The client's explanations; and
 - Their conclusion and the reasons for reaching that conclusion.

It may be appropriate to confirm the facts in writing with the client.

Is the error trivial

- 6.16 As a general principle all known errors should be corrected. In the opinion of the Institute it is reasonable for a member to take no steps to advise the IRD of isolated errors where the tax effect is no more than minimal, as these will probably cost the IRD and the client more to process than they are worth to the Treasury.

Does a member need specific authorisation from the client to disclose an error?

- 6.17 A member must ensure that they have authority to disclose an error to the IRD.
- 6.18 This could be specific authority agreed with the client or a general authority contained in a letter of engagement. If in any doubt, or if the amount of tax involved is material, the member should confirm the position with the client.
- 6.19 If the client withdraws the member's authority to correct the error, the member should follow the guidance below (see sections: Actions where the client refuses to disclose; Ceasing to act; Informing the IRD; Withdrawing reports signed by the member; and Reporting to MLRO/JFIU).

6.20 A member must have the client's authority to agree a negotiated figure following disclosure of the facts and circumstances. A member cannot agree a figure that they know to contain an error.

Stage 1: Asking the client for authority to disclose

6.21 Subject to the circumstances set out above (see section: Does a member need specific authorisation from the client to disclose an error?), the member should ask the client's permission to notify the IRD of the error. A member should encourage the client to make a timely disclosure. The member should advise the client of their obligations under the relevant tax legislation and refer, as relevant, to penalties for errors.

6.22 Whether the client follows the member's advice is, ultimately, the client's decision. If, however, the client decides not to act in accordance with the member's advice on their obligations, the member should take the further steps detailed below (see sections: Stage 2; Stage 3; Actions where the client refuses to disclose; Ceasing to act; Informing the IRD; Withdrawing reports signed by the member; and Reporting to MLRO/JFIU).

Stage 2: Advising the client of the consequences of failure to disclose

6.23 Where it appears that the client is reluctant to authorise disclosure of the error to the IRD, the member should explain to the client:

- The potential consequences of non-disclosure;
- The benefit of making a voluntary disclosure especially as regards reduced penalties; and
- The wide ranging powers to obtain information from taxpayers, their agents and third parties available to the IRD.

6.24 This will also include the member explaining that they will:

- Be required to put their advice that disclosure is required in writing;
- Be obliged to cease to act and in some circumstances to disassociate themselves from any work done, should disclosure not be made. The client should be left in no doubt that adverse inferences could be made and that this step could result in the IRD commencing enquiries which might lead to the discovery of the non-disclosure; and

6.25 Where the client is an organisation and the client contact still remains reluctant to authorise disclosure of the error to the IRD, the member should raise the issue at a higher level within the client organisation. If, having followed this approach, the client continues to be reluctant to authorise disclosure to the IRD, the member should follow the guidance set out below (see sections: Stage 3; Actions where the client refuses to disclose; Ceasing to act; Informing the IRD; Withdrawing reports signed by the member; and Reporting to MLRO/JFIU).

Stage 3: Advising the client in writing of the consequences of failure to disclose

6.26 Where the client remains unwilling to make a full disclosure to the IRD the member should ensure that they can show they have acted properly. It is essential to advise the client in writing, setting out the facts as understood by the member, confirming to the client the member's advice to disclose and the consequences of non-disclosure.

6.27 If, after being advised in writing, the client delays making a full disclosure, the member should consider at which point the delay should be treated as a refusal to disclose.

Actions where the client refuses to disclose

6.28 If, despite being fully advised of the consequences, the client still refuses to make an appropriate disclosure to the IRD, the member must:

- Cease to act;
- If relevant, inform the IRD of their withdrawal; and should
 - Consider withdrawing reports signed by the member; and
 - Consider whether a money laundering report should be made to the firm's MLRO/JFIU.

These obligations are set out in more detail below.

Ceasing to act

6.29 Where the member should cease to act in relation to the client's tax affairs they should inform the client of this in writing.

6.30 If the IRD were to realise that the member had continued to act after becoming aware of such undisclosed errors, the member's relationship with the IRD could be damaged. The IRD might, in some circumstances, consider the member to be knowingly or carelessly involved in the commission of an offence or be engaged in dishonest conduct.

6.31 The member should consider carefully whether it is appropriate to continue to act in relation to any non-tax matters of the client.

Informing the IRD

6.32 Where the member had been dealing with the IRD on the client's behalf or had been formally appointed as a tax agent, the member should notify the IRD that they have ceased to act for that client. Because of the obligation to maintain client confidentiality a member should not provide the IRD with an explanation as to the reasons for ceasing to act.

Withdrawing reports signed by the member

6.33 Where a member has undertaken work to verify or audit accounts or statements which carry a report signed by the member and these reports are subsequently found to be misleading, the same principles of client confidentiality apply. If the engagement letter provides the member with the authority to notify the IRD in such circumstances, they should inform the IRD that they have information indicating that the accounts or statements cannot be relied upon.

6.34 If the member does not have their client's consent to the disclosure, they should write to the client and explicitly ask for permission to withdraw the report. If the client does not give consent, the member should then obtain specialist legal advice as to what action they should take.

6.35 A member should not explain to the IRD the reasons why the returns, accounts, etc. are defective. To do so without the client's consent is more likely than not to be considered by a court of law as a misuse of confidential information and an unjustified breach of client confidentiality.

Reporting to MLRO/JFIU

6.36 In deciding whether a report should be made to the JFIU, the member (or the member's MLRO) should take into account the various requirements of the AMLO and any reporting exemption which might apply.

Decisions of Courts

- 6.37 It is possible that after a client has made a return a later (perhaps years later) unrelated decision of the Court may cast doubt on whether the return was made on the correct basis.
- 6.38 A member is not under a duty to monitor all returns and all tax cases for many years after the returns have been filed to identify this rare event. However, if the member is aware of such a situation, they should determine whether the interpretation in the court case is applicable to the client's return. The member may wish to consider seeking specialist advice if in doubt. The member should also ascertain whether the case is to be appealed and may await the outcome of any appeal. Where there is a final decision which is applicable to the client's return(s), the member should refer to the guidance below to determine what action may be required.

What corrective action is required?

- 6.39 If a later court decision casts doubt on a past tax return, the action needed is a complex matter and one that presents practical difficulties.
- 6.40 Where the client's return is under enquiry, it remains open and can be amended in the normal manner.
- 6.41 The following broad principles should be applied where the client's return is not under enquiry.
- 6.42 Subject to whether there is any further appeal, a decision of a Court is regarded as determining how the law should always be applied. A member will however need to have regard to whether the facts of the relevant case can be distinguished from the client's circumstances.
- 6.43 The member should consider the IRD's powers to make an additional assessment where the tax is within the normal time for assessment (generally six years).
- 6.44 Members should be careful not to accept an allegation by the IRD of negligent/ careless or fraudulent/ deliberate conduct by the client or the member without seeking specialist advice first.
- 6.45 If a client refuses to authorise disclosure to the IRD the member should treat this situation in the same way as any other error. Unless the member has expert knowledge in this area, they should consult a specialist.

PART 7 – REQUEST FOR DATA BY THE IRD

Part 7 provides guidance on the application of the GPTP Fundamental Principles and Standards for Tax Planning in relation to requests for access to data by the IRD, including informal requests addressed to the client or to the member, formal requests to the client or to the member, and privileged data.

Introduction

- 7.1 For the purposes of this guidance the term ‘data’ includes documents in whatever form (including electronic) and other information. While this guidance relates to IRD requests, other government bodies or organisations may also approach the member for data. The same principles apply.
- 7.2 A member should not normally accede to a request for access to data by the IRD without the consent of their client unless such disclosure is required by law.
- 7.3 A distinction should be drawn between a request for data made informally (‘informal requests’) and those requests for data which are made in exercise of a power to require the provision of the data requested (‘formal requests’).
- 7.4 Similarly, requests addressed to a client and those addressed to a member require different handling.
- 7.5 Where a member no longer acts for a client, the member remains subject to the duty of confidentiality. In relation to informal requests, the member should refer the enquirer either to the former client or if authorised by the client to the new agent. In relation to formal requests addressed to the member, the termination of their professional relationship with the client does not affect the member’s duty to comply with that request, where legally required to do so.
- 7.6 A member should comply with formal requests and should not seek to frustrate legitimate requests for information. Adopting a constructive approach may help resolve issues promptly and minimise costs to all parties.
- 7.7 Whilst a member should be aware of the IRD’s powers it may be appropriate to take specialist advice.
- 7.8 Two flowcharts are at the end of this guidance;
- Requests for data addressed to the member, and
 - Requests for data addressed to the client.

Informal requests addressed to the client

- 7.9 From time to time the IRD chooses to communicate directly with clients rather than with the appointed agent.
- 7.10 When the member assists a client in dealing with such requests from the IRD, the member should advise the client that cooperation with informal requests can provide greater opportunities for the taxpayer to find a pragmatic way to work through the issue at hand with the IRD.

Informal requests addressed to the member

- 7.11 Disclosure in response to informal requests can only be made with the client's permission.
- 7.12 In many instances, the client will have authorised routine disclosure of relevant data, for example, through the engagement letter. However, if there is any doubt about whether the client has authorised disclosure, the member should ask the client to approve what is to be disclosed.
- 7.13 Where an oral enquiry is made by the IRD, a member should consider asking for it to be put in writing so that a response may be agreed with the client.
- 7.14 Although there is no obligation to comply with an informal request in whole or in part, a member should advise the client whether it is in the client's best interests to disclose such data, as lack of cooperation may have a direct impact on penalty negotiations post-enquiry.
- 7.15 Informal requests may be forerunners to formal requests compelling the disclosure of data. Consequently, it may be sensible to comply with such requests.

Formal requests addressed to the client

- 7.16 In advising their client a member should consider whether specialist advice may be needed, for example on such issues as whether the notice has been issued in accordance with the relevant tax legislation and whether the data request is valid.
- 7.17 The member should also advise the client about any relevant right of appeal against the formal request if appropriate and of the consequences of a failure to comply.
- 7.18 If the notice is legally effective the client is legally obliged to comply with the request.
- 7.19 The most common statutory notice issued to clients and third parties by the IRD is under section 51(4) of the IRO and the suggested actions are described below.

Formal requests addressed to the member

- 7.20 The same principles apply to formal requests to the member as formal requests to clients.
- 7.21 If a formal request is valid it overrides the member's duty of confidentiality to their client. The member is therefore obliged to comply with the request. Failure to comply with their legal obligations can expose the member to civil or criminal penalties.
- 7.22 In cases where the member is not legally precluded by the terms of the notice from communicating with the client, the member should advise the client of the notice and keep the client informed of progress and developments.
- 7.23 The member should ensure that in complying with any notice they do not provide information or data outside the scope of the notice.
- 7.24 If a member is faced with a situation in which the IRD is seeking to enforce disclosure by the removal of data, or seeking entrance to inspect business premises occupied by a member in their capacity as an adviser, the member should consider seeking immediate professional advice, to ensure that this is the legally correct course of action.

Section 51(4) Inland Revenue Ordinance statutory notices

- 7.25 The most common statutory notice issued to clients and third parties by the IRD is under section 51(4) of the IRO. The following notes relate only to civil enquiries; in any situation where the member knows or suspects that the IRD is undertaking a criminal investigation, specialist assistance should be sought.
- 7.26 Under section 51(4) of the IRO an assessor of the IRD has power to serve a notice requiring any person on whom the notice is served to furnish all information and make available for inspection any documents which may be relevant for the purposes of obtaining full information on any matter which may affect any liability, responsibility, or obligation of any person under the IRO. Under section 51B of the IRO, the IRD can also inspect business premises and remove and/or copy data.
- 7.27 A member should be familiar with the rules relating to the IRD's powers to issue a section 51(4) notice and the relevant rights of appeal and should advise only where experienced to do so. Where appropriate, experienced tax investigation assistance should be obtained.
- 7.28 The IRD may agree to extend any deadline for submission of the data depending on the circumstances. Any request for more time should be made well in advance of the deadline where possible.
- 7.29 A section 51(4) notice does not override legal professional privilege. A member needs to be aware of this and take specialist advice where appropriate in such cases.

Privileged data

- 7.30 Legal privilege arises under common law and may only be overridden if this is set out in legislation. It protects a party's right to communicate in confidence with a legal adviser. The privilege belongs to the client and not to the member.
- 7.31 If a document is privileged, the client cannot be required to make disclosure of that document to the IRD. Another party cannot disclose it (including the member), without the client's express permission.
- 7.32 There are two types of legal privilege under common law: legal advice privilege and litigation privilege.

(a) Legal advice privilege

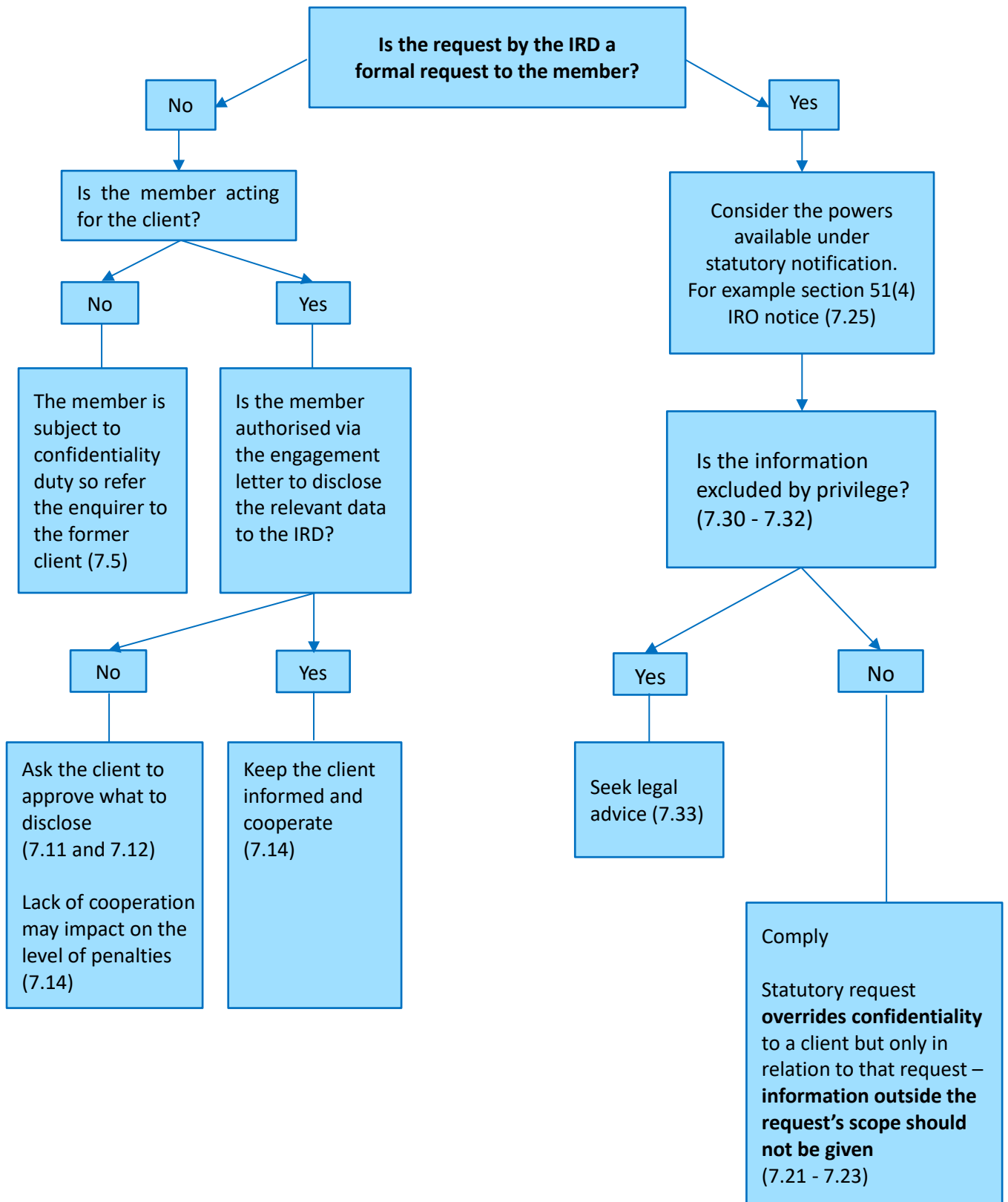
Covers documents passing between a client and their legal adviser prepared for the purposes of obtaining or giving legal advice. However, communications from a tax adviser who is not a practising lawyer will not attract legal advice privilege even if such individuals are giving advice on legal matters such as tax law.

(b) Litigation privilege

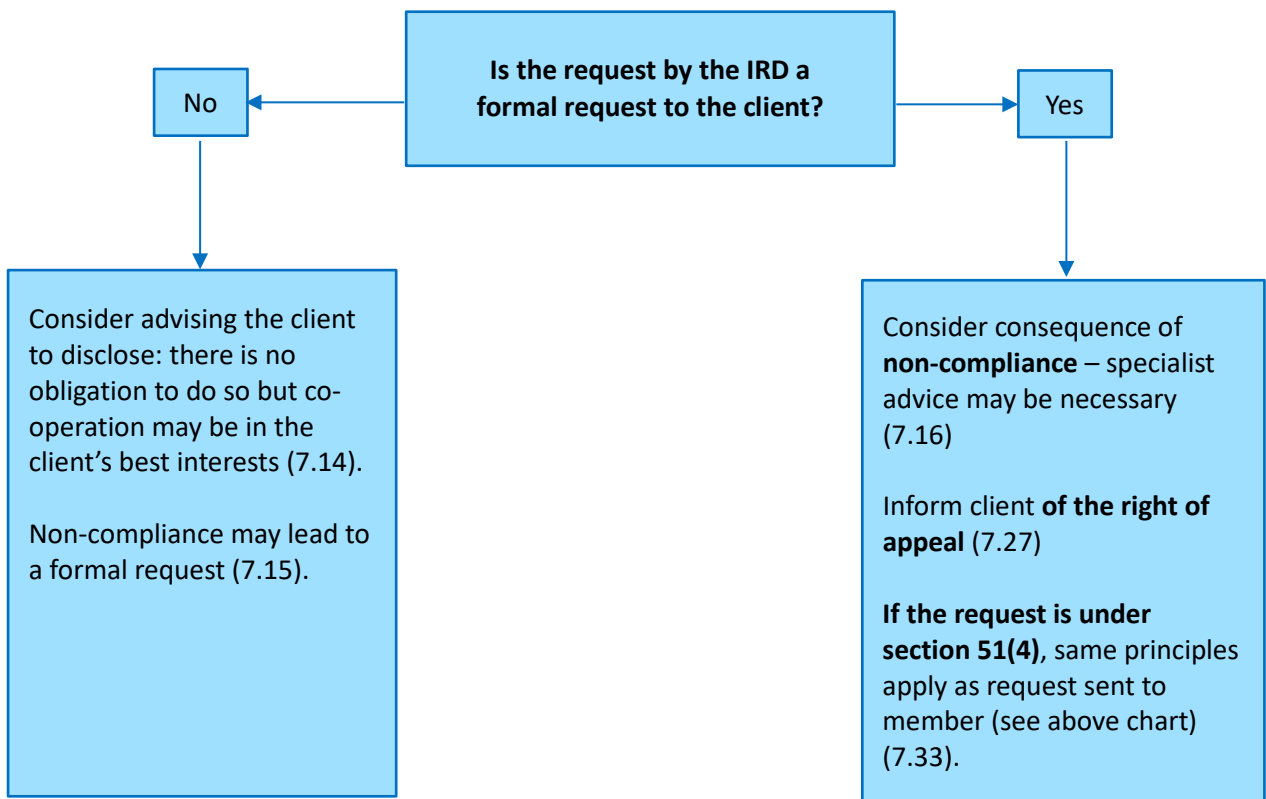
Covers data created for the dominant purpose of litigation. Litigation privilege may arise where litigation has not begun, but is merely contemplated and may apply to data prepared by non-lawyer advisers (including tax advisers). There are two important limits on litigation privilege. First, it does not arise in respect of non-adversarial proceedings. Second, the documents must be produced for the 'dominant purpose' of litigation.

- 7.33 A member who receives a request for data, some of which the member believes may be subject to privilege, should take independent legal advice on the position, unless expert in this area.

Flowchart regarding requests for data by the IRD to the Member



Flowchart regarding requests for data by the IRD to the Client



PART 8 – MEMBERS’ PERSONAL TAX AFFAIRS

Part 8 provides guidance on the application of the GPTP Fundamental Principles and Standards for Tax Planning in relation to a members’ personal tax affairs and covers the following areas:

- *Tax returns and tax compliance*
- *Disputes with the IRD and advocacy*
- *Tax planning*

Application

- 8.1 The content of this guidance is primarily applicable to members in professional practice but the principles apply to all members dealing with their own tax affairs and those of any other person or those with whom the member has a personal relationship, for example, family members and friends.
- 8.2 A member should always act in a way that will not bring the member or the Institute into disrepute.

Tax returns and tax compliance

- 8.3 A member’s own tax affairs should be kept up to date. Neglect of a member’s own affairs could raise doubts within the IRD as to the standard of the member’s professional work and could bring the member or the Institute into disrepute.

Disputes with the IRD and advocacy

- 8.4 A member who is in dispute with the IRD regarding their own tax affairs may wish to consider engaging an agent to represent them.

Tax planning

- 8.5 A member should consider whether any tax arrangements with which they might be associated on their own behalf might bring the member and the Institute into disrepute. In this regard, members are referred to the guidance set out in Part 5 – Tax Advice.