DOTAS: where are we now?

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The introduction, with effect from 23 February 2016, of the financial products hallmark (Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations, SI 2006/1543, reg 19) has considerably widened the circumstances in which the disclosure of tax avoidance schemes regime (DOTAS) needs in practice to be considered. This has followed a period of significant change in the consequences of being party to (or promoting) notifiable proposals or arrangements.

The financial products hallmark

For tax practitioners not concerned with arrangements of the type targeted by the specific hallmarks relating to loss schemes, leasing arrangements and disguised remuneration (or, until recently, pensions), or with the rules relating to indirect taxes, DOTAS has traditionally been a potential concern only where, broadly speaking, there is an element of tax novelty in the arrangements under review or the arrangements have certain characteristics of mass marketing.

Now, however, DOTAS can be in point even where those traditional generic features are absent. Indeed, in practice it must now be considered wherever there is tax planning that (as is common) involves a financial product. The relevant tests refer to what it is reasonable to assume a hypothetical informed observer would make of the arrangements. This means that transactions which involve a financial product must now be scrutinised closely, even if they are not in fact tax-driven arrangements.

The practitioner trying to apply the financial products hallmark has not been greatly assisted by HMRC's updated DOTAS guidance. It had been hoped that this would narrow the practical focus of the new hallmark by including detailed examples of circumstances in which HMRC would and would not consider it to apply. However, the updated guidance has not lived up to expectations. The example relating to entrepreneurs' relief is a case in point. It confirms that the (not unusual) practice of issuing shares with voting rights and nominal share capital out of kilter with their economic entitlements is potentially caught. While it goes on to say that HMRC recognises a limited range of circumstances in which the use of shares in this way will not meet the 'main benefit' condition, it fails to explain what those circumstances are. The reader is thus left in the dark as to when HMRC will and will not consider the financial products hallmark to apply in relation to the structuring of share rights so as to qualify for entrepreneurs' relief.

The absence of any ability to obtain clearance on the application of the hallmark exacerbates the difficulties faced by taxpayers.

Implications of having notifiable arrangements

The DOTAS rules, as their name suggests, were initially concerned solely with the obligation to notify. However, the implications of having notifiable arrangements have changed dramatically since HMRC undertook its *Raising the stakes on tax avoidance* consultation in 2013.

Obligation to notify HMRC

Where there is a UK promoter in relation to the notifiable proposal or arrangements, the promoter will have an obligation to notify HMRC of certain information (prescribed by the Tax Avoidance Schemes (Information) Regulations, SI 2012/1836) within a prescribed period. Promoters are also

obliged to notify HMRC of certain changes to arrangements that have previously been notified and to identify to HMRC the persons to whom they are obliged to pass a scheme reference number (SRN).

Where there is a promoter but the promoter is based outside the UK, or where the promoter is a lawyer and legal professional privilege prevents the promoter from providing all or part of the prescribed information to HMRC, the notification obligation will instead fall on the user. A notification obligation may also fall on a user where there is no promoter.

Obligation to notify users

Once a proposal or arrangements have been notified, HMRC is entitled to allocate an SRN to the proposal or arrangements and to notify that number to the promoter or notifying user. The promoter must then notify its relevant clients.

Any user who has been notified of an SRN must include it in its tax return and provide HMRC with information relating to the time when it obtains, or expects to obtain, the relevant tax advantage. It must potentially also notify the SRN to other users, if and to the extent that it might reasonably be expected to know that they are, or are likely to be, a party to the scheme and might reasonably be expected to gain a tax advantage from it.

Penalties

Penalties may be incurred where:

- a person who is obliged to disclose a proposal or arrangement fails to do so;
- a user fails to report an SRN to HMRC or to notify HMRC of when it expects to receive a tax advantage; or
- a person otherwise fails to comply with the DOTAS regime.

Although the penalties for a user's failure to report or notify are capped at a relatively modest level, other penalties (which are to be determined by the First-tier Tribunal) can be considerable. Where there is a continuing failure to notify HMRC following the First-tier Tribunal's making an order that a proposal or arrangements are notifiable, a daily penalty of £5,000 may be charged.

Public procurement

Would-be scheme participants who might in future bid for government contracts worth over £5m should also be aware of the government's policy to require suppliers bidding for such contracts to self-certify whether:

- their tax affairs have given rise to a criminal conviction for tax-related offences; and
- any of their tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of a successful challenge under the GAAR or on *Halifax* grounds or as a result of the failure of a notifiable arrangement.

The effect is therefore to put users of notifiable arrangements schemes potentially at risk of being excluded from public procurement processes.

Accelerated payments

Perhaps the most significant additional implication of a scheme being notifiable is that HMRC can issue an accelerated payment notice to the taxpayer if:

- it issues an SRN;
- it does not issue a notice permitting a promoter not to notify users of the SRN; and
- it opens an enquiry into the tax return in which the relevant tax advantage is claimed (or if the taxpayer appeals an assessment).

The effect of such a notice will be to require the taxpayer, subject to an entitlement to make representations to HMRC with a view to its modifying or withdrawing the notice, to make an upfront payment to HMRC of the disputed tax, which HMRC can retain pending the dispute's resolution.

This power was introduced by FA 2014 and represented a significant shift in the status of DOTAS from a notification obligation to a relevant factor in determining when tax is required to be paid.

Name and shame

FA 2015 introduced a further power for HMRC, entitling it to publish information not only about notifiable arrangements to which an SRN has been allocated, but also about promoters in relation to such arrangements.

Promoters are to be given a reasonable opportunity to make representations as to whether they should be named, and HMRC is not entitled to publish information which reveals the identity of scheme users who are not also promoters; however, this potential threat cannot be taken lightly by promoters.

POTAS

The promoters of tax avoidance schemes regime (POTAS), introduced by FA 2014, builds on the separate DOTAS regime. It allows HMRC to issue conduct and monitoring notices to persons carrying on business as promoters who have at some point in the previous three years satisfied one of a prescribed list of threshold conditions, or whose schemes have been regularly defeated. One such threshold condition is a failure to comply with DOTAS. Although the stated intention is to operate at the margins and to affect only high risk, serial promoters, it is another example of DOTAS being used to mark out bad behaviour for other purposes.

Where are we?

When DOTAS was introduced, the main concern of taxpayers was to identity whether an arrangement was notifiable and, if it was, when it fell to be notified. The fact of notification was often not unduly concerning. However, HMRC can now be expected to take a dim view of any taxpayer who participates in a scheme which is allocated an SRN. Indeed, it can appear that participation in notifiable arrangements is of itself equated with abusive behaviour.

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