

Amendments to Clause 148: Promoters of tax avoidance schemes

Summary

1. These amendments ensure that those who promote tax avoidance schemes through associated structures, partnerships, or through arrangements including National Insurance contributions, are brought within the scope of the Promoters of Tax Avoidance Schemes (POTAS) regime for the new threshold condition introduced by clause 148 of Finance Bill 2016. In addition, some amendments make minor consequential changes to ensure that the legislation works as intended.

Details of the amendments

2. Amendment 69 requires the authorised officer to carry out the significance test for both the promoter and the associated person where there have been three defeated tax avoidance arrangements attributed to an associated person.
3. Amendment 70 substitutes “Subsections (1) and (1A)” for “Subsection 1” in section 237A(2).
4. Amendment 71 removes lines 21 to 25 in section 237A(3).
5. Amendment 72 allows the authorised officer to disapply the significance test if he is already making a determination where other threshold conditions, as set out in Schedule 34 to Finance Act 2014, have been met. But where this is the case, the authorised officer must take into account the meeting of section 237A conditions in that determination.
6. Amendment 73 stipulates that if the authorised officer determines that meeting the condition is significant for both the promoter and the associated person, the authorised officer must give the other person a conduct notice, unless the tax impact test makes it inappropriate to do so.
7. Amendment 74 inserts introductory text into Schedule 34A about Part 2A and Part 2B.
8. Amendment 75 amends the wording in paragraph 3 of Schedule 34A to include the phrase "or has been". This is a minor change for purposes of consistency, and reflects the wording used in section 235 Finance Act 2014.
9. Amendment 76 allows cases where the new General Anti-Abuse Rule provisional counteraction notices (introduced by this Finance Bill) are issued to be treated as a relevant defeat for the purpose of the POTAS regime.
10. Amendment 77 inserts Part 2A and Part 2B into Schedule 34A. Part 2A provides for relevant defeats to be attributed to an associated person who is carrying on a business as a promoter of tax avoidance schemes. Part 2B sets out the circumstances under which the defeat conditions in section 237A(6)-(8) are met by associated persons.
 - a. Part 2A of Schedule 34A consists of paragraphs 16A to 16C. New paragraph 16A sets

out the circumstances under which the attribution of relevant defeats can apply. This includes where:

- b. either the relevant body in question, or the person who controls them, was carrying on a business as a promoter at the time when the defeated arrangements were promoted and at the time of the relevant defeat and the relevant body to which the relevant defeat is being attributed did not exist;
 - c. a person (other than an individual) can be treated as having a relevant defeat attributed to them by reference to a relevant body which that person controlled at that time;
 - d. a relevant defeat has been attributed to a relevant body but a different relevant body was carrying on the business of a promoter - provided both were controlled by the person in question at the time the arrangements were promoted and the time of the relevant defeat;
 - e. a relevant body can have a relevant defeat attributed to them with reference to another relevant body having defeats attributed to them, provided the latter was controlled at the earlier time by the same person who now controls the former;
 - f. a relevant defeat has been attributed to a relevant body but a different relevant body was carrying on the business of a promoter, provided both were controlled by the person in question at the time of the relevant defeat.
11. New paragraph 16B provides for defeat notices to be deemed as being given to an associated person who is carrying on a business as a promoter of tax avoidance schemes when certain conditions are met in respect of third party defeats. The conditions - Condition A1 applies to a single defeat, Condition A2 applies to a double defeat - are that either a single or double defeat notice has been given in respect of the relevant defeat(s) at a time when the authorised officer would have been able to give the person carrying on a business as a promoter a defeat notice had they been aware that the associated promoter had a relevant defeat attributable to them, and the conditions for giving the promoter a defeat notice for a third party defeat had not been met. This paragraph also introduces Conditions B1 and B2, which apply to single and double defeats respectively. These Conditions are that if the authorised officer had given the person carrying on a business as a promoter a defeat notice in respect of the relevant defeat(s), the defeat notice in question would still be in force.
 12. New paragraph 16C provides definitions of "relevant body" and "control".
 13. New Part 2B (paragraphs 16D to 16F) describes when a section 237A condition has been met in particular circumstances for a relevant body (other than an individual), in order for a conduct notice to be issued under section 237A ("duty to give a conduct notice: defeat of promoted arrangements"). This includes circumstances where:
 - a. a person under someone else's control can be treated as meeting a section 237A(6)-(8) condition. This occurs at the time the authorised officer becomes aware that those conditions have been met by a person when they were carrying on a business as a promoter, or a relevant body was carrying on a business as a promoter and the person was in control of the relevant body when the authorised officer became aware that a 237A condition had been met. It does not matter whether the relevant body existed at the time when the controlling person met the section 237A condition;

- b. a person in control of others can be treated as meeting a section 237A(6)-(8) condition. This takes place when the authorised officer becomes aware that a section 237A condition has been met by a person, and a relevant body met the condition when that relevant body was controlled by the person, and at the time the authorised officer became aware that the section 237A condition had been met, that person, or another relevant body which was also controlled by that person carried on a business as a promoter. In this instance, it does not matter whether either the person or the relevant body exist at the time the authorised officer became aware; and
 - c. persons who are controlled by the same person are treated as meeting section 237A condition. This occurs when another relevant body met a section 237A condition when it was controlled by a person, and at that time, there was a relevant body which was controlled by that person which carried on a business as a promoter, and the relevant body is controlled by that person at the time the authorised officer becomes aware of the section 237A condition being met. Again, it does not matter whether either the relevant body existed at the time another relevant body met the section 237A condition or any relevant body, apart from the relevant body in question, exists at the time authorised officer became aware that the section 237A condition was met.
14. New paragraph 16G provides definitions of “relevant Part 2B time” and “section 237A condition”, as well as a definition of when a section 237A(6) condition has been met.
 15. Amendment 78 amends Schedule 36 to the Finance Act 2014 to provide for the effect on persons leaving partnerships after a defeat notice has been issued to that partnership. Where the controlling member ceases to be a member of the partnership at the time when the defeat notice is given, the authorised officer may give that person a defeat notice as long as they are still carrying on a business as a promoter. Where that controlling partner is carrying on a business as a promoter within a new partnership, the defeat notice may be given to the new partnership, but if the controlling partner leaves that partnership, the defeat notice in respect of the new partnership ceases to be current. A new partnership defeat notice cannot be given if the original defeat notice has ceased to be effective.
 16. Amendment 79 ensures that defeated tax avoidance arrangements that involve National Insurance contributions are brought within the remit of the new legislation for the POTAS regime.
 17. Amendment 80 ensures the transitional provisions apply to associated persons.
 18. Amendment 81 provides a definition of circumstances when a person may be considered to be an associated person for the purposes of Part 2A.

Background note

19. POTAS was introduced in 2014 to change the behaviour of a small and persistent minority of promoters of tax avoidance schemes who display certain behaviours. It was extended to promoters of schemes avoiding National Insurance contributions in 2015.
20. Where any one of a number of threshold conditions is met, HMRC must consider whether to give the promoter a conduct notice lasting for up to two years. A conduct notice imposes conditions on how that promoter must behave. If the promoter breaches the conditions of the

conduct notice, HMRC may apply to the Tribunal for approval to give the promoter a monitoring notice. Monitored promoters are subject to additional information requirements and penalties for non-compliance with those requirements

21. This new threshold condition identifies promoters who promote a series of avoidance schemes that do not work.
22. This change is part of the Government's strategic response to tax avoidance to deter the development and use of avoidance schemes through influencing the behaviour of promoters, their intermediaries and clients.