

Explanatory Note

Clause 63 and Schedule: Serial tax avoidance

Summary

1. This measure introduces a new regime of warnings and escalating sanctions for those who persistently engage in tax avoidance schemes which HM Revenue & Customs (HMRC) defeats. Following the first defeat of a tax avoidance scheme, HMRC will place the taxpayer on warning that the use of any avoidance schemes in the following 5 years which HMRC defeats, will result in a penalty being issued, based on the amount of the understated tax.
2. If the taxpayer uses any further schemes while under warning which HMRC defeats, the rate of penalty will be increased to a maximum of 60% of the understated tax. If HMRC defeat three tax avoidance schemes while the taxpayer is on warning, the taxpayer's details can be published. If three avoidance schemes which exploit reliefs are used while under warning and HMRC defeat them, the taxpayer will be denied further benefit of reliefs until the warning period expires. The regime comes into effect on 6 April 2017.

Details of the clause and Schedule

Clause 63: Serial Tax Avoidance

3. Clause 63 introduces Schedule 1

The Schedule to Clause 63: Serial Tax Avoidance - *Part 1* Entry Into the Regime and Basic Concepts

4. Paragraph 1 explains that HMRC must issue a written warning notice to a person within 90 days of a relevant defeat relating to arrangements the taxpayer has used and sets out what the notice must contain. For these purposes, a scheme is used when a person submits a return or claim, or fails to comply with an obligation, on the basis that the arrangements deliver a tax advantage.
5. Paragraph 3 defines 'tax advantage' for VAT by applying the definition in paragraph 2 of Schedule 11 to VATA 1994.
6. Paragraph 5 defines 'tax advantage' for all taxes apart from value added tax (VAT) as including relief or repayment of tax, or increases in those; the receipt of a tax credit; avoidance or reduction of an assessment; deferral of tax; or the avoidance of a tax obligation.
7. Paragraph 6 defines 'DOTAS arrangements' for the purposes of the Schedule. This comprises arrangements which have been notified to HMRC under relevant enactments and those which should have been so notified but were not.
8. Paragraph 6(2) provides that the definition of 'DOTAS arrangements' for these purposes

includes arrangements which need not be notified to HMRC, either because they were properly notified as proposed arrangements or because they are substantially the same as arrangements already notified to HMRC.

9. Paragraph 7 defines 'disclosable VAT arrangements' as arrangements notified to HMRC under the relevant enactment or which should have been so notified but were not.
10. Paragraph 8 defines a person as failing to comply with a DOTAS or VADR requirement to notify only if a Tribunal makes a decision accordingly or if the person admits in writing that he failed to comply with the requirement.
11. Paragraph 9 defines the conditions for a 'relevant defeat'.
12. Paragraph 10 defines Condition A as applying when a taxpayer has been issued with a counteraction notice under the General Anti-Abuse Rule (GAAR) and the tax advantage has been successfully counteracted.
13. Paragraph 11 defines Condition B as applying when a taxpayer has been issued with a Follower Notice and either has taken the necessary corrective action or HMRC have taken action to recover the understated tax.
14. Paragraph 12 defines Condition C as applying when HMRC have counteracted arrangements used by a taxpayer which are notified or required to be notified to HMRC under the Disclosure of Tax Avoidance Schemes (DOTAS) regime and which purport to give a tax advantage or to avoid the requirement to comply with a tax obligation.
15. Paragraph 12(5) defines 'counteracted' and excludes from this 'taxpayer emendations'.
16. Paragraph 12(8) defines taxpayer emendations as occurring when a taxpayer's tax is corrected following a full disclosure by him in respect of an inaccuracy or failure at a time he has no reason to suppose HMRC have begun or are about to begin investigations into his tax affairs, or when HMRC amend the taxpayer's affairs following such a disclosure by him.
17. Paragraph 13 defines Condition D which replicates for Value Added Tax the provisions of paragraph 12.
18. Paragraph 14 defines Condition E as applying when a person who receives supplies of goods or services has been party to tax arrangements which purport to deliver him a tax advantage and HMRC have successfully counteracted that advantage by taking action against the person making the supplies.

The Schedule to Clause 63: Serial Tax Avoidance - Part 2 Annual Information Notices and Naming

19. Paragraph 16 provides that a person who has received a warning notice must send HMRC a written notice for each reporting period. The written notice must state whether or not the person has used any arrangements disclosable under DOTAS or VADR to obtain a tax advantage or avoid a tax obligation.
20. Paragraph 16(8) allows HMRC to extend the warning period if a person fails to provide an information notice by the required date or give HMRC a notice which is defective.
21. Paragraph 17 provides that HMRC may publish the details of serial tax avoiders if they are

given three warning notices in respect of schemes used while in a warning period and which are defeated. Such notices are defined as 'qualifying notices'.

The Schedule to Clause 63: Serial Tax Avoidance - Part 3

Restriction of Reliefs

22. Paragraph 18 provides that HMRC must issue a 'restriction of reliefs' notice to a person if he has used three sets of arrangements during a period of warning, which are defeated and in respect of which the warning notices 'relate to the misuse of reliefs' relating to losses or in respect of which there is a 'particular avoidance related rule
23. Paragraph 18(3) defines how a warning notice relates to the misuse of reliefs.
24. Paragraph 19 provides that a person who has received a relief restriction notice may not make any claim for a relief for the period of restriction. Certain reliefs relating to charities, international double taxation agreements and registered pension schemes are excluded from this restriction.
25. Paragraph 20(1) defines the restricted period as three years from when the relief restriction notice is given.
26. Paragraphs 20(2), 20(3) and 20(4) provide that if during a restricted period another scheme which misuses reliefs is used and defeated, the restricted period is extended to a point 3 years from the date of that defeat.
27. Paragraph 20(5) provides that if following the end of a restricted period but during the same warning period, a further scheme which misuses reliefs is used and defeated, a new restriction period begins and a restriction notice is issued.
28. Paragraph 21 defines an 'avoidance related rule' relief for the purposes of this Schedule.
29. Paragraph 25 provides that a person may appeal against a relief restriction or extension notice but only on the basis that one or more of the conditions relating to the issue of a relief restriction notice or restricted period extension notice has not been met.

The Schedule to Clause 63: Serial Tax Avoidance-Part 4

Penalty

30. Paragraph 27 provides that a person who uses arrangements during a period of warning that are ultimately defeated will incur a penalty. That penalty will be 20% of the amount of tax understated or overclaimed for the first defeat of a scheme used during a warning period, 40% for the second such defeat and 60% for any subsequent defeats.
31. Paragraph 28 explains the treatment for where a person incurs simultaneous defeats of different sets of arrangements used in the same warning period. The defeat which results in the greatest amount of tax understated or overclaimed will be penalised at the lowest penalty rate available, with the defeat resulting in the second largest amount of tax understated or overclaimed being penalised at the second lowest penalty rate available and so on.
32. Paragraph 29 defines the value of the counteracted advantage for direct taxes.
33. Paragraph 30 provides that 10% of any part of a loss not used to reduce the amount of tax due

and payable shall be included in the value of the denied advantage.

34. Paragraph 30(5) provides that where a group of companies has an aggregate loss for Corporation Tax, group relief is not disregarded when calculating the denied advantage.
35. Paragraph 31 provides a special rule for quantifying a tax advantage which comprises the deferral of tax.
36. Paragraph 32 defines counteracted advantage for direct taxes.
37. Paragraph 33 defines the value of counteracted advantage for VAT.
38. Paragraph 34 sets out how a penalty under this Chapter is to be assessed.
39. Paragraph 36 deals with situations where more than one penalty may arise in respect of the same amount and one of those penalties is a penalty under this Chapter.
40. Paragraph 37 provides that a person may appeal against HMRC's decision to issue a penalty. The person does not have to pay the penalty in order to make an appeal.
41. Paragraph 38 provides that a person is not liable to a penalty if he has a reasonable excuse for the failure to account for the correct tax.
42. Paragraph 38(2) provides that if a person has a reasonable excuse for a failure, the relevant defeat is disregarded when calculating the penalty rate for the next defeat.

The Schedule to Clause 63: Serial Tax Avoidance-Part 5 Interpretation of Parts 1 and 2

43. Paragraph 42 defines when defeated arrangements are regarded as being used for the purposes of the special regime.

The Schedule to Clause 63: Serial Tax Avoidance - Part 7 Commencement

44. Paragraph 47 details the commencement of the Special Regime.
45. Paragraph 48 provides that any arrangements a person enters into before the Act is passed but which are defeated on or after 5 April 2017 will qualify as defeated arrangements for the Special Regime, unless the person makes a full disclosure of the arrangements to HMRC before 6 April 2017, or notifies HMRC before that date of their intention to do so. Arrangements entered into between the day the Act is passed and 6 April 2017 and defeated before that date will qualify as defeated arrangements for the Special Regime.
46. Paragraph 49 provides that defeated arrangements entered into before the Act is passed will be disregarded for the purposes of penalties, naming and restricting reliefs.

Background Note

47. This regime has been introduced to change the behavior of those who persistently engage in tax avoidance schemes, often using more than one scheme on a return or using schemes on a number of successive returns. These tax avoiders do not see a significant risk resulting from their behaviour. The new regime allows HMRC to place users of defeated tax avoidance

schemes on warning and provides that they will face targeted sanctions if they persist in their behavior. These sanctions will escalate in their impact for taxpayers who fail to amend their behaviour. This will discourage such avoiders from continuing to engage in tax avoidance and to dissuade others from becoming serial tax avoiders. Elements of the draft will continue to be developed as part of the consultation on the draft legislation.

48. If you have any questions about this change, or comments on the legislation, please contact Pete Woodham on 03000 586533 (email: peter.woodham@hmrc.gsi.gov.uk).