

Explanatory Note

Clause 64: Promoters of tax avoidance schemes

Summary

1. This measure makes changes to the Promoters of Tax Avoidance Schemes (POTAS) legislation in Part 5 of the Finance Act 2014 (FA2014). In particular it introduces a new threshold condition, which, if met, identifies a person as a promoter of tax avoidance schemes to which the provisions in Part 5 can be applied.
2. These changes will be introduced by Finance Bill 2016 and will take effect from Royal Assent to the Bill to ensure that certain persons who display the behaviour of promoting a series of tax avoidance schemes which do not work are brought within POTAS.

Details of the Clause

Section 64: Promoters of tax avoidance schemes

3. Subsections (2) to (5) amend section 237 of FA2014 to introduce two new subsections. New subsection 237(1ZA) provides that if an authorised officer becomes aware that a promoter has met the new threshold condition because there have been three relevant defeats of arrangements in the preceding three years they must consider whether to issue a conduct notice to the promoter. New subsection 237(1ZB) provides that the officer must consider whether to issue a conduct notice where a promoter has been given a defeated arrangements notice (new section 241A of FA2014) in respect of either one or two defeats and there have been further defeats, making three in total, within 5 years of the defeated arrangements notice being given.
4. Subsection (6) introduces a new section 241A into FA2014. It provides that a defeated arrangements notice may be given to a promoter if the authorised officer becomes aware of one or two relevant defeats (defined in new paragraph 12B of Schedule 34 to FA2014) in the preceding three years. It also contains the definition of "qualifying arrangements" for the purposes of the new threshold condition which includes VAT.
5. Subsection (6) also introduces a new section 241B into FA2014. It provides that separate arrangements are to be treated as different from one another for the purposes of Part 5 of FA2014 unless they are substantially the same and defines specific circumstances where arrangements are to be treated as substantially the same.
6. Subsection (6) also introduces a new section 241C into FA2014. It requires that where the issue of a conduct notice relies on a defeat which is a relevant defeat by virtue only of Condition 3 in new paragraph 12C Schedule 34 to FA 2014 (at least 75% of those having used the arrangements have been defeated) that conduct notice is provisional. If the arrangements

in question subsequently meet any of the other conditions in new paragraph 12C then the defeat and any conduct notice is no longer provisional. A provisional conduct notice is not taken into account when determining whether an application for a monitoring notice under section 242 of FA2014 should be made. However, if failures occur in relation to that provisional conduct notice they can be taken into account for the purposes of section 242 when the conduct notice is no longer provisional.

7. Subsection (6) also introduces a new section 241D into FA 2014. It provides that a relevant defeat, which occurs by virtue only of Condition 3 in paragraph 12C of Schedule 34 to FA2014, is treated as never having occurred for the purposes of Part 5 of FA2014 where a court makes a final determination that the related arrangements obtain the asserted tax advantage.
8. Subsection (6) also introduces a new section 241E into FA2014. It provides that a relevant defeat for one person is also treated as a relevant defeat for a person associated with the promoter.
9. Subsection (7) provides that subsections (8) to (11) amend Schedule 34 to FA2014 to provide a new threshold condition.
10. Subsection (10) introduces a new Part 1A into Schedule 34 to FA2014. New paragraph 12B defines "relevant defeat" for the purposes of these new provisions. A relevant defeat occurs where any of Conditions A to F in new paragraphs 12D to 12I is met. Those conditions are that:
 - Condition A - the arrangements have been counteracted by the general anti-abuse rule in Part 5 of FA2013;
 - Condition B - a follower notice has been given under Chapter 2 of Part 4 of FA2014;
 - Condition C - the arrangements are DOTAS arrangements as defined in new paragraph 12L, which have been counteracted;
 - Conditions D and E - the arrangements are disclosable VAT arrangements as defined in new paragraph 12L, which have been counteracted;
 - Condition F - the obtaining of tax advantage relies on the application or disapplication of an anti-avoidance rule (defined in new paragraph 12J) to which a final judicial ruling applies.
11. Subsection (10) also introduces new paragraph 12C into Schedule 34 to FA2014. It provides special rules for determining when a relevant defeat occurs where more than one person has used the same or substantially the same arrangements. These are referred to as sibling arrangements. Where there are such sibling arrangements there will be a relevant defeat where there is a final judicial ruling in relation to any person's use of those arrangements where any of Conditions A to F in new paragraphs 12D to 12I met. There will also be a relevant defeat where, in the absence of a judicial ruling which is final, HMRC is satisfied that the tax advantages have been counteracted in relation to at least 75% of persons known to have relied on arrangements. Where the figure is at least 75% but less than 100%, the provisions of new section 241C and 241D apply.

12. Subsection (10) also introduces new paragraphs 12K to 12M into Schedule 34 to FA2014. Paragraphs 12K and 12L define DOTAS arrangements and disclosable VAT arrangements for the purposes of new Part 1A of Schedule 34 to FA2014. Paragraph 12M defines when a person fails to comply with a duty to disclose arrangements by virtue of Part 7 of Finance Act 2004 (Disclosure of Tax Avoidance Schemes), or Schedule 11A of the Value Added Tax Act 1994 ((Disclosure of Avoidance Schemes), for the purposes of determining whether particular arrangements are covered by paragraph 12K or 12L.
13. Subsection (10) also introduces new paragraph 12N into Schedule 34 to FA2014 which defines what is to be treated as a return for the purposes of new Part 1A in relation to inheritance tax.
14. Subsection (10) also introduces new paragraph 12O which defines "judicial ruling" and when such a ruling is "final" for the purposes of new Part 1A.

Background note

15. 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.
16. Where any one of a number of threshold conditions is met, HM Revenue and Customs (HMRC) must consider whether to give the promoter a conduct notice lasting for a maximum of two years. A conduct notice imposes conditions on how that promoter must behave. If the conditions of the conduct notice are breached HMRC may apply to the Tribunal for authority to give the promoter a monitoring notice. Monitored promoters are subject to additional information requirements and penalties for non-compliance with those requirements
17. This new threshold condition is intended to tackle the behaviour of promoters who promote a series of avoidance schemes that do not work.
18. 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.
19. If you have any questions about this change, or comments on the legislation, please contact Clare Yiannakou on 03000 561904 (email: clare.yiannakou@hmrc.gov.uk)