Accelerated payments--rules become law

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Tax analysis: What steps is HMRC taking to exercise its new 'accelerated payments' powers relating to tax avoidance schemes? James Bullock, partner and head of litigation and compliance at Pinsent Masons, talks us through the details of the new rules.

Original news

HMRC publishes list of avoidance schemes facing accelerated payments, LNB News 15/07/2014 82

HMRC has put on notice those tax avoidance schemes whose users it may require to make an 'accelerated payment' of tax under the new legislation contained in Finance Act 2014, Pt 4. A list of the schemes affected, identified only by their Disclosure of Tax Avoidance Schemes (DOTAS) scheme reference numbers, has been published on the GOV.UK website.

What are the accelerated payment rules?

They are rules within the Finance Act 2014 (which became law on receiving Royal Assent on 17 July 2014) which apply to any taxpayer who has an open enquiry or appeal in relation to tax planning that was:

- notifiable to HMRC under the DOTAS rules--no matter how long ago, and/or
- where HMRC has won a case against another taxpayer relating to similar arrangements and has issued a ‘follower notice’

They will also apply in the future where a general anti-abuse rule (GAAR) counteraction notice is given in a case where the stated opinion of at least two members of the sub-panel of the GAAR advisory panel is that the tax arrangements in question are not a 'reasonable course of action'.

The rules enable HMRC to issue an accelerated payment notice (APN) to the taxpayer specifying an amount of tax that the taxpayer will then be required to pay within 90 days. This will be based on HMRC’s assessment of the tax due--broadly on the assumption that the tax planning did not work. The tax is paid on account of the taxpayer’s liability and is ultimately repaid if the taxpayer wins their case. An APN cannot be appealed--but the taxpayer can make written representations as to why the notice should not have been issued. If unsuccessful, the taxpayer has a further 30 days from receipt of HMRC’s response to pay the tax (assuming this expires after the end of the original 90 day period).

Have the rules changed in any significant way between their announcement and becoming law?

When the accelerated payment rules were first announced in the Autumn Statement in December 2013 they were only to apply where a follower notice had been issued. However, a consultation document issued in January 2014 proposed that they would also apply to DOTAS arrangements and to arrangements subject to the GAAR.
Since the Finance Bill was published in March 2014 the provisions have remained essentially the same, despite concerns having been voiced during the passage through Parliament about their retrospective nature and the fact that they 'hit' the compliant—notably those taxpayers who declared DOTAS arrangements.

**What is the difference between an accelerated payment notice and a follower notice?**

A follower notice can be issued if HMRC has won a case against another taxpayer which HMRC believes is 'relevant to' the arrangements in question. It requires a taxpayer to withdraw their claim or settle their dispute with HMRC within 90 days. If a taxpayer receiving a follower notice does not comply they could face a penalty of up to 50% of the outstanding tax if their claim or dispute is ultimately unsuccessful. A taxpayer who receives a follower notice is also likely to receive an APN, unless the tax has already been paid or a tax repayment is being claimed.

**Is it a surprise that the list of affected schemes has been published so soon?**

No--HMRC had announced that the list would be published before the provisions became law. HMRC has said that APNs will be issued to listed schemes over a 20-month period beginning in August--so the fact that a scheme is on the list does not mean that an APN will be issued imminently.

HMRC's rhetoric has been pretty clear certainly since the finalised measures were announced in the Budget--and the 'broad brush' approach is consistent with their apparent refusal to settle disputes relating to cases of this nature. As a result, judicial challenges to the legality of the notices are considered more likely, particularly having regard to the element of retrospectivity.

**What should lawyers be advising clients who receive, or will be receiving, an accelerated payment notice?**

It depends on the facts of each case—which should first be reviewed very carefully. If HMRC has won a case on the relevant scheme and the planning is on balance unlikely to succeed, then continuing and risking a follower penalty (on top of having to pay the tax under the APN) would seem pointless. HMRC is counting on the fact that many will lose the stomach for the fight once they have had to pay the disputed tax.

On the other hand, if there are strong grounds for believing that the planning still works the taxpayer should not be discouraged. The fact that a type of planning has received a DOTAS number does not necessarily mean that the courts will decide that it does not work. It is likely that there will be other taxpayers in a similar position so a 'group action' with shared costs is a definite possibility. The key is to ensure that a taxpayer has taken a 'second opinion'—independent of the scheme promoter (who in many cases will be running the dispute with HMRC) on the merits of the planning before deciding whether to challenge and continue—or capitulate.

Whatever the merits of the scheme, doing nothing after receiving an APN is not a recommended option as the tax becomes liable for payment once the time for payment has expired—and so HMRC can then take action to enforce payment. Anyone who is at risk of an APN needs to be thinking now about how they will fund the tax due. HMRC's usual discretionary 'time to pay' arrangements may apply for those who cannot pay it all immediately, but these usually involve payment by instalments over a relatively short period.

*Interviewed by Jane Crinnion.*

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