

New "follower regime" forces taxpayer action and denies appeal rights

The new 'Follower Notice' regime has unique and startling features. If you receive a "Follower Notice" what should you do?

Our parallel briefing note ['Pay Now, Argue Later'](#) describes the new payment on account regime to be introduced for certain tax disputes.

How does the follower notice regime work?

In future when a tax appeal is determined by a court and no appeal made, HMRC may decide that ruling is determinative of other unrelated disputes. HMRC may then designate outstanding cases as 'Followers' and demand that every taxpayer take 'corrective action'. Corrective action means amending your return or entering into a settlement with HMRC. Failure to take corrective action could result in HMRC imposing a penalty.

The ruling may be any judicial decision not subject to appeal, including a decision (or even just part of a decision) of the First-tier Tribunal.

When does it apply?

- When the following conditions are met:
 - A tax appeal/enquiry is in progress;
 - The appeal/enquiry relates to a tax advantage which results from a particular tax arrangement;
 - HMRC believe there is a ruling that is relevant to the particular tax arrangement;
 - No previous follower notice has been made and not withdrawn.
- The notice must be issued within 12 months.
- There is no requirement that the ruling relates to a case of equal significance or in which the taxpayer was adequately represented.
- There is no requirement for the Follower to have any connection with the taxpayer concerned with the ruling.

The contents of the follower notice

- When HMRC issues the notice they must:
 - identify the ruling which they regard as relevant,
 - explain their decision that the ruling denies the tax advantage which is claimed; and

- set out the corrective action, the taxpayer has to take and the consequences of not doing so.

The effect of the follower notice

If the taxpayer does not take corrective action by not amending their tax return or entering into an "agreement" with HMRC to give up the tax advantage, the taxpayer is liable to a penalty.

The penalty regime is harsh – 50% of the tax that HMRC assert is denied as a result of the ruling from the other case.

What can you do?

While there is no right to appeal the notice, you can exercise the right to make representations within 90 days as to why the ruling in question is not 'relevant'.

If your representations are not successful, you may face a penalty if you do not take corrective action. You then have at least two options:

- (a) You can appeal the penalty; or
- (b) You can pay the penalty (and tax on account) and then continue in the normal manner.

What you can't do is to appeal the follower notice itself on substantive grounds or by appealing the penalty".

Other ideas?

Another option would be to argue that the corrective action you are required to take does not result in an agreement with HMRC and the "agreement" is therefore void. It is the very essence of an agreement under English law that the parties to it agree, and it is normally enough to escape a purported agreement to show that one did not agree. Can it be argued that a threat of a 50% penalty is economic duress vitiating the "agreement"? While we think this is possible, it seems unlikely that the courts will, in the current climate, accept this argument unless you make clear (e.g. in a covering letter) that your agreement is based upon the

coercion of the threatened penalty and does not signify any genuine volition on your part. With that sort of covering letter, HMRC may simply not accept that the necessary corrective action has been taken.

As a variant, you could apply to the High Court for a declaration that your purported agreement was vitiated by duress. There is a simplified court procedure which is appropriate where the point at issue is a narrow one. The question would be, simply, whether or not the coerced agreement was deemed to be a real agreement so as to deprive you of the right of appeal given you by law. We think this is unlikely to succeed.

What should you do?

At the very least you should do the following:

- consider the details set out in the notice carefully .
- check the conditions required for the notice to be issued are met. If not, use judicial review to challenge the lawfulness of the notice.
- Make representations that the relevant ruling does not apply to your appeal or investigation.
- If your representations are not successful, consider whether HMRC's decision should be challenged by judicial review.
- If you are required to take corrective action and do not, and you are then faced with a penalty, consider whether you should start an appeal within the time periods.

And a few additional thoughts...

Whether the Follower Notice regime becomes a major source of conflict will depend upon how restrained HMRC

are in applying it. If it is limited to marketed schemes, it may pass off quietly (though it will still be a major milestone in replacing the rule of law with the rule of administrative discretion). The reasons to doubt this are many.

HMRC's publicity material suggests that notices will be issued if cases are 'similar'. But their decision will often be made at a time when they have limited knowledge of the Follower case and are therefore in no position to make even that judgment.

If HMRC embark on a broad application of this regime, the result will be an increase in litigation. The operational impact predicted in the Budget notice is that 'flexible legal reserve options are being considered and ... will be increased', which perhaps means that HMRC expect litigation to increase.

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