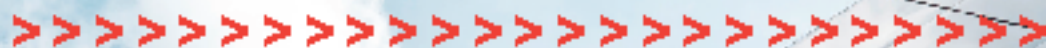


TAX PLANNING INTERNATIONAL

EUROPEAN TAX SERVICE

International Information for International Business



VOLUME 16, NUMBER 7 >>> JULY 2014

www.bnai.com

Follower notices and accelerated payment notices: Time to act

Liesl Fichardt and Nicola Hemsley
Clifford Chance, London

Following on from the analysis of the new payment on account regime for certain tax disputes, this article provides a recap of the rationale, a checklist for what to do when and the consequences of non-action.

The much-discussed “follower notice” and “accelerated payment notice” regimes, effective from 17 July 2014, will potentially have significant consequences for anyone whose affairs are subject to an open tax enquiry or a tax appeal. HMRC have indicated that they will be targeting employee benefit trusts (EBTs), partnerships claiming losses (including film schemes) and Stamp Duty Land Tax (SDLT) schemes in particular and have published a list of DOTAS scheme numbers which they intend to target for purposes of the new payment on account regime (see below for a link to the list).

I. Background

In May our previous article “Pay Now, Argue Later” described the new payment on account regime to be introduced for certain tax disputes under the Finance Bill 2014, whereby HMRC will be able to issue “accelerated payment notices” requiring taxpayers involved in such tax disputes to pay any disputed tax up front. The Finance Bill 2014 also provides for related measures which allow HMRC to issue “follower notices” requiring taxpayers to settle outstanding avoidance cases deemed by HMRC to be determined by a judicial ruling in a different case. The power to issue accelerated payment notices will affect potentially 33,000 individuals concerning £5.1 billion of tax and 10,000 corporates concerning £2.1 billion of tax. HMRC acknowledge that the measures are likely to result in a range of different legal challenges, including judicial review proceedings.

According to HMRC, the purpose of these new powers is to incentivise users of certain tax avoidance

schemes to accept the courts’ findings in an avoidance dispute similar to their own and to remove the cash flow advantage of holding onto the tax during the dispute. HMRC have indicated that they will be targeting EBTs, partnerships claiming losses (including film schemes) and SDLT schemes in particular. HMRC have also published a list of DOTAS scheme numbers which they intend to target for purposes of the new payment on account regime. The list is available [here](#).

Both the “follower notice” and the “accelerated payment notice” regimes come into force this month; anyone whose affairs are subject to an open tax enquiry or a tax appeal, in particular an enquiry or appeal relating to the targeted schemes set out above or to a scheme included on the HMRC list of DOTAS scheme numbers, should now consider what action they can take if they receive a follower notice and/or an accelerated payment notice.

The checklists below offer a practical guide to the steps to be followed upon receiving a follower notice and/or an accelerated payment notice.

A. If you receive a follower notice

Step 1: Check and assess

Check whether the follower notice is valid i.e. whether ALL of the following conditions are satisfied:

- is there an ongoing enquiry or pending appeal which involves particular arrangements giving rise to a tax advantage?

Liesl Fichardt is a Partner and Head of Tax Dispute Resolution, Nicola Hemsley is an Associate in the Tax Department at Clifford Chance, London

- AND is HMRC's explanation of how the judicial ruling is relevant to those arrangements compelling and well-founded?
 - consider: are the facts comparable? is the legal analysis applicable (even if the arrangements could fail, this may not be for the same reasons as those given in the judicial ruling)?
- AND has no previous follower notice been given?
- AND has the follower notice been given within the prescribed time limit?

Step 2: Consider making representations

If one or more of these conditions is not satisfied, send written representations to HMRC objecting to the follower notice within 90 days of the date of the notice:

- if HMRC withdraws the follower notice, any related accelerated payment notice (see below) will also be withdrawn;
- if HMRC confirms the follower notice, there is no right of appeal.

Step 3: Consider action (no right of appeal)

If all of the follower notice conditions are satisfied or you make representations but HMRC confirms the follower notice, your options are:

- take corrective action (i.e. amend your tax return/enter into a settlement with HMRC) within 90 days of the date of the follower notice/30 days of confirmation of the follower notice (whichever is later);
 - this will stop the follower notice but not any related accelerated payment notice (see below);
- continue with your appeal and risk a penalty (but the penalty can be appealed – see below);
- use judicial review to challenge the lawfulness of the follower notice.

Step 4: No corrective action – face a penalty

If you do not take corrective action, you may face a penalty of 50 percent (reduced to a minimum of 10 percent for cooperation) of the disputed tax. Your options are:

- pay the penalty and continue with your enquiry/appeal;
 - you may also be required to pay the disputed tax itself on account (see below);
- appeal the penalty itself or the amount of the penalty within 30 days of notification of the penalty;
 - grounds of appeal of the penalty itself include in particular:
 - the validity of the follower notice;
 - this ground is likely to be of limited value if you have already sent written representations to HMRC objecting to the follower notice;
 - it was reasonable not to take corrective action;
 - this could be the case even if you ultimately lose the tax appeal;
 - consider: have you been advised that you have a good prospect of success?
 - the penalty will be frozen pending determination of the appeal;
 - ask for the follower notice and penalty appeal to be stayed until the tax enquiry/appeal is resolved.

B. If you receive an accelerated payment notice

Step 1: Check and assess

Check whether the accelerated payment notice is valid i.e. whether ALL of the following conditions are satisfied:

- is there an ongoing enquiry or pending appeal which involves particular arrangements giving rise to a tax advantage?
- AND does one or more of the following apply?
 - are the arrangements notifiable arrangements under DOTAS?
 - consider: were the arrangements strictly “notifiable arrangements” for the purpose of the DOTAS rules or were they notified out of caution? were the arrangements included on HMRC's list of existing DOTAS schemes for which it intends to issue an accelerated payment notice?
 - has HMRC given a valid follower notice (see above)?
 - has a GAAR counteraction notice been given in relation to the arrangements?
- AND does the amount specified as payable accurately reflect the amount of tax in dispute?

Step 2: Consider making representations

If one or more of these conditions is not satisfied, send written representations to HMRC objecting to the accelerated payment notice/amount payable within 90 days of the date of the notice.

- if HMRC withdraws the accelerated payment notice, this will stop the accelerated payment notice but not any related follower notice (see above)
- if HMRC confirms the accelerated payment notice/the amount payable, there is no right of appeal.

Step 3: Consider action (no right of appeal)

If all of the accelerated payment notice conditions are satisfied or you make representations but HMRC confirms the accelerated payment notice, your options are:

- pay the specified amount within 90 days of the date of the accelerated payment notice/30 days of confirmation of the accelerated payment notice (whichever is later);
 - this will be treated as a payment on account so could be enforced as a debt, including insolvency action, but should be repaid with interest if your appeal is ultimately successful;
- do not pay the specified amount and risk a penalty (but the penalty can be appealed – see below);
- use judicial review to challenge the lawfulness of the accelerated payment notice;
- ask for accelerated payment notice to be stayed pending determination of judicial review.

Step 4: No payment – face a penalty

If you do not pay the specified amount, you may face a penalty of 5 percent (with a further 5 percent after 5

months and a further 5 percent after 11 months) of the specified amount. Your options are:

- pay the penalty and continue with your enquiry/appeal;
 - note that if you continue not to pay the specified amount, you will be liable for a further penalty of 5 percent after 5 months and a further penalty of 5 percent after 11 months;
- appeal the penalty itself or the amount of the penalty within 30 days of notification of the penalty;

- the penalty will be frozen pending determination of the appeal;
- ask for the accelerated payment notice and penalty appeal to be stayed until the tax enquiry/appeal is resolved.

Liesl Fichardt is a Partner and Head of Tax Dispute Resolution at Clifford Chance, London and may be contacted by email at: liesl.fichardt@cliffordchance.com. Nicola Hemsley is an Associate in the Tax Department at Clifford Chance, London and may be contacted by email at: nicola.hemsley@cliffordchance.com.