Comment

HMRC's misunderstanding of accelerated payment notices

Speed read

HMRC is issuing APNs on the basis that a transaction is substantially the same as a previous transaction that was notifiable under DOTAS; and hence it is a DOTAS arrangement for APN purposes. This misinterprets the 2004 DOTAS rules under which the later transaction must itself meet the DOTAS standard. And it means that changes in the hallmarks are being ignored.

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There has been a lot of comment on accelerated payment notices (APNs) since they were introduced in 2014. Their introduction has been a bumpy road, with legal challenges that still rumble on and the odd misstep by HMRC. The highest profile of these was the withdrawal of several hundred APNs last week after 2,000 APNs were withdrawn late last year, when HMRC accepted that the legislative requirements were not met: although the arrangements were notified to HMRC purportedly under DOTAS, they were not notifiable.

HMRC's mistake in relation to the 2,000 withdrawn APNs seems to be quite straightforward. Promoter A made a disclosure, apparently under DOTAS. It turned out there was no obligation to disclose; and the APN is therefore unfounded. However, there is a more subtle mistake that HMRC is now making. Promoter B made a disclosure under DOTAS; B subsequently implemented the same transaction with another client. HMRC seems to take the view that if the original disclosure was correctly made, the subsequent transaction must be notifiable and hence the APN is soundly based.

Is that right? This requires a close analysis of the APN and DOTAS rules. The APN rules contain various conditions, including condition C, that 'the chosen arrangements are DOTAS arrangements' (FA 2014 s 219(4)(b)).

DOTAS arrangements are defined with three alternatives, all referring back to the DOTAS legislation:

- The first two are variations of notifiable arrangements. The original distinction between a notifiable arrangement in FA 2004 s 306(1) and a notifiable proposal in s 306(2) reflected the different contractual possibilities, including a promoter making a proposal but not knowing whether it had been implemented. In either case, only one taxpayer is necessarily involved. In these circumstances, the promoter sends HMRC a disclosure under s 308, HMRC allocates a reference number under s 311 and the promoter passes it to the client under s 312.
- The third alternative deals with the very common scenario where more than one client is involved. The first one had a notifiable arrangement or proposal and HMRC issued a DOTAS number; the same promoter then gives similar advice to a subsequent client. The promoter does not need to send in an identical disclosure because s 308(5) removes that requirement as long as the arrangements are (or the proposal is) substantially the same, but the original reference number must be passed to the second client under s 312(2)(b).

It is in this last scenario that the problem occurs. What order do we need to answer the questions in? Should we say: the original arrangements were notifiable; these subsequent arrangements are substantially the same; the client must be given the reference number? Or: these subsequent arrangements are notifiable; the original arrangements were substantially the same; the client must be given the original reference number?

This matters because we may be looking at different rules. Are we asking whether these subsequent arrangements are notifiable by reference to the original DOTAS rules; or by reference to the rules that were current when they were proposed/implemented? For example, take a disclosure that was made in 2004 when DOTAS was introduced and a transaction that is substantially the same in 2016. The 2004 transaction must have enabled the taxpayer to obtain a tax advantage, which must have been one of the main benefits. Nothing has changed here (although it may be possible, on the facts, to show that a tax advantage or a main benefit for one client in 2004 was not the same as a tax advantage or a main benefit for another client at a later date). It must also have fallen within 'any description prescribed … by regulations'.

Those regulations have changed over the years since 2004. Originally, we had financial products and employment products, and the key issues were confidentiality and premium fee. Subsequently, there have been various iterations as 'hallmarks' have come and gone. Is the 2016 transaction to be judged by reference to the 2004 hallmarks or the 2016 edition? From the analysis above, it seems clear that it must be 2016. The first question is: is this a notifiable arrangement or proposal within s 306? Only if the answer is 'yes' do you go on to ask which reference number the promoter must pass on.

HMRC has recently been responding to APN representations with a rather different analysis, however. In HMRC's view, if a scheme was notifiable in 2004, it remains notifiable 'even if it ceased to meet the definition of notifiable arrangements at some later date'. Therefore, the arrangements have some sort of independent existence, have been badged as notifiable and this branding stays with the arrangements come what may. The design is what counts in HMRC's analysis, so you don't need to test the actual arrangements each time they are implemented.

It seems to me that this is not a sustainable interpretation of the DOTAS rules and is inconsistent with the recent *Graham* case ([2016] EWHC 1197 (Admin)) and hence that HMRC is applying the APN rules incorrectly. As Lin Homer told the Public Accounts Committee, HMRC has to apply the law as it is, not as some people would like it to be. I understand HMRC is reviewing its analysis. Those who have received APNs in these circumstances will be hoping that Counter-Avoidance reconsiders their cases. ■

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