Tax Alert

April 2017

Penalties for Enabling Tax Avoidance

New penalties for "enablers" of abusive tax arrangements

Introduction: New penalties for enablers of abusive tax arrangements

The UK Government is introducing legislation under which penalties may be assessed against anyone (an "enabler") who is involved in designing, establishing or assisting a taxpayer in relation to any tax arrangements that are defeated by HMRC and are considered abusive.

These new rules will, if enacted, apply to arrangements entered into on or after the date of Royal Assent of Finance Bill 2017 (expected to be this Summer), with actions before that date being disregarded.

The provisions as currently drafted are very wide, and can, for example, potentially apply to: (i) finance or tax managers assisting in reducing the tax footprint of related parties, (ii) private equity staff involved in arrangements for portfolio companies, (iii) management teams involved as a counterparty in a corporate transaction, and (iv) financial institutions providing products (such as loans or depositary services) in support of any arrangements, in each case which HMRC considers offensive.

When can the regime apply?

For the regime to apply there must be an "abusive tax arrangement" which has been "defeated" by HMRC.

An arrangement will be a "tax arrangement" if it is reasonable to conclude that one of the main purposes of the arrangement was the obtaining of a tax advantage. A "tax arrangement" will be "abusive" if entering into or carrying out the arrangement cannot "reasonably be regarded as a reasonable course of action" in relation to the relevant tax provisions.

Arrangements will be "defeated" when: (i) HMRC counteracts a tax advantage (for example, by making adjustments to a tax return, raising an assessment, or entering into a settlement agreement) with the effect that some or all of the tax advantage does not arise; and (ii) the counteraction is final (that is, it cannot be varied on appeal or otherwise). It is worth noting that the inclusion of a settlement with

HMRC within the definition of counteraction (and, therefore, as an occasion of "defeat") means that an enabler: (a) will not be able to avoid the impact of the new rules by encouraging the taxpayer to settle with HMRC, and (b) may be subject to an enabler penalty if the taxpayer decides not to fight an HMRC challenge on the basis of a favourable settlement offer.

Who is an enabler?

The new legislation aims to penalise any person in the "supply chain" who benefitted (for example, by deriving advisory fees) from a taxpayer implementing an abusive tax arrangement which is later defeated. Five different categories of enabler are set out in the draft legislation (although both the taxpayer implementing the arrangements and a company in the same corporate group as a corporate taxpayer implementing the arrangements are excluded and cannot be enablers):

A designer

A "designer" is a person who, in the course of their business, was responsible for the design of the arrangements (or a proposal which was implemented by the arrangements). However, if a person is 'innocently involved' they may escape being considered a designer – a person will not be a designer if they did not: (i) suggest arrangements (or alterations to arrangements) with a view to them giving rise to a tax advantage; and (ii) know (and could not have been reasonably expected to know) that the advice would (or would likely) be used in the design of, or a proposal for, abusive tax arrangements.

A manager

A manager is a person who, in the course of their business, was responsible to any extent for the management and organisation of the arrangements.

A marketer of arrangements

A marketer is a person who, in the course of their business: (i) made available for implementation by others a proposal which was implemented, or (ii) communicated information about a proposal with a view to the arrangements (or part thereof) being entered into (explaining the tax advantage that might be expected to arise from the arrangements) and such proposal has been implemented.

An enabling participant

An enabling participant is a participant in arrangements (or part thereof) without whose participation (or, importantly, the participation of another person in the same capacity) those arrangements could not be expected to result in a tax advantage to the taxpayer. However, a person can only be an enabling participant if they knew, or could reasonably be expected to have known, that what was being entered into were abusive tax arrangements (or a transaction forming part of such arrangements).

A financial enabler

A financial enabler is a person who, in the course of their business, provided a financial product to the taxpayer or an enabler, where it is reasonable to assume that the financial product was provided in order to allow the taxpayer or an enabler to participate in the arrangements. However, a person can only be a financial enabler if they knew, or could reasonably be expected to have known, that the purpose of obtaining the product was to participate in the arrangements.

Penalties

The penalty to be levied on an enabler is 100% of the consideration they received in relation to the arrangements (with provisions which, in certain circumstances, substantially widen the extent to which amounts are perceived as being received in relation to the arrangements) and can be imposed upon each enabler.

If HMRC cannot obtain the information needed to determine the consideration received by the enabler they can, instead, make a reasonable estimate of that amount; with that estimate becoming the penalty amount. HMRC may also publish information relating to the penalty, including the name and address of the "enabler" and the amount assessed.

HMRC has, broadly speaking, two years from the date on which the arrangements are defeated to assess a penalty under these rules. Penalties must be paid within 30 days of receipt of a notice of assessment from HMRC.

Likely practical effects

The wide categories of people potentially caught by the new rules make it clear that HMRC is aiming to catch both enablers, in the classic sense of the term, along with anybody who receives a fee for their role in designing, organising or marketing tax arrangements which are considered offensive. Anyone who is not either: (a) the taxpayer implementing the arrangements or (b) a company in the same corporate group as the implementing taxpayer will need to be mindful of the potential application of the rules.

Given both the breadth of the rules and the wide scope of the "enabler" concept, it is to be hoped that HMRC will take a realistic view of what can "reasonably be regarded as a reasonable course of action" when reviewing arrangements which aimed to achieve (but which were unsuccessful in achieving), amongst other things, a tax-efficient outcome.

If you have questions concerning the contents of this Alert, or would like more information about penalties for enabling tax avoidance, please speak to your regular contact at Weil, or to:

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