

FINANCE ACT 2014

EXPLANATORY NOTES

INTRODUCTION

Sections 199 to 233 and Schedules 30-33: Follower Notices and Accelerated Payments

Summary

1. These sections and Schedules introduce two new consequences for certain users of tax arrangements.
2. The first is a power for HMRC to issue a ‘follower notice’ where those tax arrangements have been shown in a relevant judicial ruling not to give the asserted tax advantage. The legislation sets out the steps that a taxpayer should take to settle their dispute with HMRC in response to the ‘follower notice’, and what happens if a taxpayer elects not to take those steps, including the possibility of a penalty. The taxpayer has a right of appeal against any penalty charged under these provisions.
3. The second is a requirement to pay the amount of the asserted tax advantage to HMRC on receipt of an ‘accelerated payment notice’. This notice can be given in three cases:
 - i. Where a follower notice is issued, as described above.
 - ii. Where the tax arrangements are discloseable under the Disclosure of Tax Avoidance Scheme (DOTAS) rules; or
 - iii. where HMRC is taking counteraction under the General Anti-Abuse Rule (GAAR).
4. The measure applies to Income Tax (IT); Capital Gains Tax (CGT); Corporation Tax (CT), including amounts chargeable as or treated as CT; Inheritance Tax (IHT); Stamp Duty Land Tax (SDLT); and the Annual Tax on Enveloped Dwellings (ATED). The legislation provides for further taxes to be added to the measure by Treasury Order.

Details of the Sections

Chapter 1 Introduction

Overview

5. Section 199 is introductory.

Main definitions

6. Sections 200 to 203 contain definitions that apply across the whole Part.

Chapter 2 Follower Notices

Giving of follower notices

7. Section 204 defines the conditions which must apply for HMRC to issue a follower notice to a person.
8. Subsection (2) provides the first condition that there is an open tax enquiry into that person's return or claim, or the person has made a tax appeal.
9. Subsection (3) provides the second condition that the return or claim subject to the enquiry, or the appeal, is made on the basis that the person obtains a tax advantage from the use of tax arrangements.
10. Subsection (4) provides the third condition that there has been a judicial ruling relevant to the person's return/claim or appeal.
11. Subsection (5) provides the fourth condition, that no previous follower notice has been given to the person in respect of the same tax arrangements and tax advantage, unless it was withdrawn.
12. Section 205 sets out the conditions in which a judicial ruling is treated as 'relevant'.
13. Subsection (3) provides that a judicial ruling in another party's litigation is relevant to a person if the ruling relates to tax arrangements; the principles or reasoning behind the ruling would, if applied to those arrangements, deny the advantage claimed or part of it; and it is a final ruling.
14. Subsection (4) defines a ruling as final if it is made by the Supreme Court or, if made by a lower court or tribunal, no appeal is made against it, permission to appeal is refused or, if an appeal is made, it is abandoned or otherwise disposed of before it was determined.
15. Section 206 provides that a follower notice must identify the judicial ruling on which it is based, explain why HMRC consider it is relevant to the person's tax arrangements, and set out the consequences of the taxpayer's action in response to the notice.

Representations

16. Section 207 provides that a person may make representations to HMRC within 90 days of a follower notice being issued. The person may object to a follower notice because there is no open tax enquiry or appeal or no tax advantage was obtained by the return/claim; that he has already been given a follower notice in respect of the tax arrangements or tax advantage; that the judicial ruling is not relevant to his circumstances; or that HMRC did not issue the notice within the time allowed following the relevant judicial ruling. HMRC must consider the representations and notify the person that the follower notice is confirmed or amended, or withdrawn.

Penalties

17. Section 208 sets out the steps a taxpayer would need to take in response to a follower notice in order to be regarded as having taken the necessary corrective action. The taxpayer is not compelled to take those steps, but the section sets out the consequences where those steps are not taken.
18. Subsection (2) provides that a person who is issued with a follower notice becomes liable to a penalty if he does not take corrective action before the specified time.
19. Subsection (5) defines the first step of the corrective action as the taxpayer amending his return or claim to counteract the tax advantage claimed if the follower notice is in respect of an open tax enquiry, or taking all necessary action to reach agreement with HMRC to relinquish the denied advantage if the notice is issued in respect of a tax appeal.

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20. Subsection (6) defines the second step of the corrective action as the taxpayer confirming to HMRC that he has taken the first step and advising them of the advantage that will be denied and the further tax due as a result of the amendment to his return or claim.
21. Subsection (8) sets out the time limits for taking the necessary corrective action.
22. Subsection (9) provides that any time limit applied to prevent a taxpayer amending his return or claim before the end of the tax enquiry is disregarded for the purposes of this section.
23. Subsection (10) provides that a taxpayer may not appeal against a notice closing an enquiry into his return or claim where that notice gives effect to any amendment made by the taxpayer in response to a follower notice.
24. Section 209 sets out the amount of a penalty under section 208.
25. Subsection (3) makes clear that where the taxpayer takes corrective action, within the required time, to counteract or relinquish part of the denied advantage, any penalty under section 208 is to be based on the amount not counteracted or relinquished.
26. Section 210 sets out how a penalty may be reduced for co-operation.
27. Subsection (3) sets out how the taxpayer can provide the co-operation required for HMRC to reduce the penalty. The penalty can be reduced if the taxpayer:
 - Gives reasonable help to HMRC to quantify the tax advantage;
 - Counteracts the tax advantage (but after the time specified in section 208);
 - Provides sufficient information for HMRC to counteract the tax advantage or to reach agreement with the taxpayer to relinquish the tax advantage; and/or
 - Gives HMRC access to records to allow HMRC to ensure the advantage is counteracted.
28. Section 211 sets out how a penalty under this Chapter is assessed.
29. Subsection (2) requires HMRC to notify the taxpayer when a penalty is assessed, and requires that the notice must state the tax period to which the penalty relates.
30. Subsection (5)(a) provides that in the case of a follower notice issued in respect of an open tax enquiry, the penalty must be notified no later than 90 days after the enquiry is closed.
31. Subsection (5)(b) provides that in the case of a follower notice issued in respect of a pending appeal case, the penalty must be notified no later than 90 days after the taxpayer takes the necessary action to agree his case with HMRC or withdraws his appeal. If the litigation proceeds, the penalty must be issued no later than 90 days after the final ruling is made.
32. Section 212 deals with situations where more than one penalty may arise in respect of the same amount, and one of those penalties is a penalty under this Chapter.
33. Subsection (2) establishes a limit on the total amount of penalties where penalties may apply under more than one penalty provision to the same amount of tax, and include a penalty under section 208.
34. Subsection (2)(a) sets the general rule – that the aggregate amounts of the penalties cannot exceed the “relevant percentage”, defined in subsection (5).
35. Subsection (2)(b) applies if one of the penalties applying is issued under Schedule 55 to the Finance Act 2009 (Penalty for Failure to Make Returns) because a return is more than 6-months or 12-months outstanding. In such cases the maximum amount of

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penalties aggregated under this section must not exceed the “relevant percentage”, or £300 if greater.

36. Subsection (5) sets the “relevant percentage” applicable in each case by reference to the penalty provision under which the other penalty is imposed reflecting the seriousness of the default and whether the penalty concerns an offshore matter.
37. Section 213 sets out that HMRC may alter an assessment to a penalty, either to increase it where the denied advantage was underestimated, or to reduce it where the denied advantage was overestimated.
38. Section 214 provides that a person may appeal against HMRC’s decision that a penalty is payable and against the amount of any penalty. A person does not have to pay a penalty before the appeal is determined. The grounds for appeal under this section include an appeal on the basis that there was no judicial ruling relevant to the taxpayer’s arrangements or that it was reasonable, taking all circumstances into account, for the taxpayer to take no action in respect of the denied advantage. If a Tribunal finds that it was reasonable for the taxpayer to take no such action, it may cancel the penalty but the follower notice and any related accelerated payment notice remain valid.

Partners and partnerships

39. Section 215 makes reference to Schedule 31, which sets out how the rules of Chapter 2 apply to partners and partnerships.

Appeals out of time

40. Section 216 sets out what happens when there is a late appeal against a final judicial ruling, so that the judicial ruling is no longer final. This could happen some time after HMRC issues a ‘follower notice’, at a time when that decision was regarded as final.
41. Subsection (2) provides for a follower notice to be suspended if an appeal is accepted by a court out of time in respect of a relevant ruling, until HMRC notifies the taxpayer that the appeal has been abandoned or has reached a final ruling.
42. Subsection (3) states that the limits of 90 days, or where appropriate 30 days, for the taxpayer to comply with a follower notice do not include the period during which a notice is suspended. This also applies to the ‘payment period’ for an accelerated payment.
43. Subsection (6) provides that unless cancelled a follower notice continues once HMRC notifies the taxpayer that the suspension is over and, if relevant, that the new judicial ruling is now the final one for the purposes of the notice.
44. Subsection (7)(b) requires HMRC to include in a notice issued under subsection (2) any changes to the final notice needed to take account of a new final ruling.
45. Subsection (8) prevents the issue of further follower notices to other taxpayers in respect of the matter under appeal, unless that appeal is abandoned or otherwise disposed of before it is determined. If the late appeal results in a new final ruling, subsection (9) permits follower notices to be issued in relation to that new ruling.
46. Subsection (10) provides that when such an appeal is abandoned, the period between when the person was given leave to appeal and the abandonment of the appeal does not count towards the limit of 12 months from the date of the final ruling for HMRC to issue a follower notice.

Transitional provision

47. Section 217 provides that where a judicial ruling was made before the date this Act was passed, a follower notice may not be issued later than a date two years from the

day this Act was passed or one year from the day the return or claim was submitted or appeal made, if later.

Defined terms

48. Section 218 contains definitions.

Chapter 3 Accelerated Payments

Accelerated payment notices

49. Section 219 explains the circumstances in which an accelerated payment notice may be given. Three conditions must be met.
50. Subsection (2) sets out Condition A, which stipulates that there must be a tax enquiry or a tax appeal.
51. Subsection (3) sets out Condition B, which stipulates that a tax advantage has been claimed that results from the arrangements in question.
52. Subsection (4) sets out Condition C, which has three alternatives. Any one of these is sufficient to trigger a notice (provided that Conditions A and B are also satisfied) but more than one of them may be relevant and may be specified in the notice.
53. Subsection (5) explains what is meant in subsection (4) by “DOTAS arrangements”. The starting point is that HMRC has issued a Scheme Reference Number (SRN) under section 311 of FA 2004. In order to do so, HMRC must have received a disclosure of notifiable arrangements or a notifiable proposal under Part 7 of FA 2004, or must have successfully taken proceedings to require such a disclosure. Subsection 5(c) addresses the situation under section 312(2)(b) of FA 2004 where the promoter must also provide the SRN to clients of arrangements that are substantially the same as those that were the subject of the notified arrangements or notified proposal.
54. Subsection (6) provides that the DOTAS criterion ceases to be satisfied if HMRC gives notice under section 312(6) of FA 2004 that a promoter is no longer required to notify a client of the SRN.
55. Section 220 sets out the contents of an accelerated payment notice given while an enquiry is in progress.
56. Subsection (3) requires that the amount of any accelerated payment must be determined by a designated HMRC officer.
57. Subsections (4) and (5) set out how the amount is to be determined. For those cases linked to a notice under Chapter 2, the amount is the same as would be required if the taxpayer were to have taken the necessary action to settle the dispute. For cases subject to the GAAR, the amount will be the same as specified in the GAAR counteraction notice. Where DOTAS is the only criterion, the amount must be determined to the best of the designated officer’s information and belief.
58. Subsection (6) deals with the situation where more than one Condition C under section 219(4) may be relevant. In such a case, HMRC must stipulate which of them is being applied to determine the amount of the accelerated payment. See section 227(5) and (6) for circumstances where HMRC subsequently amends a notice where more than one Condition C initially applied, but the Condition specified under this subsection or section 221(5) falls away, and an alternative Condition C is still applicable.
59. Section 221 sets out how an accelerated payment notice is given for cases that are under appeal. The ‘disputed tax’ is all or part of the tax charged in the assessment or determination, or arising in consequence of a conclusion stated in a closure notice that is the subject of the appeal.

60. Section 222 explains how representations may be made to HMRC about an accelerated payment notice, the time limit for making those representations, and what HMRC must do in response.

Forms of accelerated payment

61. Section 223 explains the consequences of an accelerated payment notice given while a tax enquiry is in progress.
62. Subsection (3) explains that the accelerated payment is to be treated as a payment on account of the tax in dispute. When the final liability is agreed, this payment will be set against it, and any interest payable on that final liability will be adjusted so that no interest will be charged on the amount of the accelerated payment from the date that it is paid. If the final liability is lower than the accelerated payment any excess will be repaid with interest.
63. Subsections (4) and (5) set out the time limits for making an accelerated payment.
64. Subsection (6) deals with the special case where Inheritance Tax is payable by instalments. The due date for an accelerated payment that relates to those instalments cannot be earlier than the due date for paying the instalment to which it relates.
65. Subsection (7) deals with the situation where the taxpayer pays some or all of the tax in dispute before an accelerated payment is made. The amount paid will reduce the amount of the accelerated payment that is outstanding.
66. Section 224 sets out how an accelerated payment notice operates for cases under appeal. It operates by amending section 55 of TMA 1970, which applies to income tax, PAYE, corporation tax and capital gains tax; and the equivalent rules for IHT, SDLT and ATED. Any tax that is the subject of an accelerated payment notice cannot be postponed under section 55 of TMA 1970 (and the equivalents), and if the tax has already been postponed the accelerated payment notice has the effect that it is no longer postponed. The time limits for making the payment are the same as in section 223.
67. Section 225 amends the rule in section 56 of TMA 1970 (and its parallels for SDLT and ATED) which directs that the tax in dispute should be paid to the successful litigant pending any further appeal. The amendment permits HMRC to apply to the tribunal or court for an order not to repay the tax where HMRC pursues a further appeal and HMRC considers there would be risk to the Exchequer in making the repayment at that stage.

Penalties

68. Section 226 establishes a late payment penalty in respect of an accelerated payment. The rates and structure are based on Schedule 56 to FA 2009, and a number of paragraphs of that Schedule are applied with any necessary modification.

Withdrawal etc of accelerated payment notice

69. Section 227 explains the process for and consequences of the withdrawal or amendment of an accelerated payment notice.
70. Subsections (3) to (5) explain that where a particular Condition C ceases to apply, the related accelerated payment notice must be withdrawn, but only to the extent that it was given on the basis of that Condition. If another Condition C remains in effect the accelerated payment notice also continues to have effect.
71. Subsections (6) and (7) explain what happens where more than one Condition C was originally applicable, and one of them was referenced as the basis of the accelerated payment notice. Where that Condition no longer applies, HMRC must amend the notice to state the alternative Condition C and must make any consequent reduction in the amount of the accelerated payment.

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72. Subsections (8), (9), (10) and (11) explain what happens when a notice given under Chapter 2 is suspended while application is made for a late appeal against a relevant judicial ruling. The accelerated payment notice is also suspended, but where the notice is also given under an alternative Condition C the notice remains in effect in relation to that Condition.
73. Subsection (12) covers the situation where an accelerated payment notice is withdrawn. Any amount paid is to be repaid with interest.
74. Subsection (13) covers the situation where the accelerated payment notice remains in place, but the amount is reduced. If the taxpayer has paid more than the amount specified in the modified notice any excess is repaid with interest.

Partners and partnerships

75. Section 228 refers to the provisions for partners and partnerships in Schedule 3.

Defined terms

76. Section 229 contains definitions for the purposes of Chapter 3.

Chapter 4 Miscellaneous and general provision

Stamp duty land tax and annual tax on enveloped dwellings

77. Section 230 makes specific modifications to apply these rules to Stamp Duty Land Tax (SDLT).
78. Subsections (2) to (8) bring in the effect of existing SDLT rules to different types of joint purchaser, including partnerships and bodies of trustees.
79. Subsection (2) applies the general principle of joint and several liability for SDLT in the case of joint purchasers, apart from members of a partnership or trustees of a settlement, to a payment or penalty that may arise under Chapter 2 and/or Chapter 3 in relation to a liability to SDLT.
80. Subsections (4) and (5) apply the general principle of joint and several liability for SDLT in the case of members of a partnership to a payment or penalty that may arise under Chapter 2 and/or Chapter 3 in relation to a liability to SDLT.
81. Subsections (6) and (7) apply the general principle of joint and several liability for SDLT in the case of trustees of a settlement to a payment or penalty that may arise under Chapter 2 and/or Chapter 3 in relation to a liability to SDLT.
82. Section 231 makes specific modifications to apply these rules to the Annual Tax on Enveloped Dwellings (ATED).
83. Subsection (2) applies the general principle of joint and several liability for ATED in the case of members of a partnership to a payment or penalty that may arise under Chapter 2 and/or Chapter 3 in relation to an ATED liability.
84. Subsection (3) applies the general principle of joint and several liability for ATED to the penalty that may arise under Chapter 2 in relation to an ATED liability.
85. Subsection (4) applies the general principle of joint and several liability for ATED to an accelerated payment and any related late payment penalty in relation to an ATED liability.
86. Subsection (5) requires HMRC to issue a notice under Chapter 2 and/or Chapter 3 to all persons who may be jointly and severally liable for a penalty or payment under these rules that relates to ATED.

Extension of Part by order

87. Section 232 provides for the Treasury to make an order to add other taxes to the scope of the measure. This must be approved by Parliament under the affirmative procedure.

Consequential amendments

88. Section 233 introduces Schedule 33, which contains consequential amendments.

Details of the Schedules

Schedule 30: Section 208 Penalty: Value of the denied advantage

89. Paragraph 2(1) defines the value of the denied advantage as the additional amount of tax due or payable resulting from the advantage being counteracted.
90. Paragraph 2(3) excludes two specific items from the calculation of the denied advantage in respect of Corporation Tax. These are group relief and relief under section 458 of CTA 2010 in respect of repayment of loans, where that relief is deferred under section 458(5) of CTA 2010.
91. Paragraph 3(2)(b) provides that 10 per cent of any part of a loss not used to reduce the amount of tax due and payable shall be included in the value of the denied advantage.
92. Paragraph 3(4) provides that where a group of companies has an aggregate loss (for Corporation Tax) group relief is not disregarded when quantifying the relevant denied advantage.
93. Paragraph 3(5) provides that where the nature of the loss is, or the person's circumstances are, such that there is no reasonable prospect of the loss being used to reduce a tax liability of any person, there will be no penalty.
94. Paragraph 4 provides a special rule for quantifying a tax advantage which comprises the deferral of tax.

Schedule 31: Follower notices and partnerships

95. Paragraph 3(3) states that in respect of partnership returns, a tax advantage arises from tax arrangements if the arrangements increase or reduce any of the items required to be included in a partnership return, and result in a tax advantage for at least one of the partners.
96. Paragraph 3(4)(a) provides that any follower notice given to a representative partner or his successor is not treated as a notice given to that person in any other capacity.
97. Paragraph 3(4)(b) provides that a representative partner and his successor are to be treated as the same person in respect of any follower notice given to them in that capacity.
98. Paragraph 4(2) provides that a penalty for not taking corrective action within the specified time is payable by each relevant partner.
99. Paragraph 5(2)(b) provides that each partner's share of the total penalty is the appropriate share.
100. Paragraph 5(3) defines the appropriate share as the same share of profits or losses apportioned to that partner in the accounting period, but if that information is not available to HMRC, any such share as an officer of HMRC may determine.
101. Paragraph 5(4) provides that any reduction to the penalty for co-operation under section 210 is calculated and applied to the total amount of penalties issued to the partners.

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102. Paragraph 5(6) provides that for the purposes of applying the maximum sum of aggregated penalties under section 212, a penalty charged to a relevant partner is to be treated as if it were calculated by reference to the amount of tax due from the partner and so be subject to the aggregation limits.
103. Paragraph 5(7) states that an appeal may be made against a decision that the partners are liable to penalties or against the sum total of those penalties.
104. Paragraphs 5(11) and 5(12) provide for the Treasury to make an order using the negative procedure to vary the rates applied under this paragraph.

Schedule 32: Accelerated payments and partnerships

105. Paragraphs 2 to 8 provide rules on when an accelerated payment notice can be sent to partners in a partnership, in a case where there is an open enquiry, or a live appeal, which relates to the partnership return given under section 12AA of TMA 1970 (but not to any other partnership circumstance, such as SDLT or ATED – for which, see sections 223 and 224 respectively). These rules mirror the general position, but adapted as appropriate for this special case.
106. Paragraph 2(2) makes clear that an accelerated payment notice may not be given to the representative partner in that capacity. An accelerated payment notice may be given to that person if they are also a relevant partner (defined in paragraph 1(4)).
107. Paragraph 3 makes clear that although the open enquiry or appeal relates to the partnership return, an accelerated payment will be required from each of the partners individually, in the same way as the tax that they each pay on their share of the partnership profits. As a result, all other provisions and consequences, such as the right to make representations and the provision for a late payment penalty, apply to each partner individually.
108. Paragraph 4 sets out the necessary modifications for the contents of a ‘partner payment notice’, and sets out the meaning of ‘understated partner tax’.
109. Paragraph 5 makes clear that the right to make representations applies to each partner individually.
110. Paragraph 6 makes clear that it is each partner individually who must make the accelerated payment.
111. Paragraph 7 makes clear that the late payment penalty rules of section 226 apply in respect of each partner individually, and applies section 226 with appropriate modifications.
112. Paragraph 8 applies, with appropriate modifications, the provisions of section 227 concerning withdrawal or modification of an accelerated payment notice to partner payment notices.

Schedule 33 Consequential amendments

113. Paragraph 1 extends the ability of a taxpayer under section 9B of TMA 1970 to amend their return during an enquiry to enable an amendment to be made for the purposes of this Part.
114. Paragraph 2 disapplies the assessment provisions for penalties in sections 100 to 103 of TMA 1970 as the penalties under this Part either have their own assessing provision (see section 211) or adopt other provisions (see section 226(7), adopting provisions in Schedule 56 to FA 2009).
115. Paragraph 3 disapplies the interaction provision in Schedule 24 to FA 2007 (penalties for errors) so that a penalty under that Schedule is not reduced by the amount of a penalty charged under this Part, calculated by reference to the same amount of tax.

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116. Paragraph 4 disapplies the interaction provision in Schedule 41 to FA 2008 (penalties for failure to notify and certain VAT and excise offences) so that a penalty under that schedule is not reduced by the amount of a penalty charged under this Part, calculated by reference to the same amount of tax.
117. Paragraph 5 disapplies the interaction provision in Schedule 55 to FA 2009 (penalties for failure to make returns) so that a penalty under that schedule is not reduced by the amount of a penalty charged under this Part, calculated by reference to the same amount of tax.

Background Note

118. HMRC sometimes have to deal with a large number of taxpayers' returns that claim a tax advantage from the same or similar tax arrangements, or large numbers of appeals against HMRC's conclusion that the arrangements do not work. This measure gives HMRC the power to issue a notice to a taxpayer to the effect that they should settle their case with HMRC once a tribunal or court has concluded in another party's litigation that the arrangements do not produce the asserted tax advantage.
119. Under current legislation, HMRC may deny a claimed repayment of tax while a dispute is resolved, but in the general scheme of self assessment the taxpayer is able to claim the effect of the tax advantage while the enquiry and any subsequent tax appeal is unresolved. This measure gives HMRC the power to issue a notice to require an accelerated payment of the amount in dispute, in certain defined circumstances, while an enquiry is in progress or while there is an open appeal.