SCHEDULES

SCHEDULE 18

SERIAL TAX AVOIDANCE

PART 2

ENTRY INTO THE REGIME AND BASIC CONCEPTS

Duty to give warning notice

2 (1) This paragraph applies where a person incurs a relevant defeat in relation to any arrangements.

(2) HMRC must give the person a written notice (a "warning notice").

(3) The notice must be given within the period of 90 days beginning with the day on which the relevant defeat is incurred.

(4) The notice must—

(a) set out when the warning period begins and ends (see paragraph 3),

(b) specify the relevant defeat to which the notice relates, and

(c) explain the effect of paragraphs 3 and 17 to 46.

(5) A warning notice given by virtue of paragraph 49 must also explain the effect of paragraph 51 (information in certain cases involving partnerships).

(6) In this Schedule "arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

(7) For the meaning of "relevant defeat" and provision about when a relevant defeat is incurred see paragraph 11.

Warning period

3 (1) If a person is given a warning notice with respect to a relevant defeat (and sub-paragraph (2) does not apply) the period of 5 years beginning with the day after the day on which the notice is given is a "warning period" in relation to that person.

(2) If a person incurs a relevant defeat in relation to arrangements during a period which is a warning period in relation to that person, the warning period is extended to the end of the 5 years beginning with the day after the day on which the relevant defeat occurs.

(3) In relation to a warning period which has been extended under this Schedule, references in this Schedule (including this paragraph) to the warning period are to be read as references to the warning period as extended.

Meaning of "tax"

4 In this Schedule "tax" includes any of the following taxes—

(a) income tax,

(b) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,

(c) capital gains tax,

(d) petroleum revenue tax,

(e) diverted profits tax,

(f) apprenticeship levy,

(g) inheritance tax,

(h) stamp duty land tax,

(i) annual tax on enveloped dwellings,

(j) VAT, and

(k) national insurance contributions.

Meaning of "tax advantage" in relation to VAT

5 (1) In this Schedule "tax advantage", in relation to VAT, is to be read in accordance with sub-paragraphs (2) to (4).

(2) A taxable person obtains a tax advantage if—

(a) in any prescribed accounting period, the amount by which the output tax accounted for by the person exceeds the input tax deducted by the person is less than it would otherwise be,

(b) the person obtains a VAT credit when the person would not otherwise do so, or obtains a larger VAT credit or obtains a VAT credit earlier than would otherwise be the case,

(c) in a case where the person recovers input tax as a recipient of a supply before the supplier accounts for the output tax, the period between the time when the input tax is recovered and the time when the output tax is accounted for is greater than would otherwise be the case, or

(d) in any prescribed accounting period, the amount of the person's non-deductible tax is less than it would otherwise be.

(3) A person who is not a taxable person obtains a tax advantage if the person's non-refundable tax is less than it otherwise would be.

(4) In sub-paragraph (3) "non-refundable tax", in relation to a person who is not a taxable person, means—

(a) VAT on the supply to the person of any goods or services,

(b) VAT on the acquisition by the person from another member State of any goods, and

(c) VAT paid or payable by the person on the importation of any goods from a place outside the member States,

but excluding (in each case) any VAT in respect of which the person is entitled to a refund from the Commissioners by virtue of any provision of VATA 1994.

Meaning of "non-deductible tax"

6 (1) In this Schedule "non-deductible tax", in relation to a taxable person, means—

(a) input tax for which the person is not entitled to credit under section 25 of VATA 1994, and

(b) any VAT incurred by the person which is not input tax and in respect of which the person is not entitled to a refund from the Commissioners by virtue of any provision of VATA 1994.

(2) For the purposes of sub-paragraph (1)(b), the VAT "incurred" by a taxable person is—

(a) VAT on the supply to the person of any goods or services,

(b) VAT on the acquisition by the person from another member State of any goods, and

(c) VAT paid or payable by the person on the importation of any goods from a place outside the member States.

"Tax advantage": other taxes

7 In relation to taxes other than VAT, "tax advantage" includes—

(a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) receipt, or advancement of a receipt, of a tax credit,

(d) avoidance or reduction of a charge to tax, an assessment of tax or a liability to pay tax,

(e) avoidance of a possible assessment to tax or liability to pay tax,

(f) deferral of a payment of tax or advancement of a repayment of tax, and

(g) avoidance of an obligation to deduct or account for tax.

"DOTAS arrangements"

8 (1) For the purposes of this Schedule arrangements are "DOTAS arrangements" at any time if they are notifiable arrangements at the time in question and a person—

(a) has provided information in relation to the arrangements under section 308(3), 309 or 310 of FA 2004, or

(b) has failed to comply with any of those provisions in relation to the arrangements.

(2) But for the purposes of this Schedule "DOTAS arrangements" does not include arrangements in respect of which HMRC has given notice under section 312(6) of FA 2004 (notice that promoters not under duty to notify client of reference number).

(3) For the purposes of sub-paragraph (1) a person who would be required to provide information under subsection (3) of section 308 of FA 2004—

(a) but for the fact that the arrangements implement a proposal in respect of which notice has been given under subsection (1) of that section, or

(b) but for subsection (4A), (4C) or (5) of that section,

is treated as providing the information at the end of the period referred to in subsection (3) of that section.

(4) In this paragraph "notifiable arrangements" has the same meaning as in Part 7 of FA 2004.

"Disclosable VAT arrangements"

9 For the purposes of this Schedule arrangements are "disclosable VAT arrangements" at any time if at that time—

(a) a person has complied with paragraph 6 of Schedule 11A to VATA 1994 in relation to the arrangements (duty to notify Commissioners),

(b) a person under a duty to comply with that paragraph in relation to the arrangements has failed to do so, or

(c) a reference number has been allocated to the scheme under paragraph 9 of that Schedule (voluntary notification of avoidance scheme which is not a designated scheme).

Paragraphs 8 and 9: "failure to comply"

10 (1) A person "fails to comply" with any provision mentioned in paragraph 8(1) or 9(a) if and only if any of the conditions in sub-paragraphs (2) to (4) is met.

(2) The condition in this sub-paragraph is that—

(a) the tribunal has determined that the person has failed to comply with the provision concerned,

(b) the appeal period has ended, and

(c) the determination has not been overturned on appeal.

(3) The condition in this sub-paragraph is that—

(a) the tribunal has determined for the purposes of section 118(2) of TMA 1970 that the person is to be deemed not to have failed to comply with the provision concerned as the person had a reasonable excuse for not doing the thing required to be done,

(b) the appeal period has ended, and

(c) the determination has not been overturned on appeal.

(4) The condition in this sub-paragraph is that the person admitted in writing to HMRC that the person has failed to comply with the provision concerned.

(5) In this paragraph "the appeal period" means—

(a) the period during which an appeal could be brought against the determination of the tribunal, or

(b) where an appeal mentioned in paragraph (a) has been brought, the period during which that appeal has not been finally determined, withdrawn or otherwise disposed of.

(6) In this paragraph "the tribunal" means the First-tier tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal.

"Relevant defeat"

11 (1) A person ("P") incurs a "relevant defeat" in relation to arrangements if any of Conditions A to E is met in relation to P and the arrangements.

(2) The relevant defeat is incurred when the condition in question is first met.

Condition A

12 (1) Condition A is that—

(a) P has been given a notice under paragraph 12 of Schedule 43 to FA 2013 (general anti-abuse rule: notice of final decision), paragraph 8 or 9 of Schedule 43A to that Act (pooling and binding of arrangements: notice of final decision) or paragraph 8 of Schedule 43B to that Act (generic referrals: notice of final decision) stating that a tax advantage arising from the arrangements is to be counteracted,

(b) that tax advantage has been counteracted under section 209 of FA 2013, and

(c) the counteraction is final.

(2) For the purposes of this paragraph the counteraction of a tax advantage is "final" when the adjustments made to effect the counteraction, and any amounts arising as a result of those adjustments, can no longer be varied, on appeal or otherwise.

Condition B

13 (1) Condition B is that (in a case not falling within Condition A above) a follower notice has been given to P by reference to the arrangements (and not withdrawn) and—

(a) the necessary corrective action for the purposes of section 208 of FA 2014 has been taken in respect of the denied advantage, or

(b) the denied advantage has been counteracted otherwise than as mentioned in paragraph (a) and the counteraction of the denied advantage is final.

(2) In sub-paragraph (1) the reference to giving a follower notice to P includes a reference to giving a partnership follower notice in respect of a partnership return in relation to which P is a relevant partner (as defined in paragraph 2(5) of Schedule 31 to FA 2014).

(3) For the purposes of this paragraph it does not matter whether the denied advantage has been dealt with—

(a) wholly as mentioned in one or other of paragraphs (a) and (b) of sub-paragraph (1), or

(b) partly as mentioned in one and partly as mentioned in the other of those paragraphs.

(4) In this paragraph "the denied advantage" has the same meaning as in Chapter 2 of Part 4 of FA 2014 (see section 208(3) of and paragraph 4(3) of Schedule 31 to that Act).

(5) For the purposes of this paragraph the counteraction of a tax advantage is "final" when the adjustments made to effect the counteraction, and any amounts arising as a result of those adjustments, can no longer be varied, on appeal or otherwise.

(6) In this Schedule "follower notice" means a follower notice under Chapter 2 of Part 4 of FA 2014.

(7) For the purposes of this paragraph a partnership follower notice is given "in respect of" the partnership return mentioned in paragraph (a) or (b) of paragraph 2(2) of Schedule 31 to FA 2014.

Condition C

14 (1) Condition C is that (in a case not falling within Condition A or B)—

(a) the arrangements are DOTAS arrangements,

(b) P has relied on the arrangements (see sub-paragraph (2))—

(c) the arrangements have been counteracted, and

(d) the counteraction is final.

(2) For the purposes of sub-paragraph (1), P "relies on the arrangements" if—

(a) P makes a return, claim or election, or a partnership return is made, on the basis that a relevant tax advantage arises, or

(b) P fails to discharge a relevant obligation ("the disputed obligation") and there is reason to believe that P's failure to discharge that obligation is connected with the arrangements.

(3) For the purposes of sub-paragraph (2) "relevant tax advantage" means a tax advantage which the arrangements might be expected to enable P to obtain.

(4) For the purposes of sub-paragraph (2) an obligation is a "relevant obligation" if the arrangements might be expected to have the result that the obligation does not arise.

(5) For the purposes of this paragraph the arrangements are "counteracted" if—

(a) adjustments, other than taxpayer emendations, are made in respect of P's tax position—

(i) on the basis that the whole or part of the relevant tax advantage mentioned in sub-paragraph (2)(a) does not arise, or

(ii) on the basis that the disputed obligation does (or did) arise, or

(b) an assessment to tax other than a self-assessment is made, or any other action is taken by HMRC, on the basis mentioned in paragraph (a)(i) or (ii) (otherwise than by way of an adjustment).

(6) For the purposes of this paragraph a counteraction is "final" when the assessment, adjustments or action in question, and any amounts arising from the assessment, adjustments or action, can no longer be varied, on appeal or otherwise.

(7) For the purposes of sub-paragraph (1) the time at which it falls to be determined whether or not the arrangements are DOTAS arrangements is when the counteraction becomes final.

(8) The following are "taxpayer emendations" for the purposes of sub-paragraph (5)—

(a) an adjustment made by P at a time when P had no reason to believe that HMRC had begun or were about to begin enquiries into P's affairs relating to the tax in question;

(b) an adjustment (by way of an assessment or otherwise) made by HMRC with respect to P's tax position as a result of a disclosure made by P which meets the conditions in sub-paragraph (9).

For the purposes of paragraph (a) a payment in respect of a liability to pay national insurance contributions is not an adjustment unless it is a payment in full.

(9) The conditions are that the disclosure—

(a) is a full and explicit disclosure of an inaccuracy in a return or other document or of a failure to comply with an obligation, and

(b) was made at a time when P had no reason to believe that HMRC were about to begin enquiries into P's affairs relating to the tax in question.

(10) For the purposes of this paragraph a contract settlement which HMRC enters into with P is treated as an assessment to tax (other than a self-assessment); and in relation to contract settlements references in sub-paragraph (5) to the basis an which any assessment or adjustments are made, or any other action is taken, are to be read with any necessary modifications.

Condition D

15 (1) Condition D is that—

(a) P is a taxable person;

(b) the arrangements are disclosable VAT arrangements to which P is a party,

(c) P has relied on the arrangements (see sub-paragraph (2));

(d) the arrangements have been counteracted, and

(e) the counteraction is final.

(2) For the purposes of sub-paragraph (1) P "relies on the arrangements" if—

(a) P makes a return or claim on the basis that a relevant tax advantage arises, or

(b) P fails to discharge a relevant obligation ("the disputed obligation") and there is reason to believe that P's failure to discharge that obligation is connected with those arrangements.

(3) For the purposes of sub-paragraph (2) "relevant tax advantage" means a tax advantage which the arrangements might be expected to enable P to obtain.

(4) For the purposes of sub-paragraph (2) an obligation is a "relevant obligation" if the arrangements might be expected to have the result that the obligation does not arise.

(5) For the purposes of this paragraph the arrangements are "counteracted" if—

(a) adjustments, other than taxpayer emendations, are made in respect of P's tax position—

(i) on the basis that the whole or part of the relevant tax advantage mentioned in sub-paragraph (2)(a) does not arise, or

(ii) on the basis that the disputed obligation does (or did) arise, or

(b) an assessment to tax is made, or any other action is taken by HMRC, on the basis mentioned in paragraph (a)(i) or (ii) (otherwise than by way of an adjustment).

(6) For the purposes of this paragraph a counteraction is "final" when the assessment, adjustments or action in question, and any amounts arising from the assessment, adjustments or action, can no longer be varied, on appeal or otherwise.

(7) For the purposes of sub-paragraph (1) the time at which it falls to be determined whether or not the arrangements are disclosable VAT arrangements is when the counteraction becomes final.

(8) The following are "taxpayer emendations" for the purposes of sub-paragraph (5)—

(a) an adjustment made by P at a time when P had no reason to believe that HMRC had begun or were about to begin enquiries into P's affairs relating to VAT;

(b) an adjustment made by HMRC with respect to P's tax position (by way of an assessment or otherwise) as a result of a disclosure made by P which meets the conditions in sub-paragraph (9).

(9) The conditions are that the disclosure—

(a) is a full and explicit disclosure of an inaccuracy in a return or other document or of a failure to comply with an obligation, and

(b) was made at a time when P had no reason to believe that HMRC were about to begin enquiries into P's affairs relating to VAT.

Condition E

16 (1) Condition E is that the arrangements are disclosable VAT arrangements to which P is a party and—

(a) the arrangements relate to the position with respect to VAT of a person other than P ("S") who has made supplies of goods or services to P,

(b) the arrangements might be expected to enable P to obtain a tax advantage in connection with those supplies of goods or services,

(c) the arrangements have been counteracted, and

(d) the counteraction is final.

(2) For the purposes of this paragraph the arrangements are "counteracted" if—

(a) HMRC assess S to tax or take any other action on a basis which prevents P from obtaining (or obtaining the whole of) the tax advantage in question, or

(b) adjustments, other than taxpayer emendations, are made in relation to S's VAT affairs on a basis such as is mentioned in paragraph (a).

(3) For the purposes of this paragraph a counteraction is "final" when the assessment, adjustments or action in question, and any amounts arising from the assessment, adjustments or action, can no longer be varied, on appeal or otherwise.

(4) For the purposes of sub-paragraph (1) the time when it falls to be determined whether or not the arrangements are disclosable VAT arrangements is when the counteraction becomes final.

(5) The following are "taxpayer emendations" for the purposes of sub-paragraph (2)—

(a) an adjustment made by S at a time when neither P nor S had reason to believe that HMRC had begun or were about to begin enquiries into the affairs of S or P relating to VAT;

(b) an adjustment (by way of an assessment or otherwise) made by HMRC with respect to S's tax position as a result of a disclosure made by S which meets the conditions in sub-paragraph (6).

(6) The conditions are that the disclosure—

(a) is a full and explicit disclosure of an inaccuracy in a return or other document or of a failure to comply with an obligation, and

(b) was made at a time when neither S nor P had reason to believe that HMRC were about to begin enquiries into the affairs of S or P relating to VAT.