# HMRC TO REQUIRE ACCELERATED TAX PAYMENTS FROM CERTAIN TAXPAYERS SUBJECT TO ENQUIRY

**Tolley®Guidance**

14th February 2014



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HMRC published the consultation document on accelerated tax payments on 24 January 2014. This is part of a number of measures designed to tackle tax avoidance and was published on the same day as the summary of responses to the August 2013 consultation on the new regime for 'high-risk promoters'.

As announced in Autumn Statement 2013, accelerated tax payments are proposed in two circumstances:

- 'follower cases' — open enquiries which HMRC decides turn on "the same or substantially the same grounds as a case already decided in the tribunal or court"
- enquiries into schemes which have been disclosed under the disclosure of tax avoidance scheme (DOTAS) rules or the general anti-abuse rules (GAAR)

The main driver behind these proposals is that, generally speaking, HMRC is unable to disallow the disputed tax relief pending the outcome of the enquiry or litigation. This means that the taxpayer has, effectively, a low-interest loan from the Government until the case is settled, which could be a number of years.

The proposals also reflect HMRC's general trend of using tax policy to influence the behaviour of taxpayers and advisers. Given the need to pay the tax much sooner, it hopes that the appetite for such avoidance schemes will be reduced.

Of these plans, it is the second proposal which will be of most concern to tax advisers. It is expected to apply from Royal Assent to Finance Bill 2014 and is retrospective in that it can be applied to existing enquiries. Once the payment notice is issued by HMRC, the taxpayer might have as little as **90 days** to make the payment or challenge the notice. This may leave taxpayers only nine months away from having to make substantial payments to HMRC and investments may have to be cashed-in (with a potential knock-on tax liability) to release the necessary funds.

This news item summarises these proposals. For full details and the draft legislation (from page 26 onwards), see the consultation document . Responses must be submitted to the Counter Avoidance Group (aag.consultation@hmrc.gsi.gov.uk) by 24 February 2014.

## Follower cases

It is important to be aware that the draft legislation does not accurately reflect the text of the consultation document. For example, the consultation document refers to a 'follower notice' but the term used in the draft legislation is 'failure notice'. Also, the consultation document refers to a 'payment notice' but, according to the draft legislation, the amount due for payment is to be included in the failure notice; there is to be no payment notice. Where possible, this news item analyses the draft legislation rather than the text of the consultation document. However, the consultation document has also been taken into account in drafting this commentary.

The proposed procedure in follower cases is:

1. there is a final judicial decision in another taxpayer's case
2. HMRC identifies other taxpayers under enquiry who have the same or similar arrangements
3. HMRC issues a 'failure notice' which includes HMRC's estimate of the amount due (the notice may not state the correct amount due as HMRC may not have the full information to quantify the tax at stake, therefore the onus is on the taxpayer to tell HMRC the correct amount)
4. the taxpayer has 90 days to challenge the failure notice or take the necessary corrective action and make the payment to HMRC

In most cases, the tax due will be the amount that would have been paid had the taxpayer not entered into the arrangements. However, there may be situations where the tax effect of the arrangements are found to be different than originally thought and so it is not as simple as that. Each case will have to be dealt with on its own facts.

The amount of tax to be paid as a result of the failure notice may not be the entire disputed tax liability for the year if the enquiry covers more than just that aspect. In that situation the tax paid under the failure notice will be treated as an interim payment pending the conclusion of the enquiry as a whole.

### Failure notice

In order to issue a failure notice it is proposed that four conditions must be met:

A) the taxpayer's return or stand alone claim is subject to an enquiry (or the taxpayer has made an appeal against a decision by HMRC)

B) the taxpayer obtains a tax advantage from tax arrangements in the return / claim under enquiry (or by appeal against a decision by HMRC)

C) HMRC believes there is a final judicial ruling which applies to the taxpayer's tax arrangements

D) the taxpayer has not previously received a failure notice in relation to that tax advantage based on that judicial ruling

FB 2014 draft legislation, Sch 1, para 1

As you might expect, all the necessary terms are defined in the draft legislation, including 'tax enquiry', 'tax appeal', 'tax arrangements', 'tax advantage', 'judicial ruling', 'final ruling'.

FB 2014 draft legislation, Sch 1, paras 2–4

For the failure notice to be valid it must be issued within 12 months of the later of:

- the date of the final ruling, or
- the date the return / claim was received by HMRC (or the date the appeal was made)

FB 2014 draft legislation, Sch 1, para 1(6)

This time limit is modified where the ruling was handed down prior to Royal Assent to Finance Bill 2014 (see below).

There appears to be no requirement for the taxpayer to self-identify as being within the scope of a failure notice. The onus is on HMRC to identify the affected taxpayers and issue a failure notice. The content of the failure notice is to be set by law and this includes the identification of the judicial ruling in question and the reasons why HMRC believes the judgment is relevant to the taxpayer's situation.

FB 2014 draft legislation, Sch 1, para 5

The taxes within these proposals are:

- income tax
- capital gains tax
- corporation tax
- inheritance tax
- stamp duty land tax
- annual tax on enveloped dwellings

FB 2014 draft legislation, Sch 1, para 2(2)

The accelerated tax payments cannot be extended to national insurance contributions without the introduction of separate legislation. The Government plans to do this once a 'suitable vehicle' becomes available.

Consultation document, para 3.11

**Options open to the taxpayer on receipt of the failure notice**

Essentially the taxpayer has a number of options in response to the failure notice:

- challenge the failure notice on the grounds that one or more of conditions A to D summarised above are not met
- challenge the failure notice on the grounds that the judicial ruling does not apply to the taxpayer
- challenge the failure notice on the grounds that HMRC are out of time to issue the failure notice
- challenge HMRC's calculation of the tax due as a result of the application of the judicial ruling
- acknowledge that the judicial ruling is relevant and take the necessary corrective action (such as amending the return, amending / withdrawing the stand-alone claim or withdrawing the appeal) and pay the tax due as a result

FB 2014 draft legislation, Sch 1, paras 6, 19

The taxpayer has 90 days from the date the failure notice is given to take this action.

If the taxpayer challenges the failure notice, HMRC has a legal obligation to consider the representations and either confirm the failure notice (with amendment to the content of the notice, including the amount due, as necessary), or withdraw the failure notice. Should HMRC confirm the failure notice, the taxpayer has 30 days from the date of the confirmation to take the necessary corrective action and pay the tax due as a result.

FB 2014 draft legislation, Sch 1, paras 7–8, 19–20

**Commencement**

These provisions are to come into effect from Royal Assent to Finance Bill 2014. However, the rules are not limited to judicial rulings which take place after Royal Assent. HMRC will be able to issue failure notices in open cases following Royal Assent in relation to final rulings which were handed down prior to this date.

However, for the failure notice issued in these circumstances to be valid it must be issued within whichever is the later of:

- 24 months following Royal Assent, or
- 12 months of the date the return / claim was received by HMRC (or the date the appeal was made)

FB 2014 draft legislation, Sch 1, para 41

## Interest and penalties

The draft legislation contains two new penalty regimes to encourage compliance:

- penalty for failure to take the necessary corrective action (either within 90 days of the failure notice or within 30 days from the confirmation of the failure notice following representations)
- penalty for failure to make the accelerated tax payment on time

### Penalty for failure to take corrective action

In the case of the penalty for failure to take corrective action, the penalty is tax-geared based on the value of the tax advantage. The percentage of the tax-geared penalty has yet to be decided. The value of the tax advantage depends on whether or not the advantage is a loss and whether it has been used. The draft legislation also recognises and quantifies the advantage conferred by deferring the tax due.

FB 2014 draft legislation, Sch 1, paras 9–12

There is potential for the penalty to be reduced to take account of the co-operation provided by the taxpayer and agent. Based on the current draft legislation, this is expected to be possible only where the penalty is due but has yet to be assessed. This might be in point where the deadline is only just missed.

FB 2014 draft legislation, Sch 1, para 13

Note that HMRC has limited time to issue a penalty. A penalty notice issued more than 90 days after the conclusion of the enquiry (presumably from the date of the closure notice) or the date the appeal is withdrawn / ruling is given on the appeal (whichever is the earliest) is invalid. This prevents HMRC from issuing the penalty more than three months after the taxpayer thinks the issue has finally been put to bed.

FB 2014 draft legislation, Sch 1, para 14

### Interaction between these penalties and existing penalty rules

The draft legislation recognises that the taxpayer may be liable to penalties under other statutory provisions in relation to the tax arrangements as well as a penalty for failure to take corrective action in time.

The other statutory penalties recognised by the draft legislation are:

- penalties for errors under FA 2007, Sch 24
- penalties for failure to notify under FA 2008, Sch 41

- penalties for failure to make returns under FA 2009, Sch 55

FB 2014 draft legislation, Sch 1, para 15(1), (4)

The draft legislation envisages a total cap on all tax-geared penalties of between 100% and 200% of the tax due. As the cap is only in relation to the tax due as a result of the corrective action, it may be that the penalties paid under other provisions may need to be apportioned.

FB 2014 draft legislation, Sch 1, para 15(2), (5)

**Penalty for failure to make accelerated payment on time**

The penalty regime for failure to make the accelerated tax payment by the due date is modelled on the late payment penalty rules in FA 2009, Sch 56.

The penalty trigger dates are:

| Date | Penalty |
|---|---|
| Due date for payment (either within 90 days of the failure notice or within 30 days from the confirmation of the failure notice following representations) | 5% of the amount that remains unpaid at that date |
| Five months from the due date for payment | 5% of the amount that remains unpaid at that date |
| 11 months from the due date for payment | 5% of the amount that remains unpaid at that date |

FB 2014 draft legislation, Sch 1, para 21

**Interest position**

Interest is charged on the tax due with reference to the original due date in relation to the tax year in question.

Consultation document, paras 3.30–3.33

**Time to pay?**

The consultation document contains no discussion of what will happen if the taxpayer does not have the ready cash to fund the accelerated tax payment.

It is assumed that in these circumstances the taxpayer will be able to approach HMRC with a time to pay proposal. The taxpayer should be prepared to submit detailed financial information (including cash flows and asset statements) to support his proposed payment

plan.

## Open enquiries where DOTAS or GAAR applies

As mentioned above, HMRC proposes to require accelerated tax payments where the tax arrangement is under enquiry and it has either:

- been disclosed under the DOTAS rules, or
- been challenged under the GAAR

Consultation document, para 4.2

Whilst this is the criteria proposed in the consultation, the Government recognises that many tax avoidance arrangements will not fall into these categories and so plans to keep the conditions under review with a view to extending them. However, whilst the above would be simple to codify, it might be more difficult to legislate extended criteria without encompassing enquiries into tax issues which would not normally be considered to be 'avoidance'.

Consultation document , para 4.3

### Payment notice

No draft legislation has been included with the consultation, however it is expected to be included in Finance Bill 2014 (which will be published in March 2014). When the draft legislation is released it is expected to encompass much of the detail discussed above in relation to follower cases, which will probably include:

- the onus being on the taxpayer to tell HMRC the amount of tax due had the taxpayer not entered into the arrangements
- the penalties due for late payment of the tax, and
- the interest position on the tax due

The deadline for paying the tax has not yet been decided but the Government favours using the same time scales as for follower cases (ie 90 days from the date of the notice).

Consultation document, para 4.15–4.16

There will be situations where no extra tax is due in the case of a tax arrangement which has been disclosed under DOTAS. In such cases a payment notice would not be appropriate.

Consultation document, para 4.11

However, whilst it would seem necessary for the taxpayer to have a right of appeal against the notice, in DOTAS cases it is difficult to see the basis upon which such an appeal could be made other than in relation to the amount of tax due under the notice. For those

taxpayers who took part in such a scheme and who are subject to an enquiry into this aspect of their returns, it is difficult to see how they could legitimately argue that the payment notice is not valid. The taxpayer whose tax arrangements did not fall into the DOTAS regime but to which HMRC believes the GAAR applies may have more scope for appealing the notice. This is because it may be more difficult to prove that the arrangements fail the GAAR. We will have to wait for the draft legislation to be released for details of the precise conditions for issue of the notice to comment.

It is assumed that anyone failing to make the accelerated tax payment as a result of receiving a valid payment notice will be subject to the usual debt collection process.

### Commencement

These rules are expected to apply from Royal Assent to Finance Bill 2014. It is understood that the law will apply retrospectively to existing enquiries and appeals as well as enquiries and appeals opened after that date.

HMRC is to review all DOTAS schemes in advance of Royal Assent and will issue a list of schemes where payment notices will be issued to the taxpayers involved.

Consultation document, paras 4.10, 4.12

On this basis, it would seem reasonable to assume that payment notices will start to be issued either on or shortly after Royal Assent. Since Royal Assent usually happens in July before the summer recess of Parliament, it may be that the first accelerated tax payments in relation to existing enquiries into DOTAS schemes may be due at the end of October 2014.

### What if the taxpayer subsequently wins?

This is not directly addressed in the consultation document, however if the tax arrangements were found to work as intended HMRC would have to refund the tax paid (and interest suffered) under these accelerated payment rules. In addition repayment supplement would be applied.

## What do you need to do?

Affected taxpayers are likely to need as much notice as possible to make the arrangements needed to release the cash to make the tax payment.

Many investors in schemes subject to the DOTAS rules have to receive a certain rate of return on the money saved via the tax relief in order to make a ‘profit’ from taking part in the scheme. This may mean they have serially invested the money in other schemes, which could compound the amount of tax due under the above proposals as well as make it difficult

for them to extract the cash at short notice.

It is suggested that you review your client list to identify those who will be impacted by these proposals and contact them to warn them of the Government's plans. See the Standard document — letter to clients regarding accelerated tax payments in DOTAS enquiries for sample wording. Consider your fees if you are asked to prepare estimates of the amount potentially due under these proposals.

When advising affected clients remember that you are unable to give advice on disposing of investments unless you are authorised to do so. However, you can advise on the tax implications of selling the investments in question.