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Sections 121–124 and Schedules 30–32: avoidance

Background

Sections 121 to 123 of (and Schedules 30 and 31 to) the Finance Act 2021 (FA 2021) expand HMRC's powers under the existing regimes for the disclosure of tax avoidance schemes (DOTAS),[1] disclosure of avoidance schemes for VAT and other indirect taxes (DASVOIT),[2] promoters of tax avoidance schemes (POTAS)[3] and penalties for enablers of tax avoidance.[4] Section 124 and Schedule 32 FA 2021 make certain amendments to the General Anti-Abuse Rule (the GAAR)[5] in the context of partnerships. These changes form part of the government's broader strategy for tackling promoters of mass-marketed tax avoidance schemes[6] which was first published as part of the March 2020 Budget[7] in response to the *Independent Loan Charge Review* of December 2019.[8]

HMRC have stated that the changes set out in sections 121 to 123 FA 2021 are targeted at a minority of "unscrupulous" promoters that are actively frustrating HMRC's efforts to enforce the regimes outlined above.[9] HMRC's principal concern is that the resulting delays and other issues with enforcement lead to longer periods of time during which promoters can promote avoidance schemes and taxpayers can become unwittingly involved in them. While protecting taxpayers from such promoters is an important aim, this must be balanced against the requirements that HMRC's powers are defined with sufficient legal certainty and that the relevant regimes contain appropriate safeguards for advisers and taxpayers. Much of the commentary in this note focuses on whether the legislation has got this balance right.

The changes introduced by FA 2021 do not represent a fundamental shift in the regimes outlined above but they do reflect an increasingly common trend for widely drafted legislation with "safeguards" coming in the form of HMRC guidance or internal HMRC controls. While the writers acknowledge that HMRC's practice with respect to the regimes referred to above has been largely sensible to date, guidance and internal controls are ultimately not an adequate replacement for appropriately drafted legislation. As such, the changes in FA 2021 should be viewed in the context of the increasing scope and breadth of HMRC's powers, which no doubt will continue to be a live issue going forward.

[1] Finance Act 2004 Pt 7.
[2] Finance (No.2) Act 2017 (F(No.2)A 2017) s.66 and Sch.17.
[3] Finance Act 2014 (FA 2014) Pt 5.
[4] F(No.2)A 2017 s.65 and Sch.16.
[5] Finance Act 2013 (FA 2013) Pt 5.
[6] HMRC, Policy Paper, *Tackling promoters of mass-marketed tax avoidance schemes* (published 19 March 2020; updated 23 March 2020).
[7] HM Treasury, *Budget 2020: Delivering on Our Promises to the British People* (March 2020), HC 121, in particular pp.97–98, paras 2.255–2.258.
[8] Sir Amyas Morse, *Independent Loan Charge Review: report on the policy and its implementation* (December 2019).
[9] HMRC, *Tackling Promoters of Tax Avoidance: Consultation* (21 July 2020), Foreword, p.5.

(1) Section 121 and Schedule 30: POTAS

Prior to FA 2021 HMRC were concerned that certain promoters were using tactics to delay HMRC enforcement of the POTAS rules so that the process to issue stop notices was taking an undue amount of time (in some cases, years) and/or the impact of conduct notices was being negated. HMRC were also concerned that certain promoters were moving their businesses to new companies or artificially dividing up activities between multiple entities to sidestep the rules.[10] FA 2021 made a number of changes to the POTAS rules to address these concerns.

(a) Power to issue stop notices

FA 2021 brings forward the point in time at which HMRC can issue a stop notice. Prior to FA 2021 HMRC could issue a stop notice to a person (P) if (broadly) a follower notice had been issued to a person in respect of a particular set of arrangements, P was a promoter in relation to a proposal that was implemented by those arrangements and 90 days had elapsed since the follower notice was given.[11] If P were to subsequently breach the stop notice, this would constitute a threshold condition under Schedule 34 to the Finance Act 2014 (FA 2014), which could result in the issue of a conduct notice.[12]

The changes set out in FA 2021 allow HMRC to issue a stop notice to a person if an authorised officer suspects that the person promotes, or has promoted, arrangements (or proposals for arrangements) that the authorised officer considers meet certain conditions.[13] For convenience these conditions have been grouped into two categories below. For a stop notice to be issued, the arrangements in question (or proposals for such arrangements) must fall within either or both of these categories.

Category 1: Condition A + any of Conditions B and C are met

Condition A[14] is met if arrangements 1) would, if they had been implemented before 5 April 2019, have fallen within the loan charge provisions, or 2) would be the same or similar in form or effect to arrangements or proposed arrangements to which a DOTAS or DASVOIT reference number has been allocated (including under the broadened DOTAS and DASVOIT rules described below), or 3) would be the same or similar in form or effect to arrangements in relation to which a person has been given a follower notice under section 204 FA 2014 or, 4) would be the same or similar in form or effect to arrangements of a description specified in regulations.

Condition B[15] is that arrangements or proposals of that description have been, or are likely to be, marketed (in any manner, whether by the recipient of the stop notice or otherwise) as capable of enabling a person to obtain a particular tax advantage, and it is more likely than not that arrangements of that description are not capable of enabling that advantage to be obtained.

[10] HMRC, *Tackling Promoters of Tax Avoidance: Consultation* (21 July 2020), Chs 4 and 5.
[11] FA 2014 Sch.34, para.12(3), prior to Finance Act 2021 (FA 2021) amendments.
[12] FA 2014 Sch.34, para.12(1), prior to FA 2021 amendments.
[13] FA 2014 s.236A inserted by FA 2021 s.121 and Sch.30, para.1.
[14] FA 2014 s.236A(3) inserted by FA 2021 s.121 and Sch.30, para.1.
[15] FA 2014 s.236A(4) inserted by FA 2021 s.121 and Sch.30, para.1.

Condition C[16] is that Condition A is met as a result of the allocation of a reference number under DOTAS or DASVOIT in relation to arrangements or proposed arrangements and 1) HMRC have required any person to provide information or documents under certain DOTAS or DASVOIT provisions following the issue of a reference number and that person has not complied with that requirement, or 2) HMRC have made an application to the tribunal under section 308A(2) of the Finance Act 2004 (FA 2004) or the DASVOIT equivalent (i.e. where HMRC do not believe that the promoter has provided all relevant prescribed information following a disclosure).

Category 2: Conditions B and D are met

Condition B is as above, so (broadly) requiring the marketing of a tax advantage which it is more likely than not will not be obtained.

Condition D[17] is that 1) arrangements of that description or proposals for such arrangements would be "relevant arrangements" or "relevant proposals" (with such concepts including a requirement that the main benefit or one of the main benefits that might be expected to arise from the relevant arrangements is the obtaining of a tax advantage), and 2) the recipient of the notice is subject to a conduct notice or a monitoring notice.

Appeals and consequences of a stop notice

A person subject to a stop notice may, within 30 days of the date of the stop notice, request that HMRC withdraw the stop notice.[18] If HMRC refuse to withdraw the stop notice there is a right to appeal, with the grounds of appeal including, amongst other things, that the arrangements or proposals do not fall within Category 1 or Category 2 as described above.[19] There are provisions for the suspension of stop notices and the automatic withdrawal of stop notices in certain situations.[20]

Following the issue of a stop notice, there are provisions allowing HMRC to publish the names of the persons subject to the notice.[21] As described in the "Promotion structures" section below, persons other than the recipient of the notice may be subject to the notice. A person subject to a stop notice must provide quarterly returns to HMRC containing certain specified information.[22] HMRC's information powers in relation to stop notices (and the POTAS regime more generally) are also broadened by a new section 272A FA 2014,[23] which applies a modified version of Schedule 36 to the Finance Act 2008 (FA 2008) (not including the exclusions for tax advisers in paragraph 25 of Schedule 36 FA 2008) to the POTAS legislation. Failure to comply with section 272A FA 2014, as well as failure to comply with section 236B(1) FA 2014 (i.e. failure

[16] FA 2014 s.236A(5) inserted by FA 2021 s.121 and Sch.30, para.1.
[17] FA 2014 s.236A(6) inserted by FA 2021 s.121 and Sch.30, para.1.
[18] FA 2014 s.236D inserted by FA 2021 s.121 and Sch.30, para.1.
[19] FA 2014 s.236E(4) inserted by FA 2021 s.121 and Sch.30, para.1.
[20] FA 2014 ss.236F–236G inserted by FA 2021 s.121 and Sch.30, para.1.
[21] FA 2014 s.236H inserted by FA 2021 s.121 and Sch.30, para.1.
[22] FA 2014 s.236C inserted by FA 2021 s.121 and Sch.30, para.1.
[23] FA 2014 s.272A inserted by FA 2021 s.121 and Sch.30, para.4.

to stop promoting when a stop notice is given) or section 236C(1) FA 2014 (i.e. failure to provide a quarterly return) are now threshold conditions.[24]

Analysis of provisions

As described above, an authorised officer need only *suspect* that a person is promoting arrangements that the authorised officer *considers* fall within Category 1 and/or Category 2 to issue a stop notice. This is a subjective test which gives HMRC significant discretion and does not set a particularly high bar for HMRC to meet. While there is a right to appeal, which does allow the tribunal to consider whether the conditions have been met as an objective matter, by the time an appeal has been determined "the damage may have already been done" to advisers and/or taxpayers.

In terms of the conditions themselves, Condition A is broad and sets a low bar. The main safeguards in the case of Category 1 are therefore Conditions B and C. Condition B requires that an authorised officer considers it is "more likely than not"[25] that arrangements or proposals of that description are not, or will not be, capable of enabling the relevant tax advantage to be obtained. This is a lower bar than was required for the issue of a stop notice prior to FA 2021 (which required a follower notice, and therefore a judicial defeat).

In terms of Condition C, this cross refers to the DOTAS/DASVOIT limb of Condition A. Condition C will be met where there has been a failure by "any"[26] person to comply with the relevant DOTAS/DASVOIT information requirements in respect of the relevant arrangements. This person could be a third party that is unrelated to C. In the writers' view, it is difficult to see why a person should be issued with a stop notice as a result of a third party's failure to notify (which that person may know nothing about), without being given the opportunity (so far as they are able) to disclose and thereby remedy this failure. Condition C will also be met if HMRC have made an application to the tribunal under section 308A(2) FA 2004 or the DASVOIT equivalent in respect of relevant arrangements. Condition C is met regardless of the outcome of that request, which again is a low bar.

In the writers' view, Category 1 gives HMRC significant discretion and sets a threshold for issuing a stop notice which, in certain respects, may be too low. The consequences of a stop notice for advisers are significant, particularly as such a notice can result in an adviser being named by HMRC, and the FA 2021 changes arguably do not provide sufficient safeguards for advisers. Category 2 seems more reasonable on the basis that it requires, as a gateway, that the promoter is already subject to a conduct or monitoring notice, although this gateway is widened by the expanded list of threshold conditions included in FA 2021.

(b) Promotion structures

FA 2021 amends the POTAS rules to try to stop promoters from side-stepping the rules through use of particular corporate or other structures. The rules are expanded so that a "member of a promotion structure" is treated as carrying on a business as a promoter (regardless of whether

[24] FA 2014 Sch.34, para.12, as amended by FA 2021 s.121 and Sch.30, para.7.
[25] FA 2014 s.236A(4)(b) inserted by FA 2021 s.121 and Sch.30, para.1.
[26] FA 2014 s.236A(5)(a) inserted by FA 2021 s.121 and Sch.30, para.1.

or not that member carries on a business).[27] There are four scenarios in which a person (A) is a member of a promotion structure[28]:

1) **Multiple entity promoter**

A and one or more other persons carry out activities between them that if carried out by a single person would cause that person to be a promoter within the meaning of section 235(2) or (3) FA 2014 and each of the persons carrying out the activities is closely related to at least one other of those persons.[29]

2) **Acting for a non-resident promoter**

A acts under the instruction or guidance of a person (O) who carries on a business as a promoter and who is resident outside the UK, and (a) A is a promoter or facilitates any activity by virtue of which a person would be a promoter under that instruction or guidance, or (b) A receives remuneration (of any kind) from O in connection with the business carried on by O.[30]

3) **Control of another promoter**

A is an individual who controls, or has significant influence over, a body corporate or a partnership (B) that carries on a business as a promoter, and either: (a) at any time after A first controlled or had significant influence over B, A was declared bankrupt etc., or (b) at any time A controlled or had significant influence over a body corporate or partnership (other than B) that carried on a business as a promoter and went bankrupt, dormant etc.[31]

4) **Transfer of promotion business**

A falls within this case if (a) there has been a relevant transfer to A, or (b) there has been a relevant transfer to a body corporate or partnership that A controls or has significant influence over. "Relevant transfer" means a transfer of (a) the whole of the business of a person carrying on a business as a promoter, (b) any part of such a business that relates to the promotion of relevant arrangements or relevant proposals, or (c) property, rights or liabilities of such a business that are connected with the promotion of relevant arrangements or relevant proposals.[32]

The concepts above are broad and use a number of wide and, to a certain extent, subjective terms such as "closely related", "facilitates", "remuneration" and "significant influence". This makes the rules somewhat uncertain and difficult to apply in practice. The "transfer of promotion business" test will put a burden on innocent third party purchasers to ensure that the businesses

[27] FA 2014 s.235(1A) inserted by FA 2021 s.121 and Sch.30, para.9. There is also a similar, though slightly narrower, deeming provision in respect of the concept of "activities as a promoter" in FA 2014 s.283(4) inserted by FA 2021 s.121 and Sch.30, para.18.
[28] FA 2014 Sch.33A, paras 1–5 inserted by FA 2021 s.121 and Sch.30, para.10.
[29] FA 2014 Sch.33A, para.2 inserted by FA 2021 s.121 and Sch.30, para.10.
[30] FA 2014 Sch.33A, para.3 inserted by FA 2021 s.121 and Sch.30, para.10.
[31] FA 2014 Sch.33A, para.4 inserted by FA 2021 s.121 and Sch.30, para.10.
[32] FA 2014 Sch.33A, para.5 inserted by FA 2021 s.121 and Sch.30, para.10.

they are acquiring are not subject to the POTAS rules (and limb (c) of "relevant transfer" is particularly wide).[33]

Even if a person is deemed to be a promoter under the rules described above, that person must still meet a threshold condition before a conduct notice can be issued to them. While the changes introduced by FA 2021 do not deem a member of a promotion structure to have met a threshold condition, Part 2 of Schedule 34 FA 2014 already includes provisions that deem certain threshold conditions to be met in certain circumstances involving bodies corporate and partnerships. However, following FA 2021, if a person meets a threshold condition this will now automatically be considered significant if that person is a multiple entity promoter.[34]

FA 2021 provides that a stop notice can be given to a member of a promotion structure.[35] The group of persons that are subject to a stop notice is wider than just the recipient of the stop notice and includes 1) any body corporate or partnership that the recipient controls or has significant influence over, 2) any person who controls or has significant influence over a body corporate or partnership that is the recipient, and 3) the transferee of a relevant transfer.[36]

HMRC may also give conduct or monitoring notices to the transferee of a relevant transfer (where the transferor was subject to a conduct or monitoring notice, as applicable),[37] using the wide definition of "relevant transfer" set out above. The terms of a conduct notice given to the transferee may be different to those set out in the transferor's conduct notice, but the transferee must be given the opportunity to comment in these circumstances.[38] If a transferee considers that they were not a person to whom a relevant transfer was made then they can make representations to an authorised officer, who must consider them. However, there is no right of appeal to the tribunal in respect of the issue of a conduct or monitoring notice under section 239A or section 244A FA 2014. In the writers' view, there are real concerns that this does not provide sufficient protection to transferees, particularly given the breadth of the concept of a relevant transfer. It is unfortunate that so much importance will be attached to the way in which HMRC operate these provisions in practice, rather than more adequate safeguards being included in the legislation.

(c) Extension of time period for conduct notices

Prior to FA 2021 HMRC were concerned that promoters were actively using litigation (for example, judicial review) to stymie HMRC's actions under POTAS. HMRC were often unable to give practical effect to the POTAS regime while litigation was in progress and, by the time a litigation process had completed, the two year time limit for a conduct notice may have expired or been close to expiring.[39] FA 2021 introduces the following changes:

[33] FA 2014 Sch.33A, para.5(2)(c) inserted by FA 2021 s.121 and Sch.30, para.10.
[34] FA 2014 s.237(8A) inserted by FA 2021 s.121 and Sch.30, para.11 and FA 2014 s.237A(3C) inserted by FA 2021 s.121 and Sch.30, para.12.
[35] FA 2014 s.236A(1) and (7) inserted by FA 2021 s.121 and Sch.30, para.1.
[36] FA 2014 s.236B(2) inserted by FA 2021 s.121 and Sch.30, para.10.
[37] FA 2014 ss.239A and 244A inserted by FA 2021 s.121 and Sch.30, paras.20 and 21.
[38] FA 2014 s.239A(3)–(4) inserted by FA 2021 s.121 and Sch.30, para.20.
[39] HMRC, *Tackling Promoters of Tax Avoidance: Consultation* (21 July 2020), paras 5.10–5.13.

1) A tiered system for the length of a conduct notice, with the duration ranging from two to five years depending on several factors.[40]
2) An authorised officer may suspend the effect of a conduct notice, with the time period of the conduct notice being extended to reflect the period for which the notice was suspended.[41] The writers' understanding is that this is intended to address the delays caused by litigation as outlined above.
3) If a person fails to comply with certain obligations to provide information following the issue of a conduct notice, the time period during which such failure persists is ignored when calculating the time remaining until the conduct notice expires.[42]

FA 2021 includes a new power for HMRC to withdraw a conduct notice and give a new conduct notice (instead of amending a notice).[43] Per section 241(2A) FA 2014, the time period may be "reset" by HMRC for the new conduct notice unless HMRC have withdrawn the old notice and given the new notice within the last 12 months of the time period for the existing conduct notice. There is a question if this new power is open to potential misuse in order to extend the time period for which conduct notices remain in force.

Separately, the circumstances in which a monitoring notice can be given are extended by FA 2021 to include 1) where a person subject to a conduct notice provides false or misleading information[44] or 2) in certain circumstances, where HMRC determine within a period of six years following the expiry of a conduct notice that the conditions in extended section 242(1)(b) FA 2014 were met.[45] There is a similar power (with a similar six year time period) that applies to transferees under a "relevant transfer", with certain failures of the transferor being attributed to the transferee in certain circumstances.[46]

(d) Additional breaches of DOTAS/DASVOIT included as "threshold conditions"

FA 2021 amends Schedule 34 FA 2014 to include additional breaches of the DOTAS and DASVOIT regimes as threshold conditions.[47] This widens the scope of the threshold conditions to include what might be considered more minor breaches of the DOTAS and/or DASVOIT regimes.

(2) Section 122 and Schedule 31: DOTAS/DASVOIT

FA 2021 introduces a new information power that can be used where HMRC have reasonable grounds for suspecting that a DOTAS disclosure should have been but has not been made. Prior to FA 2021, HMRC needed to rely on the somewhat complex interaction between sections 306A, 313A, 313B and 314A FA 2004 in this situation. In HMRC's view this was a time-consuming

[40] FA 2014 s.241(4A) inserted by FA 2021 s.121 and Sch.30, para.25.
[41] FA 2014 s.241(4E)–(4G) inserted by FA 2021 s.121 and Sch.30, para.25.
[42] FA 2014 s.241(4H) inserted by FA 2021 s.121 and Sch.30, para.25.
[43] FA 2014 s.240(4) inserted by FA 2021 s.121 and Sch.30, para.24.
[44] FA 2014 s.242(1)(b)(ii) inserted by FA 2021 s.121 and Sch.30, para.27(1)(a)(ii).
[45] FA 2014 s.242(1A) inserted by FA 2021 s.121 and Sch.30, para.27(2).
[46] FA 2014 s.242(1D) inserted by FA 2021 s.121 and Sch.30, para.27(2).
[47] FA 2014 Sch.34, para.5 as amended by FA 2021 s.121 and Sch.30, para.29.

process that led to delays in the issue of DOTAS reference numbers, which weakened the protections afforded to taxpayers.[48]

The new information power can be used where HMRC have become aware that 1) a transaction forming part of arrangements has been entered into, a firm approach has been made to a person in relation to a proposal for arrangements with a view to making the proposal available for implementation, or a proposal for arrangements is made available for implementation, and 2) HMRC have reasonable grounds for suspecting that the arrangements or the proposal are notifiable.[49] In these circumstances HMRC may issue a notice (a section 310D notice) to a person explaining that, unless the person is able to satisfy HMRC before the end of the notice period (which is at least 30 days[50]) that the arrangements or proposal are not notifiable, HMRC may allocate a reference number to the arrangements or proposed arrangements.[51] A section 310D notice must be issued to any person HMRC reasonably suspect to be a promoter in relation to the arrangements or proposal and may be issued to any other person who HMRC reasonably suspect to be involved in the supply of the arrangements or proposed arrangements.[52]

If a section 310D notice has been issued, the notice period has expired and the person to whom the notice was given has failed to satisfy HMRC that the arrangements are not notifiable, HMRC may allocate a reference number to the arrangements or proposed arrangements.[53] Once a reference number has been given, the consequences that follow are substantially the same as for a reference number that has otherwise been given under the DOTAS regime. HMRC may publish information about the relevant arrangements, promoters or persons otherwise involved in the supply chain.[54] There is a right of appeal against the allocation of a reference number following a section 310D notice, with the specific grounds of appeal listed in section 311B FA 2004, but there is no right of appeal against the issue of a section 310D notice itself. HMRC may publish details of the arrangements and those involved while the appeal is ongoing.[55]

Analysis of provisions

The amendments introduced by FA 2021 allow HMRC to get information from promoters more quickly than under sections 313A and 313B FA 2004 (which remain on the statute book but potentially require HMRC to apply to the tribunal for an order requiring a promoter to provide information). Preventing unreasonable delays in the provision of information is a legitimate aim. However, FA 2021 achieves this by putting the burden on advisers to convince HMRC that arrangements are not notifiable, with the "stick" being the ability of HMRC to issue a reference number if the adviser fails to convince HMRC that the relevant arrangements are not notifiable. Prior to FA 2021, the DOTAS rules did include a similar mechanic (in section 306A FA 2004, which also remains on the statute book) for issuing reference numbers in situations where HMRC were unable to obtain sufficient information from a promoter. Section 306A FA 2004 provides

[48] HMRC, *Tackling Promoters of Tax Avoidance: Consultation* (21 July 2020), Ch.3.
[49] FA 2004 s.310D inserted by FA 2021 s.122 and Sch.31, para.4.
[50] FA 2004 s.311(4) substituted by FA 2021 s.122 and Sch.31, para.5.
[51] FA 2004 s.310D(2) inserted by FA 2021 s.122 and Sch.31, para.4.
[52] FA 2004 s.310D(4)–(5) inserted by FA 2021 s.122 and Sch.31, para.4.
[53] FA 2004 s.311(1), (3) and (5) substituted by FA 2021 s.122 and Sch.31, para.5.
[54] FA 2004 s.316C as amended by FA 2021 s.122 and Sch.31, para.16.
[55] FA 2004 s.311B(9) inserted by FA 2021 s.122 and Sch.31, para.5.

that the tribunal may make an order that the relevant arrangements or proposal are to be treated as notifiable if it is satisfied that 1) HMRC have taken all reasonable steps to establish whether the proposal or arrangements are notifiable and 2) HMRC have reasonable grounds for suspecting that the proposal or arrangements may be notifiable.[56]

The key distinction between the position under section 306A FA 2004 and the new FA 2021 provisions is that tribunal oversight of the process is delayed until *after* the point at which a reference number has been issued. By the time an appeal is heard, the reference number will have already been issued, advisers may have already been named and the "damage may have already been done". As well as being delayed, tribunal oversight is also more limited. Under section 306A FA 2004 the tribunal has discretion as to whether to give an order. However, under section 311B FA 2004 an appeal can only be made on specific grounds. Given that the application of section 311(3)(c) FA 2004 is subjective, in some cases the writers suspect the tribunal may feel that the only question that it may consider is whether HMRC had reasonable grounds for suspecting that the arrangements or proposal are notifiable under section 310D(1)(b) FA 2004. This is not a particularly high threshold for HMRC to meet.

The new information powers in FA 2021 also extend to any person that HMRC reasonably suspect to be "involved in the supply" of arrangements or proposed arrangements.[57] Such persons are also subject to the "naming" provisions in section 316C FA 2004. The concept of persons "involved in the supply" is broad and could capture people who are only tangentially or unknowingly involved in the supply chain. These powers could also theoretically be used to target persons with insubstantial roles in transactions, even if there is an obvious promoter that could be approached.

In the writers' view the original aims of HMRC could have been achieved while maintaining better safeguards for advisers and taxpayers. HMRC could have considered 1) stronger enforcement of, or amendments to, section 306A FA 2004, 2) introducing harsher penalties for failure of promoters to provide information without bringing forward the time at which a reference number is issued, or 3) made the FA 2021 changes but provided for more meaningful tribunal oversight at an earlier stage. Once again, much weight will be placed on HMRC's use of these powers in practice.

Schedule 31 FA 2021 makes changes to the DASVOIT regime that are substantially the same as the changes to DOTAS described above.[58]

(3) Section 123: penalties for enablers of defeated tax avoidance

Prior to FA 2021 HMRC's concern with the penalties for enablers regime[59] was that it took too long for penalties to be imposed in respect of multi-user schemes[60] and for the enablers of such schemes to be named. Due to an error in the original drafting of the legislation, prior to FA 2021

[56] FA 2004 s.306A(3).
[57] FA 2004 s.310D(5) inserted by FA 2021 s.122 and Sch.31, para.5.
[58] F(No.2)A 2017 Sch.17 amended by FA 2021 s.122 and Sch.31, paras 19–41.
[59] F(No.2)A 2017 s.65 and Sch.16.
[60] i.e. a proposal for arrangements that is implemented more than once by a number of tax arrangements that are substantially the same as each other, per F(No.2)A 2017 Sch.16, para.21(1).

HMRC could only use their information powers under the regime[61] after a relevant scheme had been defeated.[62] FA 2021 introduced three changes:

1) Prior to FA 2021, a penalty could only be issued in respect of a multi-user scheme if HMRC reasonably believed that more than 50 per cent of multi-user schemes had been defeated.[63] Following FA 2021, a penalty can be issued in broadly two circumstances.[64] The first is where there is at least one tribunal or court defeat in respect of a multi-user scheme. A "defeat" broadly means that the First-tier Tribunal, the Upper Tribunal or a court has confirmed a counteraction. The legislation does not state what should happen if a counteraction is confirmed by the First-tier Tribunal but subsequently overturned by the Upper Tribunal (or in the situation where different tribunals or courts take different views on similar cases), nor does it provide for refunds of penalties in these situations. HMRC's July 2020 Consultation, *Tackling Promoters of Tax Avoidance*,[65] referred to provisions for refunds of penalties, but these were not included in the legislation. The second set of circumstances in which a penalty can be issued in respect of multi-user schemes is where the required number or percentage of relevant defeats is met. This introduces a tiered system for the required number or percentage of defeats depending on the number of related arrangements forming part of the multi-user scheme.
2) FA 2021 makes it easier for HMRC to name enablers of multi-user schemes. Prior to FA 2021, an enabler of a multi-user scheme could only be named where HMRC reasonably believed that defeats had been incurred in respect of all of the related arrangements forming part of the multi-user scheme. This additional requirement for multi-user schemes has been removed by FA 2021, so that the usual rules for naming enablers set out in paragraphs 46 to 48 of Schedule 16 F(No.2)A 2017 apply.[66]
3) FA 2021 corrects the errors in the underlying legislation to ensure that HMRC can use Schedule 36 FA 2008 powers to obtain information needed to investigate the arrangements and in particular the identities of enablers.[67]

(4) Section 124 and Schedule 32: the GAAR and partnerships

Prior to FA 2021 there was some ambiguity regarding the application of the GAAR to partnerships and a potential tension between the operation of the GAAR and the general partnership taxation framework. This was largely in terms of the level at which the GAAR counteraction was effected.

[61] F(No.2)A 2017 Sch.16, para.40.
[62] This is discussed and acknowledged in HMRC, *Tackling Promoters of Tax Avoidance: Consultation* (21 July 2020), para.6.2.
[63] F(No.2)A 2017 Sch.16, para.21, prior to FA 2021 amendments.
[64] New Conditions 1 and 2 in F(No.2)A 2017 Sch.16, para.21 inserted by FA 2021 s.123(2)(c). Note that para.21 does not apply if a user of the multi-user scheme has itself suffered a tribunal or court defeat.
[65] HMRC, *Tackling Promoters of Tax Avoidance: Consultation* (21 July 2020), para.6.20.
[66] FA 2021 s.123(8).
[67] See amendments to F(No.2)A 2017 Sch.16, para.40 made by FA 2021 s.123(4).

FA 2021 amends the GAAR so that the counteraction takes place at the partnership level, with amendments made to the partnership return. This counteraction of the identified tax advantage would then apply for each partner.

HMRC and the GAAR panel would deal with the representative partner, who would be responsible for making representations.[68] Corrective action may be taken at the partnership level, or at the level of the individual partners.[69] In the latter case, this is done by the relevant partner taking all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the tax advantage.

The GAAR penalty would be calculated at the partner level (60 per cent of each partner's counteracted tax advantage)[70] but appeals may only be made by the responsible partner.[71]

Simon Skinner[*] and Hugh Brooks[**]

[68] e.g. FA 2013 Sch.43D, paras 4, 5, 7 and 10 inserted by FA 2021 s.124 and Sch.32, para.1.
[69] e.g. FA 2013 Sch.43D, para.7 inserted by FA 2021 s.124 and Sch.32, para.1.
[70] FA 2013 s.212B inserted by FA 2021 s.124 and Sch.32, para.8.
[71] FA 2013 Sch.43C, para.9(1A) inserted by FA 2021 s.124 and Sch.32, para.13(9).

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