

DOTAS: VAT

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Draft Legislation

- Finance Bill 2017 clause 66 & schedule 17
 - Published on 8 September 2017
- Indirect Taxes (Notifiable Arrangements) Regulations 2017
 - Published on 20 March 2017
- Indirect Taxes (Disclosure of Avoidance Schemes) Regulations 2017
 - Published on 20 March 2017

An Everyday Transaction

- X bought a commercial building in 2005
- It opted to tax the building in 2005
- The whole of the building was let to Y in February 2016
- X sells the building to Z in February 2018 (subject to the lease to Y)
- Z opts to tax the building (and notifies HMRC of the making of the option) before completion

Is DOTAS: VAT relevant?

- Is there a notifiable arrangement?
 - Does the transaction fall within the Notifiable Arrangements Regulations?
 - If so, does the arrangement enable the obtaining of a VAT advantage?
 - If so, is that a main benefit of the arrangement?
 - If so, is the arrangement excluded by virtue of transitional provisions?
- If there is a notifiable arrangement, who notifies?

Notifiable Arrangements Regulations I

- Confidentiality – promoters (Reg 10)
 - “It might reasonably be expected, were it not for this regulation, that a promoter of the arrangement would wish after the material date that -
 - (a) the arrangement; or
 - (b) any element of the arrangement which obtains, or which may obtain, a tax advantage,
 - be kept confidential from HMRC or another promoter.”
- Confidentiality – other persons (Reg 11)
- Premium fees (Reg 12)
 - “It might reasonably be expected, were it not for this regulation, that a promoter (“P”) of the arrangement or another person (“Q”) would be able to obtain a premium fee in relation to -
 - (a) the arrangement; or
 - (b) any element of the arrangement which obtains, or which may obtain, a tax advantage.”

Notifiable Arrangements Regulations II

- Standardised tax products (Reg 13)
 - “A promoter of the arrangement makes it available for implementation by more than one other person.
 - It might reasonably be concluded by a person who has studied the arrangement and who has had regard to all relevant circumstances that conditions 1 to 3 are met.”

Notifiable Arrangements Regulations III

- Standardised tax products (Reg 13) (cont'd)
 - Condition 1 – “the arrangement has standardised or substantially standardised documentation
 - (a) the purpose of which is to enable a person other than the promoter to implement the arrangement;
 - (b) the form of which is determined by the promoter; and
 - (c) the substance of which does not need to be tailored to any material extent to enable a person to implement the arrangement.
 - Condition 2 –
 - “(a) a person who intends to implement the arrangement must enter into a specific transaction or series of specific transactions; and
 - (b) the transaction or series of transactions is standardised or substantially standardised in form.”
 - Condition 3 –
 - “(a) the main purpose of the arrangement is to enable a person to obtain a tax advantage; or
 - (b) it is unlikely that a person would enter into the arrangement were it not that the person or another person may obtain a tax advantage.”

Notifiable Arrangements Regulations IV

- Retail supplies – splitting and value shifting (Reg 4)
 - Two supplies
 - Retail customer (C)
 - Condition 1 or 2 + 3 are met
- Condition 1
 - Positive-rated if one supply (or part of single supply)
 - At least one is not standard rated (if exempt, not IPT higher-rated)
- Condition 2
 - Exempt if one supply (or part of single supply)
 - At least one is taxable

Notifiable Arrangements Regulations V

- Retail supplies – splitting and value shifting (Reg 4) (cont'd)
 - Condition 3 – “reasonable to conclude” two or more of following apply:
 - “(a) C would not agree to receive supply 1 without also agreeing to receive supply 2;
 - (b) where supply 2 is made to C by B, B makes the supply with the agreement of A;
 - (c) supply 1 and supply 2 would be made as a single supply or part of a single supply to C were it not for a VAT advantage which is obtained, or which may be obtained, by making those supplies separately to C;
 - (d) the business model of A or B (or both) assumes that –
 - (i) only A will make supply 1 to C;
 - (ii) only A or B (as the case may be) will make supply 2 to C; and
 - (iii) the agreements to make supply 1 and supply 2 will be entered into with C at or about the same time;
 - (e) of supply 1 and supply 2, at least one is dependent on the other;
 - (f) were supply 1 and supply 2 made as a single supply or part of a single supply to C, that supply would be made at or about the same price as the price of both supply 1 and supply 2 are made to C
 - (g) a higher profit is generated from whichever of supply 1 or supply 2 is the supply which obtains the greater VAT advantage.”

Notifiable Arrangements Regulations VI

- Offshore supplies – insurance and finance (Reg 5)
 - D carries on business in the UK
 - E belongs outside the EU
 - F belongs in the EU
 - D makes a supply to E of ordinarily exempt insurance or financial intermediary services
 - E makes an ordinarily exempt supply to F
 - D-E supply enables E-F supply

Notifiable Arrangements Regulations VII

- Offshore supplies – relevant business persons (Reg 6)
 - G carries on business in the UK
 - H belongs outside the EU
 - I belongs in the EU
 - H is a “relevant business person” (taxable person receiving supply otherwise than wholly for private purposes)
 - G makes an ordinarily positive-rated supply to H
 - H makes an ordinarily exempt supply to I or a supply to I made where H belongs
 - G-H supply enables H-I supply

Notifiable Arrangements Regulations VIII

- Option to tax – disapplication (Reg 7)
 - Opted capital item
 - Less than 20 years since effective date
 - Transaction in relation to capital item and:
 - option is disappplied; or
 - transaction is TOGC

VAT Advantage

- Schedule 17 para 6
 - “A person (P) obtains a tax advantage in relation to VAT if –
 - (a) in any prescribed accounting period, the amount by which the output tax accounted for by P exceeds the input tax deducted by P is less than it would otherwise be;
 - (b) P obtains a VAT credit when P would otherwise not do so, or obtains a larger credit or obtains a credit earlier than would otherwise be the case;
 - (c) in a case where P 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;
 - (d) in any prescribed accounting period, the amount of P’s non- deductible tax is less than it otherwise would be;
 - (e) P avoids an obligation to account for tax.”
 - “A person who is not a taxable person obtains a tax advantage in relation to VAT if that person’s non-refundable tax is less than it otherwise would be.”

Excluded Arrangements

- Schedule 17 para 3(2)
 - “Arrangements ... are not notifiable arrangements if they implement a proposal which is excluded from being a notifiable proposal by sub-paragraph (4).”
- Schedule 17 para 3(4)
 - “... not a notifiable proposal if any of the following occur before 1 January 2018 –
 - (a) a promoter first makes a firm approach to another person in relation to the proposal,
 - (b) a promoter makes the proposal available for implementation by any other person, or
 - (c) a promoter first becomes aware of any transaction forming part of arrangements implementing the proposal.”

Who notifies?

- Promoter
 - Schedule 17 paras 11 & 12
- Where there is no UK-resident promoter
 - Schedule 17 para 17
- Where a person “enters into any transaction forming part of notifiable arrangements as respects which neither that person nor any other person in the United Kingdom is liable to comply with paragraph 11(1), 12(1) or 17(2)”
 - Schedule 17 para 18

Who is a promoter?

- Schedule 17 para 8
 - Notifiable proposal
 - Relevant business
 - P -
 - “(a) is to any extent responsible for the design of the proposed arrangements,
 - (b) makes a firm approach to another person (C) in relation to the proposal with a view to P making the proposal available for implementation by C or any other person, or
 - (c) makes the proposal available for implementation by other persons.”
 - Notifiable arrangements
 - P = (b) or (c) promoter in relation to relevant notifiable proposal, or
 - Relevant business, and
 - “P is to any extent responsible for -
 - (i) the design of the arrangements, or
 - (ii) the organisation or management of the arrangements.
 - Relevant business
 - “... any trade, profession or business which –
 - (a) involves the provision to other persons of services relating to taxation, or
 - (b) is carried on by a bank or securities house.”

Who is not a promoter?

- Disclosure of Avoidance Schemes Regulations 2017
 - Reg 3 – same corporate group
 - Reg 4 – employee
 - Reg 5 – legal professional privilege
 - Reg 6 – would-be promoter but:
 - “G, in the course of providing tax advice, is not responsible for the design of any element of the notifiable proposal or notifiable arrangement from which the tax advantage expected to be obtained arises.”
 - “G –
 - (a) in the course of a relevant business ... is to any extent responsible for the design of the notifiable proposal or notifiable arrangement; but
 - (b) does not provide tax advice in the course of carrying out G’s responsibilities in relation to the notifiable proposal or notifiable arrangement.”
 - “G –
 - (a) is not responsible for the design of all the elements of the notifiable proposal or notifiable arrangement from which the tax advantage expected to be obtained arises; and
 - (b) could not reasonably be expected to have sufficient information as would enable G –
 - (i) to know whether or not the proposal or the arrangement is a notifiable proposal or a notifiable arrangement; or
 - (ii) to comply with [the notification requirements].”

Where does DOTAS: VAT leave VADR?

- Clause 66(2)
 - In consequence of [DOTAS: VAT], section 58A of, and Schedule 11A to, VATA 1994 (disclosure of VAT avoidance schemes) cease to have effect to require a person to disclose any scheme which –
 - (a) is first entered into by that person on or after 1 January 2018,
 - (b) constitutes notifiable arrangements under [DOTAS: VAT],
 - (c) implements proposals which are notifiable proposals under [DOTAS: VAT].
- Clause 66(3)
 - No scheme or proposed scheme may be notified to the Commissioners under paragraph 9 of Schedule 11A to VATA 1994 (voluntary notification of schemes) on or after 1 January 2018.