

OLD SQUARE TAX CHAMBERS  
THE GAAR, DOTAS AND ACCELERATED PAYMENTS NOTICES  
RECENT DEVELOPMENTS IN LEGISLATION, CASE LAW AND HMRC PRACTICE  
SEMINAR JANUARY 30<sup>TH</sup> 2018  
DEVELOPMENTS IN ACCELERATED PAYMENTS NOTICES - ROBERT VENABLES Q.C.

OLD SQUARE TAX CHAMBERS  
SEMINAR JANUARY 30<sup>TH</sup> 2018  
DEVELOPMENTS IN ACCELERATED PAYMENTS NOTICES  
ROBERT VENABLES Q.C.<sup>1</sup>

**DISCLAIMER:** neither the contents of these Notes nor of the talk which they are intended to accompany constitutes the giving of advice intended to be acted on without more. They constitute simply preliminary thoughts. Readers or hearers (and their clients) should take independent professional advice before acting or refraining from action.

**WARNING:** The speaker does not give any licence to any person to record and /or reproduce in any format (including sound and /or visual recording)

- (a) any Notes prepared in conjunction with this seminar;
- (b) the delivery of his talk or any response to any question or discussion at this seminar

or to make any epitome or transcript (in whatever format) based, in whole or in part, on any of the above. Any such unlicensed recording or reproduction or the making of any such epitome or transcript is a civil wrong and could well involve the commission of a criminal offence.

1. ACCELERATED PAYMENT NOTICES - RESUMÉ
  - 1.1 Legislation contained in Finance Act 2014 Part 4, especially Chapter 3.
  - 1.2 Conditions A, B and C must be satisfied.
    - 1.2.1 Condition A (tax enquiry or appeal) will not normally be problematic
    - 1.2.2 Condition B “that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular arrangements (“the chosen arrangements”)” has not been a problematic in any decided case HOWEVER one of the grounds of attack in the Jameson Carter Ltd Judicial Review Proceedings is that Condition B not complied with.
    - 1.2.3 Condition C can be satisfied in one of three ways, which broadly are:
      - 1.2.3.1 (a) HMRC has given the taxpayer a “follower notice”
      - 1.2.3.2 (b) the chosen arrangements are “DOTAS arrangements”

---

<sup>1</sup> Chairman of the Revenue Bar Association 2001-05, Bencher of the Middle Temple, Fellow of the Chartered Institute of Taxation, Chartered Tax Adviser, (Council Member 1999- 2011), TEP. Author of Non-Resident Trusts (9<sup>th</sup> edition forthcoming), The Taxation of Trusts 2010 (published by Key Haven June 2010, new edition with Oliver Marre entitled The Taxation of Trusts 2018 in preparation) The Taxation of Foundations (published by Key Haven 2010), Inheritance Tax Planning and numerous other works on trusts and tax. Senior Q.C. of Old Square Tax Chambers, Lincoln’s Inn.

OLD SQUARE TAX CHAMBERS  
**THE GAAR, DOTAS AND ACCELERATED PAYMENTS NOTICES**  
**RECENT DEVELOPMENTS IN LEGISLATION, CASE LAW AND HMRC PRACTICE**  
SEMINAR JANUARY 30<sup>TH</sup> 2018  
DEVELOPMENTS IN ACCELERATED PAYMENTS NOTICES - ROBERT VENABLES Q.C.

1.2.3.3 (c) a GAAR counteraction notice has been given in relation to the asserted advantage and at least or two members of the GAAR Advisory Panel (“the GAP”) agreed that the entering into the tax arrangements was not a reasonable course of action.

#### 1.2.4 HMRC Practice to Date

All the initial accelerated payment notices were based on Condition C(b) (DOTAS arrangements).

My prediction is that, following the changes effected by Finance Act 2016, HMRC will now concentrate on relying on Condition C(c) (a GAP opinion). See further section XXX.

### **2 *Rowe v HMRC and Vital Nut Ltd v HMRC* Court of Appeal December 12th 2017**

#### 2.1 Core Facts

##### 2.1.1 *Rowe*

The applicants had participated in “schemes” established by Ingenious Media PLC. These schemes involved film partnerships. The schemes were in fact disclosed under DOTAS. It was claimed that the partnerships of which the applicants were members carried on a trade and had sustained losses in the trade and that each applicant’s share of losses could make claims (as they had done) to set that share against income of the current or a prior tax year or to carry it forward against specified profits of a later year.

##### 2.1.2 *Vital Nut*

Vital Nut made contributions to an offshore trust which qualified as an employer-finance retirement benefit scheme. The dispute was whether the contributions were immediately deductible in computing its taxable profits for corporation tax purposes or whether immediately deductibility was denied on account of statutory rules which I call the Employee Benefit Contribution Rules.

#### 2.2 Arguments for the Applicants / Taxpayers

A whole plethora of arguments were deployed, some of which were rightly rejected.

Some of the arguments resulted in important pro-taxpayer statements by the Court of Appeal, even though, for special reasons, they did the applicants no good, as their appeals were dismissed.

#### 2.3 What was NOT Argued for the Applicants / Taxpayers

##### 2.3.1 Were there “Chosen Arrangements”

In neither case was it argued that the purported accelerated payment notices were void on the basis that Condition B (contained in Finance Act 2014 section 219(3)) was not satisfied. Condition B is that “the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular arrangements

OLD SQUARE TAX CHAMBERS  
**THE GAAR, DOTAS AND ACCELERATED PAYMENTS NOTICES**  
**RECENT DEVELOPMENTS IN LEGISLATION, CASE LAW AND HMRC PRACTICE**  
SEMINAR JANUARY 30<sup>TH</sup> 2018  
DEVELOPMENTS IN ACCELERATED PAYMENTS NOTICES - ROBERT VENABLES Q.C.

(“the chosen arrangements”).”

### 2.3.1 Were the “Chosen Arrangements” “DOTAS Arrangements”?

In each case, the accelerated payment notice(s) were further based on the chosen arrangements being “DOTAS arrangements”,<sup>2</sup> in this context, in effect “notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004”.<sup>3</sup>

In neither case was it argued that the “chosen arrangements” relied on were not “DOTAS arrangements”, which would have been enough in itself to render the purported accelerated payment notices void. In particular, the Court of Appeal clearly considered that the arrangements involved “tax avoidance”.

### 2.5 The Determination Which Must Be Made by the Designated HMRC Officer

Any accelerated payment notice must specify an amount of tax equal to the amount determined by a HMRC officer “to the best of his information and belief”. In effect, that is the amount of tax which he considers is due and which the taxpayer considers is not due.

The Court of Appeal overruled a High Court decision and held that the designated HMRC officer must be positively satisfied that the amount is due.

This is reinforced by the next point.

### 2.6 The Natural Justice Point

The Court of Appeal held that the requirements of natural justice, at least the right to be know the case against one and to make representations, were implied in the procedure of issuing accelerated payment notices and even, it seems, of the designated HMRC officer making the preliminary determination.

It seems that natural justice comes in at three stages

- when the designated HMRC officer is considering making his determination;
- when an officer is considering issuing an accelerated payment notice
- when the decision is being reviewed

Unsatisfactory part of the judgment - appeal dismissed because the taxpayers fully knew the case against them.

### 2.7 The Human Rights Convention Article 6 Point (Right to a Fair Trial)

Argument rejected yet argument very brief.

### 2.8 The Human Rights Convention Article 1 Protocol 1 Point (Protection of Property)

---

<sup>2</sup> Finance Act 2014 section 219(4)(b).

<sup>3</sup> Finance Act 2014 section 291(5)(a).

OLD SQUARE TAX CHAMBERS  
**THE GAAR, DOTAS AND ACCELERATED PAYMENTS NOTICES**  
**RECENT DEVELOPMENTS IN LEGISLATION, CASE LAW AND HMRC PRACTICE**  
SEMINAR JANUARY 30<sup>TH</sup> 2018  
DEVELOPMENTS IN ACCELERATED PAYMENTS NOTICES - ROBERT VENABLES Q.C.

Per McCombe LJ:

“Three issues arise: (1) Is the Article engaged at all, in this case, by interfering with the "peaceful enjoyment of ...possessions"? (2) If so, is the interference with possessions "provided for by law" and (3) Is the interference "proportionate"?"

The taxpayers had to show that (1) was satisfied and that either (2) or (3) were not.

McCombe LJ’s view on the first hurdle.

The Court took the view the applicants failed on the third hurdle. But then their arguments were so limited.

### **3 Accelerated payment notices and Pooling and Binding Notices**

#### **3.1 HMRC’s Perceived Strategy**

Issue proposed GAAR counteraction notices to a number of taxpayers

Find a case where the taxpayer has either failed to make proper representations or has made hopeless ones [very easy indeed]

Refer the matter to the GAAR Advisory Panel

Obtain a favourable Opinion

Create a tax pool by issuing a pooling notices and then issue binding notices

Rely on one or other of the two new methods of satisfying Condition C

“(d) a notice has been given under paragraph 8(2) [relates to a pool notice] or 9(2) [relates to a binding notice] of Schedule 43A to FA 2013 (notice of final decision after considering Panel's opinion about referred or counteracted arrangements) in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel about the other arrangements (see subsection (8)) was as set out in paragraph 11(3)(b) of Schedule 43 to FA 2013;

“(e) a notice under paragraph 8(2) of Schedule 43B to FA 2013 (GAAR: generic referral of tax arrangements) has been given in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel which considered the generic referral in respect of those arrangements under paragraph 6 of Schedule 43B to FA 2013 was as set out in paragraph 6(4)(b) of that Schedule.”

#### **3.2 Judicial Review?**