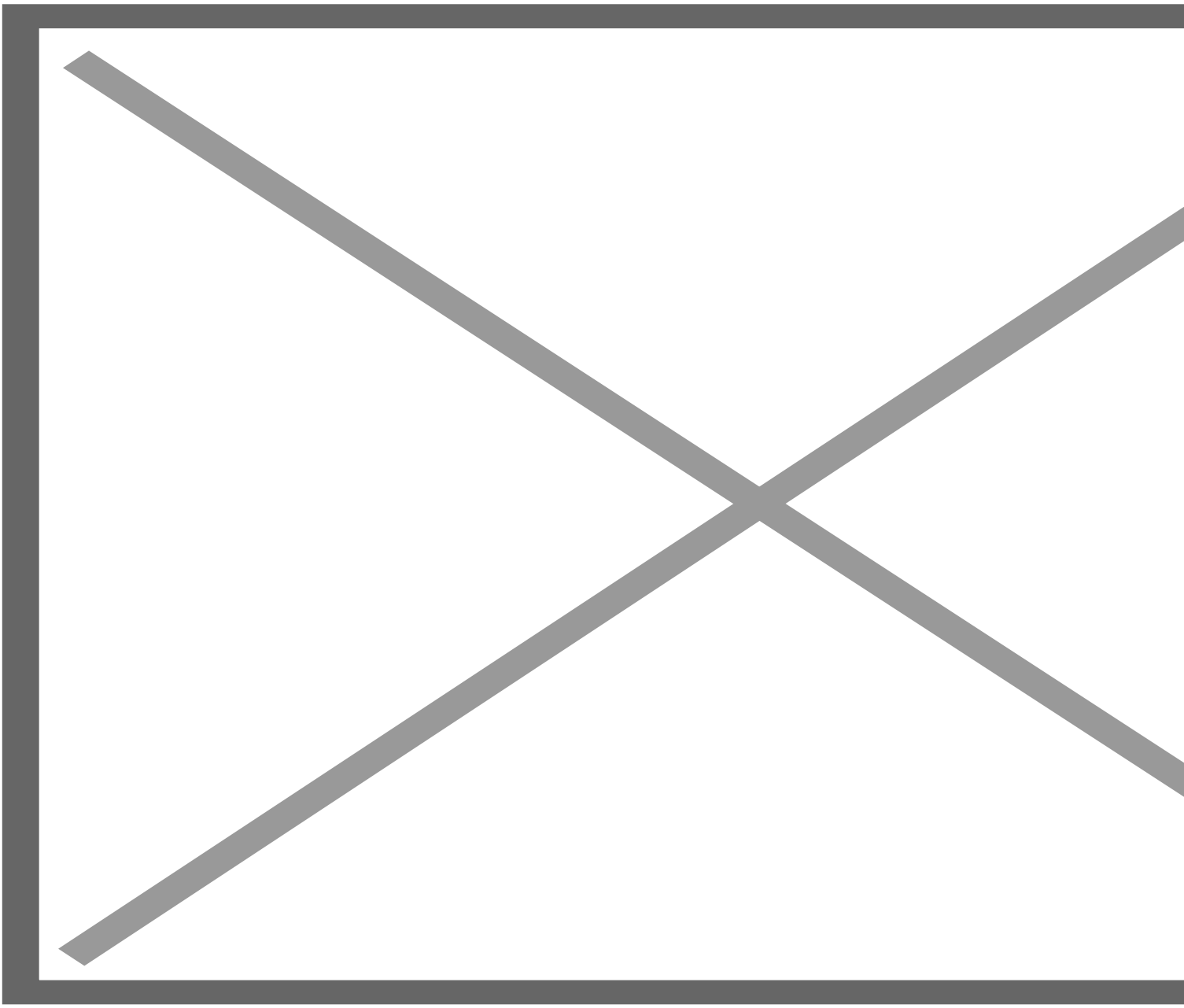
Disclosure of tax planning – DASVOIT

Indirect Tax | Tax voice



07 March 2018

Chris Lallemand reviews the changing face of the indirect taxes disclosure regime

The DASVOIT (disclosure of avoidance schemes for VAT and other indirect taxes) rules came into effect on 1 January 2018, replacing the previous VAT avoidance disclosure rules (VADR), which is now in run off.

In broad summary DASVOIT revises the list of disclosable VAT schemes, extends disclosure to other indirect taxes and extends the obligation to disclose from users to include promoters.

Taxpayers and their advisers will be considering how to practically manage their disclosure obligations. As the final regulations and HMRC guidance were only issued in December 2017 there will not have been much time to devise procedures to manage these obligations.

The legislative drafting and HMRC's guidance leave the interpretation of certain terms open to judgement, potentially generating uncertainty in their application. The impact of any widening of scope, however, may be tempered, at least initially, by the grandfathering rules.

Both VADR and DASVOIT have 'avoidance schemes' in the title (as, of course, does the direct tax 'disclosure of tax avoidance schemes' or DOTAS rules) but the reference is indirect. The legislative conditions triggering a disclosure require a 'tax advantage' to be present, and do not refer to 'avoidance'. For direct tax this distinction was highlighted in the recent case of *Carlton* and others (see [2018] EWHC 130 (Admin)). A more accurate title for the disclosure rules would have been 'Disclosure of tax advantage schemes…'.

Interestingly, with respect to the design of disclosure rules, the OECD's BEPS Action 12 report suggested countries must decide which schemes require notification for early warning of aggressive of abusive tax planning schemes, but that a reportable scheme does not have to involve tax avoidance. It also provided disclosure regime design principles of:

1. being clear and easy to understand;
2. balancing additional taxpayer compliance costs with benefits to the administration; and
3. effectiveness in achieving policy objectives in identifying relevant schemes.

This article critically examines the DASVOIT rules in the light of these principles.

Notifiable arrangements

In DASVOIT, a notifiable arrangement (where the term *arrangement* is broadly defined) is one which meets the following three conditions:

1. Falling within a prescribed hallmark;
2. Enables, or might be expected to enable, any person to obtain an advantage in relation to VAT or other specified indirect tax;
3. Such that the, or a, main benefit arising from the arrangement is the obtaining of that VAT or indirect tax advantage.

Whereas under VADR it was necessary for a scheme to have a main purpose of obtaining a tax advantage, it is now only necessary for a main benefit of the arrangement to be the obtaining of the tax advantage. In other words, a 'purpose' in this respect is no longer required, but a benefit is. Tax advantage is defined in a similar manner as for VADR. Under DASVOIT a tax advantage in relation to VAT (F(No2)A 2017 Sch17 para 6) is described as one of:

- A reduction in the amount by which output tax exceeds input tax in any prescribed accounting period;
- Where a larger VAT credit is obtained than would otherwise be the case (or be obtained earlier than otherwise);
- An increase in the length of time between when a consumer recovers input VAT compared to the supplier accounting for the corresponding output VAT, than would otherwise be the case;

- A reduction in the amount of non-deductible input VAT;
- Avoiding an obligation to account for tax;
- A non-taxable person can obtain a VAT advantage where their non-refundable tax is less than it would otherwise be.

A slightly different definition applies for other indirect tax advantages.

The removal of the 'main purpose' rule and the requirement to consider each registration and VAT period separately, means that even where the requirement to account for output VAT is advanced (a disadvantage to the supplier), a VAT advantage can arise for the recipient of the supply. Whether this means a main benefit of the VAT advantage is obtained as a result, may be open to greater uncertainty. Nevertheless, the language of 'main benefit' is consistent with the direct tax disclosure rules.

Grandfathering rules

There are grandfathering provisions (F(No2)A 2017 Sch17 para 3(4)) such that no disclosure is required under the new rules where one of the following occurs before 1 January 2018:

- A promoter has made a firm approach to another person in relation to the proposal; or
- A promoter makes the proposal available for implementation by any other person; or
- The promoter first becomes aware of any transaction forming part of the arrangements implementing the proposal.

With respect to grandfathering, VAT Notice 799 section 2.4 comments "*HMRC will interpret the rules to apply where arrangements are the same or substantially the same as those previously made available or implemented* ". This part of the guidance does not have the force of law but might create an expectation it could be relied on if one can determine and apply what is meant by 'substantially the same'.

VAT Notice 799 section 8.2.3 gives HMRC's view of what 'substantially the same' means in the context of whether more than one promoter needs to disclose a particular arrangement. It comments:

- What constitutes a change in arrangements, so they are no longer substantially the same, is a matter which will need to be considered on each occasion;
- Arrangements are not substantially the same if the effect of any change would make a previous disclosure misleading (no further guidance is provided on what 'misleading' might be) in relation to the second (or subsequent) occasion;
- Where arrangements are changed to deal with changes in the law or accounting treatment, or where changes result in a different tax outcome, they will not be regarded as substantially the same as the previous arrangements.
- Special care must be taken, where an existing tax product is used as part of otherwise bespoke arrangements, to consider whether the resulting arrangements are so different from the earlier planning idea that the disclosure position needs to be considered afresh.

Whether this is valid for interpreting the grandfathering rule is not clear, however, given the source there is a strong argument in favour.

The grandfathering provisions are open to anyone within the scope of DASVOIT. To be sure they apply, however, evidence of the involvement of a 'promoter' in one of the three grandfathering conditions is required. Anyone intending to take advantage of these provisions will be well advised to retain evidence at an early stage.

Transition

If the grandfathering rules apply, does that mean disclosure under Sch11A VATA 1994 (VADR) still needs to be considered, even for arrangements entered into on or after 1 January 2018? F(No2)A 2017 s.66 provides that disclosure under VADR is not required where all the following conditions are met:

- the scheme is first entered into on or after 1 Jan 2018
- it constitutes a notifiable arrangement under F(No2)A 2017 Sch17
- implements proposals which are notifiable under F(No2)A 2017 Sch17

Grandfathered arrangements excepted from DASVOIT disclosure are not notifiable arrangements. Whilst, F(No2)A 2017 s.66 does not clearly indicate whether the above three options should be considered together or separately, HMRC has confirmed to me by email that only one of the above three conditions needs to be met to prevent disclosure under VADR.

The hallmarks

The hallmarks noted below are set out in the regulations and described in HMRC's guidance:

- Four VAT arrangements:
    - retail schemes (splitting and value shifting);
    - offshore supplies (insurance and finance);
    - offshore supplies (relevant business person);
    - Options to tax land.
- Four arrangements applicable to any of the listed indirect tax (including VAT):
    - Confidentiality promoters;
    - Confidentiality other persons (does not apply to SMEs);
    - Premium fees;
    - Standardised tax products.

This article does not go into the detail of each hallmark, but some possible areas of uncertainty with the regulations and HMRC guidance are worthy of note.

Confidentiality

Looking at the confidentiality hallmark there are some differences with the corresponding hallmark for DOTAS.

For the DOTAS hallmark concerning confidentiality where there are no promoters (SI 2006/1543 reg 7(1)), one must satisfy all of subparagraphs (a) to (e) to be within the hallmark. This includes (d) a desire to keep matters confidential from HMRC and (e) having a specified reason for keeping it confidential (which includes repeated use). Confidentiality where promoters are involved has a similar provision (SI 2006/1543 reg 6(2)) prescribing arrangements where a reason for keeping them confidential from HMRC is to facilitate their repeated or continued future use.

In contrast, DASVOIT assumes there is an intention to keep something confidential from HMRC (or another promoter) where the promoter or user intends to continue or repeat the use of the arrangement in the future (2017/1216 reg 9 where promoters are involved and reg 11 where no promoters are involved). No reason is necessary in the legislation. HMRC has clarified that they will interpret these regulations as requiring a reason for the continued or repeated use (see also VAT Notice 799 sections 7.2.2, 7.2.5 and 7.3.2). These sections of the

guidance are also instructive on how HMRC will assess whether a non-disclosure breaches the disclosure rules.

Retail Schemes

Although the retail schemes hallmark is headed ‘splitting and value shifting, the hallmark does not actually require any splitting of supplies to apply. If the specified circumstances are met (without splitting supplies), the hallmark is met, necessitating a need to consider whether obtaining a tax advantage was a main purpose, in order to determine if disclosure is required. There are some exceptions to the application of that hallmark in the case of certain zero-rated building supplies to cater for the disabled, yet they do not include all such supplies listed for zero rating in VATA 1994 Sch8 group 12.

Standardised products

The examples in notice 799 leave further questions unanswered. The standardised products hallmark example at section 7.5.8 indicates that the use of a clause in a business sale agreement for the purchaser to enter into an option to tax buildings – in order to ensure the sale of an opted building is treated as a TOGC, is not within the hallmark where it is not the main purpose of the arrangement. This type of arrangement may well be grandfathered (assuming one can identify appropriate evidence), but may be used to illustrate how the hallmark applies in non-grandfathered situations. However, when asked how this would apply in a situation where separate tax advice is taken that may result in a transaction being altered to accommodate a more favourable VAT treatment, HMRC were unwilling to extend the range of examples to illustrate how this hallmark applies.

Offshore supplies

Both the ‘insurance and finance’ and ‘relevant business person’ DASVOIT hallmarks require that a UK person routes a supply to a non EU person, that then results in a supply back to an EU person. There is no requirement that the final recipient has to be in the UK. It will be interesting to see how relevant these hallmarks are to supplies with an ultimate UK recipient, once the UK has left the EU.

Conclusions

It is evident that judgement will need to be exercised when applying these rules. Attitudes to tax planning will change over time, so it will be crucial to have appropriate evidence on file for judgements made in applying the disclosure rules. As the legislation and guidance point out (for example see the DASVOIT guidance section 13), the penalties for non-compliance can be severe.

It will be interesting to see what level of disclosure is prompted by these new provisions, and what use HMRC makes of them.

The above narrative, in my view, indicates some doubt as to whether legislation for DASVOIT and the transition to it from VADR meet the OECD BEPS Action 12 report design principles.

Now that the VAT and indirect tax disclosure rules are structured in a similar fashion to the taxes covered by DOTAS, one might wonder why the disclosure deadline is different. This is 30 days after the trigger point for indirect tax in many cases, compared to 5 days under DOTAS. Might the DOTAS disclosure deadlines be aligned to those for indirect tax?

Perhaps a more fundamental redesign of the disclosure rules is needed. With increasing digitisation and regular information already flowing in to HMRC, it is not impossible to imagine that computer analysis of the data can

identify trends in declaration of tax and the possible reasons for differences from the norm for any submission. That might reduce the need for ‘avoidance’ scheme disclosure to those arrangements achieving a tax advantage above a certain threshold, and that have particular aggressive or abusive characteristics. It might then be easier to design a compliance and enforcement regime more clearly identified with the type of arrangements the Government wishes to discourage, while at the same time making compliance simpler.