



How can you rescue a client with a disclosure problem under DOTAS?

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1. Overview

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1. Overview
2. DOTAS: The Basics
3. DOTAS Case Study 1
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2. DOTAS: The Basics

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Objectives

To obtain early information about tax arrangements & how they work

To obtain information about who has used those tax arrangements

2. DOTAS: The Basics

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Hallmarks

1. & 2.
Confidentiality

3.
Premium Fee

5.
Standardised
Tax Products

6.
Loss Schemes

7.
Leasing
Arrangements

8.
Employment
Income

9.
Financial
Products

Inheritance Tax

2. DOTAS: The Basics

- Disclosure obligation usually falls on a “Promoter”.
- Subject to certain exclusions, “Promoters” broadly include any person who, in the course of a relevant business:
 - Is responsible, to any extent, for the design of the proposed or actual arrangements (“a Design Promoter”);
 - Makes a firm approach to another person with a view to making the scheme available for implementation;
 - Makes a notifiable proposal available for implementation by another person;
 - Is responsible, to any extent, for the organisation or management of the scheme.

2. DOTAS: The Basics

- There are general exclusions from being a “Design Promoter”:
 - “Non-Adviser Test”
 - “Benign Test”
 - “Ignorance Test”
- The aim is to require only those “at the heart of” a scheme to make disclosures

2. DOTAS: The Basics

- Report must be made to HMRC within 5 business days of earlier of: -
 - Promoter making “firm approach” in relation to a notifiable proposal;
 - Notifiable proposal being made available for implementation;
 - Promoter first becoming aware of transaction implementing notifiable proposal.
- HMRC may allocate a scheme reference number (“SRN”)

2. DOTAS: The Basics

- Failures to report will result in penalties, e.g.:
 - Penalty of up to £600 per day for failure to disclose within time limits (or up to £1 million)
 - Employers may be liable for up to £5,000 per employee that they fail to disclose in their end of year report
 - Promoters may be liable for up to £5,000 for each client to whom you fail to give an SRN
 - Users of tax avoidance schemes who fail to report their SRN to HMRC may be liable for penalties of £5,000 (first instance), £7,500 (second instance) and £10,000 (thereafter).

2. DOTAS: The Basics

- If a disclosure is made, this may trigger the application of other regimes:
 - Accelerated Payments
 - High Risk Promoters
 - Serial Tax Avoidance
 - Restriction of reasonable care defence in defeated avoidance cases



Hallmark 9: Financial Products

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2. DOTAS: The Basics

- **Condition 1** - do arrangements include a specified financial product? AND
- Would it be reasonable to expect the informed observer to conclude:
 - **Condition 2** - the main benefit (or one of the main benefits) of including a specified financial product in the arrangements is to give rise to a tax advantage? AND
 - **Condition 3** - a specified financial product included in the arrangements contains at least one term which is unlikely to have been entered into by the persons concerned were it not for a tax advantage OR
 - **Condition 4** - the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.

3. DOTAS Case Study 1

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- Growth share structure implemented for a private limited company.
- Clauses linking A and B share participation such that:
 - the fullest possible amount paid out for B shares is limited by reference to an EBITDA cap; and
 - B shares receive CGT tax treatment.

3. DOTAS Case Study 1

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- **Condition 3** - is such a clause a term which is *“unlikely to have been entered into by the persons concerned were it not for the tax advantage”*?
- **Condition 4** - is such a clause *“an abnormal step without which the tax advantage could not be obtained”*?
- No - manner of allocation is affected by tax treatment but basic provision is a commercial term.

3. DOTAS Case Study 1

- HMRC has issued extensive guidance to the DOTAS Regulations.
- **Condition 3** - *“it is intended to identify financial products which include terms [which are] unlikely to be acceptable to anyone considering the acquisition of that financial product were it not for the tax advantage the product offers, either on its own or in combination with other financial products”.*

3. DOTAS Case Study 1

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- Tests for conditions two to four apply by reference to the hypothetical informed observer (having studied the arrangements and having regard to all relevant circumstances).
- Emphasis on the Promoter's expectations of the hypothetical informed observer.
- Emphasis on terms included to obtain a tax advantage rather than terms that are consistent with an overriding commercial objective.

3. DOTAS Case Study 1

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- **Condition 4** - *“Condition 4 is met when it would be reasonable to expect the hypothetical informed observer to conclude that the arrangements, in which the financial product or products are included, involve one or more contrived or abnormal steps without which the tax advantage could not be obtained”.*

3. DOTAS Case Study 1

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- The linking of shares increased the proportion of the return potentially benefitting from the tax advantage.
- However, the B Share tax advantage (i.e. CGT treatment) would have been obtained regardless.
- All relevant circumstances should be considered including the commercial rationale.

3. DOTAS Case Study 1

- EBITDA cap is commercial, rather than a step entered into to create a tax advantage or exploit a loophole.
- LTIP would not work without the cap.
- Applying *Furniss v Dawson* - it is not possible to analyse the transaction without the step including the cap and conclude that the same commercial result is needed.

3. DOTAS Case Study 1

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- HMRC guidance on interpretation of “*contrived or abnormal*” follows normal usage but HMRC adopts similar approach to the GAAR.
- Maximising the proportion of value delivered through the growth shares seeks to maximise the tax advantage but does not exploit loopholes or obtain tax advantages without a tax cost (i.e. tax symmetry maintained with the lack of corporate tax relief).

3. DOTAS Case Study 2

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- Private company with a new class of shares providing anti-dilution protection to ensure retention of 5% voting rights & nominal value by the Founder in order to preserve his ER entitlement.
- Two conditions met:
 - one of the main benefits of including a share or shares in the arrangements is to give rise to a tax advantage; and
 - the shares include a term which is unlikely to have been included by the persons concerned were it not for the tax advantage

3. DOTAS Case Study 2

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- Such arrangements have been widely implemented and used for a number of years. They are also known to HMRC.
- These arrangements are still likely to be used despite new ER rules designed to preserve ER on dilution of a shareholding below 5%.
- Nevertheless, DOTAS disclosure obligation triggered.

4. Key Points

- Broadly, terms included for a commercial purpose - rather than to obtain a tax advantage - should not trigger a disclosure obligation.
- Serious consequences of non-disclosure.
- The scope of the rules is increasing.
- Many lawyers don't consider themselves to be subject to DOTAS if they're only commenting on the structure.

5. Questions?

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