# Disclosure of tax avoidance schemes (DOTAS) – draft hallmark regulations

Inheritance Tax and trusts | Management of taxes

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CIOT comments on the draft hallmark regulations published by HMRC

The CIOT has commented on two sets of draft regulations recently published by HMRC that amend the descriptions of the arrangements (hallmarks) that have to be notified to HMRC under the DOTAS regime. The CIOT has serious concerns about how workable these sets of draft regulations will be in practice since they are very widely drawn.

DOTAS now has much more significant consequences than it used to, such as the link to accelerated payment notices and that it is used as a test in deciding whether someone is a fit and proper person to be a charity trustee. So we do not think it is acceptable or helpful for HMRC to cast the regulations so widely.

Given that the policy intention of the regime has changed so fundamentally since DOTAS was introduced in 2004, we suggest that the whole approach of the schemes should be rethought. Rather than trying to bring everything into DOTAS and then having specific carve-outs, it would be better to work out which areas are regarded as unacceptable tax avoidance and then frame the legislation to catch these.

We have always believed that DOTAS should be a fundamentally cooperative regime between HMRC and advisers, and there should be mutual interest in having a workable system. For the most part co-operation has prevailed since 2004. However, we think that there is now a danger that this cooperation will be eroded and the DOTAS regime will become unworkable.

We do not want a system that creates unreasonable and excessive burdens placed on the compliant majority, or one that generates too much uncertainty around whether a disclosure should be made. The risk is that the same promoters who do

not fully observe the DOTAS rules will continue to sidestep them while compliant advisers will have to devote additional time and resources to compliance to no real advantage to HMRC and at considerable cost to their clients.

## The Inheritance Tax (IHT) Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2015

The CIOT has serious concerns about these draft IHT regulations. The challenge in bringing IHT avoidance within DOTAS is to ensure that legitimate estate planning is not disclosable, but we think the regulations are much too widely drafted and may well catch what has until now been considered legitimate tax planning. Indeed, the regulations are so broadly drafted that DOTAS may need to be considered in relation to many gifts to family members which would not until now have been considered as IHT planning at all. It is clear to us that the regulations are too widely drafted from the very fact that a specific exclusion for something as commonplace as wills and codicils is necessary (see reg 3(2)).

The CIOT foresees that there will be much confusion about what transactions or arrangements need to be disclosed, and it is likely that HMRC will receive a large number of queries from practitioners and taxpayers, as well as many unnecessary disclosures. In which case, it is essential that HMRC will make resources available to deal with the increased correspondence.
The CIOT also points out that, by extending DOTAS to IHT, new issues arise that could cause initial difficulties in how DOTAS operates in this area. First, it brings in a new category of adviser who may well have no experience of DOTAS, namely high street solicitors; second, it begs the question of how DOTAS interacts with legal privilege. There is also the difficulty that there is no requirement currently to report lifetime cash gifts unless they are or become chargeable.

## The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2015

Standardised Tax Product hallmark: to distinguish the types of arrangements that will be caught by the removal of grandfathering from those that will not be caught, the CIOT suggests that a clear distinction is made between what is an acceptable use of precedents and what is not. It will be essential for HMRC to provide some unqualified examples of the sort of business transactions that they consider to be

non-disclosable.

Loss Schemes hallmark: it will be vital that this is properly targeted to ensure that genuine business start-ups are not caught. We think that widening the main benefit test will necessitate the provision of a specific safeguard.

New Financial Product hallmark: with the inclusion of ‘loan’ and ‘share’ in the list of financial products, it is essential that HMRC provide examples to help those applying the hallmark understand how the conditions will operate. The CIOT notes that it will be necessary for both HMRC and advisers to take a common sense approach to applying the new hallmark in order for the regime to be workable and not inhibit or delay commercial transactions and decision-making. The problems that the above definitions might cause in practice can be illustrated by some arrangements that include a specified financial product and might contain terms that are there solely due to the tax advantage.

The full text of the CIOT’s submissions can be found at these links:

Draft IHT hallmark regulations

Draft hallmark regulations