Draft FB 2015: protection of persons making voluntary disclosures

Technical

01 March 2015

The CIOT has commented on the proposed FA 2004 s 316A on the protection of persons making voluntary disclosures, or 'DOTAS whistle-blowers'. The proposed s 316A reads:

'No duty of confidentiality or other restriction on disclosure (however imposed) prevents the voluntary disclosure by any person to HMRC of information or documents which the person has reasonable grounds for suspecting will assist HMRC in determining whether there has been a breach of any requirement imposed by or under this Part.'

We are concerned that, as written, it is potentially very wide in its application. We are therefore unsure what circumstances it is meant to be aimed at.

In theory, almost any information or documents could assist HMRC in determining whether there has been a breach of DOTAS. Furthermore, the test is even wider because, even if the information does not assist HMRC, it will be met if the person reasonably believes that it will. We have questioned whether the test could be framed in a more targeted manner.

The provision, as it stands, covers a voluntary disclosure 'by any person', so it appears that this is not restricted to employees who may come across information during their employment. This gives us two specific concerns. First, there does not therefore seem to be any constraint on how the person in question obtained the information. It would be concerning, for example, if the provision offered specific protection to a person who had obtained the relevant information by theft. We have asked for clarification on this. Second, the legislation appears to override an employee's duty of confidentiality, but there does not appear to be any explicit protection for employers where employees have disclosed information to HMRC that

does not assist the department, but which the employee reasonably believes might do so. We would welcome specific protection from legal action for employers that are sued by clients because employees have released information in breach of the organisation's duty of confidentiality.

We have also suggested that it would be helpful if HMRC were to provide examples of the circumstances in which they envisage that information might be passed to them and explain their view of the legal consequences under the provision. We can see that this provision might be used by an employee of a promoter who may see something during their work that they feel uncomfortable about, and they have enough technical expertise to doubt that DOTAS has been complied with. The application of the provision in those circumstances seems clear. It would, however, be helpful if specific clarification could be given in respect of the application of non-disclosure agreements (NDAs). HMRC will be aware that occasionally clients are approached by promoters that will require them to sign an NDA. If paperwork is shared with the client's retained adviser, they are likely to be asked to sign the NDA too.

Before an adviser reported concerns about compliance with the DOTAS regime in this situation, they would want to be certain of their legal position vis a vis the promoter and their client. We think it unlikely that they could just rely on the wording of Clause 316A to protect them. This might therefore require them having to take legal advice and incur costs in doing so. It would certainly assist if HMRC could share their view of the likely legal position in this situation. It would also assist if HMRC explained how the provision would interact with legal privilege.

In summary, we believe that the legislation could be more tightly drafted and have put forward a number of suggestions to HMRC. As well as the requirement that the person must reasonably suspect that there has been non-compliance with DOTAS, we have suggested that:

- the person must reasonably suspect that the information disclosed does not, in substance, go beyond what is necessary to assist HMRC in determining the DOTAS position;
- the reasonableness of both beliefs should be judged against a person familiar with the DOTAS regime;
- we would expect the person to be lawfully in possession of the information; and

- it is likely that there would be more confidence in the process if disclosure was made via a dedicated channel for DOTAS whistle-blowers.

The CIOT’s response can be viewed www.tinyurl.com/p5vnscq