

**June 2006**

(With effect from 1<sup>st</sup> August 2006)

**GUIDANCE**

# **DISCLOSURE OF TAX AVOIDANCE SCHEMES**

**Income tax, Corporation Tax, Capital Gains Tax  
and Stamp Duty Land Tax**

**HM Revenue & Customs**

# CONTENTS

<b>1. INTRODUCTION</b>	<b>7</b>
1.1 What is this guidance about?	7
1.2 The status of this guidance	7
1.3 Effective date and superseded guidance	7
1.4 What's changed?	8
1.5 What law does this guidance cover?	8
1.5.1 Primary legislation	8
1.5.2 Secondary legislation	9
1.5.3 National Insurance contributions	9
1.5.4 Revoked legislation	9
1.6 Terminology	9
1.7 Help and advice	10
<b>2. AN OVERVIEW OF THE DISCLOSURE RULES</b>	<b>11</b>
2.1 Objectives	11
2.2 The effect of disclosure	11
2.3 Scope and summary of the disclosure rules	11
2.3.1 Scope	11
2.3.2 Summary: Income tax, corporation tax and capital gains tax	11
2.3.3 Summary: Stamp duty land tax	12
<b>3. WHO DISCLOSES HALLMARKED AND STAMP DUTY LAND TAX SCHEMES?</b>	<b>13</b>
3.1 General	13
3.2 Who is a promoter? (FA 2004, s.307)	13
3.3 Who is not a promoter?	14
3.3.1 The benign test (SI 2004/1865, para. 4(1) and (2))	14
3.3.2 The non-adviser test (SI 2004/1865, para. 4(1) and (3))	14
3.3.3 The ignorance test (SI 2004/1865, para. 4(1) and (4))	15
3.3.4 Corporate groups (SI 2004/1865, para. 2)	15
3.3.5 Organising and managing a scheme (SI 2004/1865, para. 5)	15
3.4 Schemes marketed by offshore promoters (FA 2004, s.309)	16
3.5 Schemes promoted by lawyers (FA 2004, s.310 and SI 2004/1865, para. 6)	16
3.6 Schemes with no promoter, including "in-house" schemes (FA 2004, s.310)	17

<b>4. DETERMINING A HALLMARKED SCHEME – FLOW CHART</b>	<b>18</b>
<b>5. DETERMINING A HALLMARKED SCHEME – THE TESTS</b>	<b>19</b>
5.1 Test 1: Are there arrangements that enable an IT, CT or CGT tax advantage be obtained? (FA 2004, s.306(1)(a) and (b))	19
5.1.1 Meaning of “arrangements” (FA 2004, s.318)	19
5.1.2 Meaning of “tax advantage” (FA 2004, s.318)	19
5.2 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))	20
5.3 Test 3: Is there a promoter of the arrangements? (SI 2006/1543, reg. 5(3))	20
5.4 Test 4: The hallmarks for arrangements where there is a promoter	21
5.5 Test 5: Is the person intended to obtain the advantage a large business? (SI 2006/1543, regs. 3 and 4)	21
5.6 Test 6: The hallmarks for ‘in-house’ arrangements	21
<b>6. THE HALLMARKS</b>	<b>22</b>
6.1 About the hallmarks	22
6.2 Hallmarks 1(a) and (b): Confidentiality where promoter involved	22
6.2.1 The legislation	22
6.2.2 Hallmark 1(a): Confidentiality from competitors	23
6.2.3 Hallmark 1(b): Confidentiality from HMRC	24
6.2.4 Hallmark 1(b): “Any element” of the arrangements	26
6.2.5 Hallmark 1(b): Confidential “at any time”	27
6.2.6 Hallmark 1(b): Repeated and continued use of the element	27
6.3 Hallmark 2: Confidentiality where no promoter involved	27
6.3.1 The legislation	27
6.3.2 Confidentiality from HMRC	28
6.3.3 The timing rule	29
6.4 Hallmark 3: Premium fee	29
6.4.1 The legislation	29
6.4.2 Applying the hallmark	30
6.4.3 Is the fee significantly attributable to, or contingent on, the advantage?	30
6.5 Hallmark 4: Off market terms	31
6.5.1 The legislation	31
6.5.2 About the hallmark	32
6.5.3 Test 1 – Is a financial product included in the tax arrangements?	33
6.5.4 Test 2 – Does the tax advantage arise to “more than an incidental degree” from the inclusion of a financial product in the tax arrangements?	33
6.5.5 Test 3 – Is the promoter or a person connected with him party to the financial products?	34
6.5.6 Test 4 – Does the price differ from what might reasonably be expected?	34
6.6 Hallmark 5: Standardised tax products	35
6.6.1 The legislation	35
6.6.2 About the hallmark	37

6.6.3	Test 1 – Are the arrangements a product?	37
6.6.4	Test 2 – Is the product a tax product?	37
6.6.5	Test 3 – Is the tax product made available generally?	38
6.6.6	Test 4 – Was the tax arrangement first made available on or after 1 <sup>st</sup> August 2006?	38
6.6.7	Test 5 – Is the tax product not within an exception?	38
6.6.8	Packaged solutions	39
<b>6.7</b>	<b>Hallmark 6: Loss schemes</b>	<b>39</b>
6.7.1	The legislation	39
6.7.2	About the hallmark	39
6.7.3	Test 1 – Is more than one individual expected to implement the tax arrangements?	40
6.7.4	Test 2 – Is the main benefit of the arrangements an expected loss for use against IT or CGT liabilities?	40
<b>6.8</b>	<b>Hallmark 7: Leasing arrangements</b>	<b>40</b>
6.8.1	The legislation	40
6.8.2	About the hallmark	45
6.8.3	Test 1 – Does the arrangement include a plant or machinery lease?	45
6.8.4	Test 2 – Is the lease of high value?	46
6.8.5	Test 3 – Is the lease a long lease?	46
6.8.6	Additional condition 1 – Does the lease involve a party outside the charge to corporation tax?	46
6.8.7	Additional condition 2 – Does the arrangement involve the removal of risk from the lessor?	47
6.8.8	Additional condition 3 – Does the arrangement involve a finance leaseback?	47
<b>7.</b>	<b>NATIONAL INSURANCE CONTRIBUTIONS RELATED SCHEMES</b>	<b>49</b>
7.1	Current position	49
<b>8.</b>	<b>DETERMINING A STAMP DUTY LAND TAX SCHEME – FLOW CHART</b>	<b>50</b>
<b>9.</b>	<b>DETERMINING A STAMP DUTY LAND TAX SCHEME – THE TESTS</b>	<b>51</b>
9.1	General	51
9.2	Test 1: Are there arrangements that enable an SDLT advantage be obtained? (FA 2004, s.306(1)(a) and (b) and s.318)	51
9.3	Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))	51
9.4	Test 3: Wholly residential property?	51
9.5	Test 4: Market value of non-residential property	51
9.6	Tests 3 and 4: Frequently asked questions	52
9.6.1	Marketed arrangements	52
9.6.2	Bespoke arrangements	52
9.6.3	In-house arrangements	53
9.6.4	Using the same arrangements with future unknown properties	53
9.7	Tests 5 to 8: Introduction to steps A to F	53
9.7.1	General	53
9.7.2	The six steps – A summary	54

9.7.3	The six steps – The legislation	54
<b>9.8</b>	<b>Approach to tests 5 to 8</b>	<b>56</b>
9.8.1	Single step B	56
<b>9.9</b>	<b>Tests 7 and 8: Combination steps</b>	<b>57</b>
9.9.1	SI 2005/1868: Rule 1 to the schedule	58
9.9.2	Tests 7 and 8 (SI 2005/1868, Rule 2 to the schedule)	58
9.9.3	Examples of arrangements exempted from disclosure	58
9.9.4	Examples of arrangements not exempted from disclosure	58
<b>10.</b>	<b>WHEN TO DISCLOSE A HALLMARKED OR STAMP DUTY LAND TAX SCHEME</b>	<b>59</b>
<b>10.1</b>	<b>General</b>	<b>59</b>
<b>10.2</b>	<b>Schemes where the promoter must disclose</b>	<b>59</b>
10.2.1	Time limits (FA 2004, s.308(1) and (3), and SI 2004/1864, reg. 4(2) and (3))	59
10.2.2	Transition to hallmarked schemes from 1 <sup>st</sup> August 2006	59
10.2.3	Exemption for co-promoters (FA 2004, s.308(4))	60
10.2.4	Exemption for substantially the same scheme (FA 2004, s.308(5))	60
10.2.5	Exemption when clearance application made (SI 2004/1864, para 5)	61
<b>10.3</b>	<b>The “made available for implementation by another person” test</b>	<b>62</b>
10.3.1	General	62
10.3.2	Marketed schemes	62
10.3.3	Bespoke schemes	63
10.3.4	Internal approval processes	63
10.3.5	Communications to non-users	63
<b>10.4</b>	<b>Schemes marketed by offshore promoters</b>	<b>64</b>
10.4.1	Time limits (FA 2004, s.309 and SI 2004/1864, reg. 4(4))	64
10.4.2	Transition to hallmarked schemes from 1st August 2006	64
<b>10.5</b>	<b>Schemes marketed by lawyers</b>	<b>64</b>
10.5.1	Time limits (FA 2004, s.310 and SI 2004/1864, regs. 4(5), (5ZA) and (5A))	64
10.5.2	Transition to hallmarked schemes from 1st August 2006	64
<b>10.6</b>	<b>Schemes with no promoter, including “in-house” schemes</b>	<b>65</b>
10.6.1	Time limits (FA 2004, s.310 and SI 2004/1864, reg. 4(2))	65
10.6.2	Transition to hallmarked schemes from 1 <sup>st</sup> August 2006	65
<b>10.7</b>	<b>The “first transaction” test</b>	<b>65</b>
<b>11.</b>	<b>HOW TO MAKE A DISCLOSURE</b>	<b>67</b>
<b>11.1</b>	<b>The forms to complete</b>	<b>67</b>
<b>11.2</b>	<b>How to obtain and submit the forms</b>	<b>67</b>
<b>11.3</b>	<b>The information to be provided</b>	<b>67</b>
11.3.1	General (SI 2004/1864, reg. 3)	67
11.3.2	Legal advice (FA 2004, s.314)	68
11.3.3	The prescribed arrangement(s)	68

11.3.4	Explaining the scheme	68
<b>12.</b>	<b>SCHEME REFERENCE NUMBERS RELATING TO HALLMARKED SCHEMES</b>	<b>69</b>
12.1	General	69
12.2	Promoters of hallmarked schemes (FA 2004, s.312)	69
12.3	Users of hallmarked schemes (FA 2004, s.313)	69
12.4	How to obtain and submit form AAG 4	70
12.5	Is an individual or a small and medium enterprise (SME) exempt from notifying reference numbers?	70
12.6	Employers using schemes	71
<b>13.</b>	<b>SCHEME REFERENCE NUMBERS RELATING TO STAMP DUTY LAND TAX SCHEMES</b>	<b>72</b>
13.1	Promoters of stamp duty land tax schemes	72
13.2	Users of stamp duty land tax schemes	72
<b>14.</b>	<b>PENALTIES</b>	<b>73</b>
14.1	Penalties for non-compliance by scheme promoters (FA 2004, s.315)	73
14.2	Penalties for non-compliance by scheme users (FA 2004, s.315)	73
14.2.1	Failure to disclose a scheme	73
14.2.2	Failure to declare a scheme reference number	73
14.3	Reasonable excuse	74

## 1. Introduction

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### 1.1 What is this guidance about?

This guidance is about what to do if you promote or use arrangements (including any scheme, transaction or series of transactions) that will or are intended to provide the user with a tax advantage when compared to adopting a different course of action (“tax arrangements”). It includes advice on:

- tax arrangements relating to income tax, corporation tax and capital gains tax;
- tax arrangements relating to stamp duty land tax;
- the criteria for deciding if the tax arrangements are required to be disclosed to HMRC;
- how to make a disclosure;
- the systems we expect users of tax arrangements to have in place to monitor for arrangements that they may potentially need to disclose to HMRC, rather than the promoter (see section 3 paragraphs 10.4 to 10.7); and
- how to notify HMRC that you are using a disclosed tax arrangement.

It does not include advice on revoked, repealed or superseded legislation – see paragraph 1.5.4.

Guidance on the rules for disclosing tax arrangements relating to VAT can be found in VAT Notice 700/8 *Disclosure of VAT avoidance schemes* available on HMRC’s internet site at: <http://www.hmrc.gov.uk/>

### 1.2 The status of this guidance

This guidance is not a substitute for the relevant legislation. Whilst you can rely on this guidance as an accurate explanation of how HMRC will apply the legislation, it does not cover every possible issue that may arise.

### 1.3 Effective date and superseded guidance

This guidance replaces and supersedes all previous guidance with effect from 1<sup>st</sup> August 2006, including:

- the guidance “*Disclosure of Direct (IT, CGT and CT) Tax Avoidance Schemes (The Main Guidance)*” dated July 2005; and
- the supplementary guidance “*Disclosure of stamp duty land tax (SDLT) schemes*” also dated July 2005.

## **1.4 What's changed?**

In his Pre-Budget Report on 5<sup>th</sup> December 2005 the Chancellor announced that changes would be made to the disclosure regime, introduced in Finance Act 2004, for tax arrangements relating to income tax, corporation tax and capital gains tax. Those changes, which have effect from 1<sup>st</sup> August 2006, are reflected in this guidance.

The three key changes are:

- For income tax, corporation tax and capital gains tax purposes, the range of disclosable tax arrangements is no longer limited to employment or financial products. Under the revised rules, they potentially include any tax arrangement relating to any aspect of those taxes.
- For income tax, corporation tax and capital gains tax purposes, the range of disclosable tax arrangements is no longer limited by a series of filters. Instead a tax arrangement becomes disclosable if any one of a series of 'hallmarks' applies. There is more on the hallmarks at section 6.
- Disclosure of newly implemented 'in-house' tax arrangements relating to income tax, corporation tax and capital gains is now due within 30 days of implementation, rather than by the filing date for the return period in which the first transaction of the tax arrangement was implemented – see paragraph 10.6.

Guidance on the transitional arrangements that apply to the first two bullets can be found at section 10.

Guidance on the transitional arrangements that apply to the third bullet can be found at paragraph 10.6.2.

The guidance has also been restructured and updated generally.

There are no changes to the rules for disclosing tax arrangements relating to stamp duty land tax.

## **1.5 What law does this guidance cover?**

This guidance covers the legislation described below. Selected extracts from the legislation are reproduced in the text of the guidance to act as a quick reference and to aid understanding.

### **1.5.1 Primary legislation**

- The Finance Act 2004, Part 7 (s.306 to s.319).

### 1.5.2 Secondary legislation

- The Tax Avoidance Schemes (Information) Regulations 2004 (SI 2004/1864, as amended by SI 2004/2613, SI 2005/1869 and SI 2006/1544);
- The Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004 (SI 2004/1865, as amended by SI 2004/2613);
- The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868); and
- The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543).

### 1.5.3 National Insurance contributions

See section 7.

### 1.5.4 Revoked legislation

This guidance does not cover legislation revoked, repealed or superseded at the time of publication of this guidance, in particular:

- The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004 (SI 2004/1863), including amendments made by SI 2004/2429.

## **1.6 Terminology**

**Arrangement:** This includes any scheme, transaction or series of transactions.

**Disclosable:** The requirement to provide prescribed information to HMRC.

**Hallmarks:** The descriptions prescribed, for the purpose of FA 2004, s.306(1)(a) and (b), in The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006.

**Hallmarked scheme:** A “tax arrangement” (q.v.) in relation to income tax, corporation tax or capital gains tax that also meets all of the tests at section 4.

**Scheme:** With the exception of paragraph 5.1.1 (where the normal meaning applies), the term “scheme” is used in subsequent sections as an alternative to or shorthand for “arrangement”, “tax arrangement”, “hallmarked scheme” or “stamp duty land tax scheme” (q.v.) as context dictates.

**Stamp duty land tax scheme:** A “tax arrangement” (q.v.) in relation to stamp duty land tax that also meets all of the tests at section 8.

**Tax arrangement:** Any arrangement that will, or is expected to, provide the user with a tax advantage when compared to adopting a different course of action.

## 1.7 Help and advice

If you are concerned about any tax arrangement being marketed to you, or you would like to discuss any aspect of these guidance notes, you can contact us by post at the following address:

Anti-Avoidance Group (Intelligence)  
HM Revenue & Customs  
1<sup>st</sup> Floor South, 22 Kingsway  
London  
WC2B 6NR

Alternatively you can:

- telephone us on 020 7438 6733
- email us at [aag@hmrc.gov.uk](mailto:aag@hmrc.gov.uk), or
- make general enquiries by clicking the 'General Enquiries' link on the Anti-Avoidance Group website at <http://www.hmrc.gov.uk/aiu/index.htm>.

## **2. An overview of the disclosure rules**

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### **2.1 Objectives**

The objectives of the disclosure rules are to obtain:

- early information about tax arrangements and how they work; and
- information about who has used them.

### **2.2 The effect of disclosure**

On its own the disclosure of a tax arrangement has no effect on the tax position of any person who uses it. However, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect.

### **2.3 Scope and summary of the disclosure rules**

#### 2.3.1 Scope

Currently, disclosure covers certain tax arrangements relating to:

- income tax, corporation tax and capital gains tax – the detailed rules are in sections 4 to 6; and
- stamp duty land tax – the detailed rules are in sections 8 and 9.

However, provisions exist to allow extension of the scope to tax arrangements relating to National Insurance contributions – see section 7.

#### 2.3.2 Summary: Income tax, corporation tax and capital gains tax

When the disclosure regime was introduced in 2004, disclosure was limited in scope to tax arrangements concerning employment or certain financial products. This was widened with effect from 1<sup>st</sup> August 2006 to the whole of income tax, corporation tax and capital gains tax.

Under the rules, a tax arrangement may need to be disclosed that HMRC is already aware of or is not considered to be avoidance. However, in order to keep the burden to a minimum, a tax arrangement is only to be disclosed where:

- it will, or might be expected to, enable any person to obtain a tax advantage (see paragraph 5.1);
- that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement (see paragraph 5.2); and

- it is a hallmarked scheme by being a tax arrangement that falls within any description (the “hallmarks”) prescribed in the relevant regulations – see sections 4 to 6.

In most situations where a disclosure is required it must be made by the scheme “promoter” within 5 days of it being made available. However, the scheme user may need to make the disclosure where:

- the promoter is based outside the UK;
- the promoter is a lawyer and legal privilege applies; or
- there is no promoter.

There is more guidance on who discloses in section 3 and the time limits for doing so in section 10.

Upon disclosure, HMRC issue the promoter with an 8-digit scheme reference number for the disclosed scheme. By law the promoter must provide this number to each client that uses the scheme, who in turn must include the number on his or her return or form AAG 4. There is more on this in section 12.

A person who designs and implements their own hallmarked scheme must disclose it within 30 days of it being implemented – see section 10.

### 2.3.3 Summary: Stamp duty land tax

The disclosure regime was extended in 2005 to include tax arrangements relating to stamp duty land tax where the subject matter of the arrangements is commercial property with a market value of at least £5 million.

The main differences compared to the disclosure regime for income tax, corporation tax and capital gains tax are:

- the hallmarks are not applied to limit what is required to be disclosed, however there is a ‘white list’ of arrangements that are not required to be disclosed;
- promoters are not obliged to provide reference numbers to scheme users; and
- some minor differences in the time limits for making disclosure.

### **3. Who discloses hallmarked and stamp duty land tax schemes?**

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#### **3.1 General**

The duty to disclose a hallmarked or stamp duty land tax scheme normally falls on the scheme promoter, however special rules apply where:

- a non-UK based promoter fails to comply with any disclosure obligation – here the client of the promoter is required to disclose the scheme (see paragraph 3.3.5).
- the promoter is a lawyer and legal and professional privilege prevents him from providing all or part of the prescribed information to HMRC – here the lawyer’s client must disclose the scheme (see paragraph 3.5).
- there is no promoter (i.e. the scheme is devised ‘in-house’ for use within that entity or a corporate group to which it belongs) – here the scheme is disclosed by the scheme user (see paragraph 3.6).

#### **Warning:**

Penalties can apply if a scheme is not disclosed accurately and at the right time (see section 14).

The Anti-Avoidance Group in HMRC works closely with compliance teams to ensure that schemes discovered by our ongoing compliance activity have been disclosed properly. Anyone likely to have a liability to disclose a scheme should ensure that effective identification and reporting arrangements exist.

#### **3.2 Who is a promoter? (FA 2004, s.307)**

You are a promoter if, in the course of providing services relating to taxation, you design, or make available for implementation, proposals and arrangements of a type prescribed within the regulations (i.e. hallmarked or stamp duty land tax schemes). But you will be excluded from being a promoter where the “benign tax advice”, “non-tax advisor” or “ignorance test” apply (see paragraphs 3.3.1 to 3.3.3).

In more limited circumstances you may be a promoter where you organise or manage the implementation of a scheme (see paragraph 3.3.5).

We expect that mainly accountants and lawyers along with a number of boutique tax planning businesses will be “promoters”. In addition, banks and securities houses are specifically included.

It should be noted that both UK and non-UK based promoters are subject to the disclosure rules but they only apply to the extent that they make available schemes that expect to obtain UK tax advantages from their use.

### 3.3 Who is not a promoter?

A person is not a promoter unless any advice they provide is directly connected to the expected tax advantage (see paragraph 5.1).

A person who is involved in the design of a scheme is not a promoter if any of three tests are passed. These are:

- the benign test (see paragraph 3.3.1);
- the non-advisor test (see paragraph 3.3.2); and
- the ignorance test (see paragraph 3.3.3).

#### 3.3.1 The benign test (SI 2004/1865, para. 4(1) and (2))

The benign tax adviser test applies where, in the course of providing tax advice, a person is not responsible for the design of any of the tax arrangements. For example, a promoter marketing or designing a scheme may consult another firm to provide advice in relation to a particular element of it. The second firm will not be a promoter, despite being involved in the design of the overall scheme, so long as any tax advice does not contribute to the tax advantage element of it.

Such advice might relate to general tax issues such as the interpretation of words used in tax legislation, general compliance requirements and so on. For example, a promoter may seek advice from an accounting or law firm on whether two companies are “connected” for any purpose of the Tax Acts. If the advice given seeks to highlight opportunities to exploit the relevant provisions then it is not benign advice.

On the other hand, advice that goes no further than explaining what the terms mean will be benign. Where the advice recommends some alteration to a taxpayers affairs then whether the advice is benign will depend on the expected tax outcomes of any transactions entered into as a result of the advice.

#### 3.3.2 The non-adviser test (SI 2004/1865, para. 4(1) and (3))

A person who is involved in any way in the design of a scheme will potentially be a promoter. However, the “non-adviser” test excludes from the definition of “promoter” any person who, although involved in the design of a scheme, does not contribute any tax advice. The test does not apply to a bank or securities house.

This might typically happen where:

- a promoter consults a law firm (which has a business that includes giving tax advice) in relation to company law. The law firm will not become a promoter as long as it provides no tax advice (other than benign advice) in the course of carrying out its responsibilities; or

- a promoter consults an accounting firm in relation to accounting aspects of a scheme. The firm is not a promoter so long it provides no tax advice in the course of carrying out its responsibilities.

### 3.3.3 The ignorance test (SI 2004/1865, para. 4(1) and (4))

The ignorance test applies when a person could not reasonably be expected to have either:

- sufficient information to enable them to know whether or not the arrangements are hallmarked or stamp duty land tax schemes; or
- sufficient information so as to enable that person to comply.

This test might apply where, for example, a person has insufficient knowledge of the overall arrangements to know whether the “benign” or “non-adviser” tests are failed; or has only a partial understanding of the scheme so that they would be unable to comply with the disclosure requirements.

Where having the relevant “information” depends not merely upon factual knowledge, but upon the application of some particular expertise, persons will not normally be expected to have such an expertise if it falls outside their own area of professional expertise (unless the matters in question can reasonably be said to be common knowledge amongst business and professional persons generally).

### 3.3.4 Corporate groups (SI 2004/1865, para. 2)

A group company that provides tax services to other companies within the same group is not a promoter. This ensures that disclosable schemes devised within a group for its own use are disclosed in the same way as those devised by a single company “in-house” for its own use – see paragraph 3.6.

For the purpose of these rules a company is a group company where it is a member of a group under any of the existing provisions of the Taxes Acts e.g. group relief and/or capital gains.

### 3.3.5 Organising and managing a scheme (SI 2004/1865, para. 5)

A person who not only organises or manages a scheme but also designed or made it available for implementation is always regarded as a promoter unless one of the exemptions at paragraphs 3.3.1 to 3.3.4 above apply.

However, a person who organises or manages a scheme that they did not design or make available for implementation is not regarded as a promoter when he is not connected with a person who has marketed or designed it or similar schemes. This avoids duplicate disclosures from having to be made.

If the person who organises or manages the scheme is connected with a person who has designed or made it or similar schemes available for implementation, the need for both persons to make a disclosure will not arise when the co-promoter rule applies (see paragraph 10.2.3).

“Connected” for this purpose is by reference to any provision of the Tax Acts by virtue of which a person is connected with another.

### **3.4 Schemes marketed by offshore promoters (FA 2004, s.309)**

The obligations on promoters to disclose schemes they market and/or design apply to both UK and non-UK based promoters. Where a non-UK based promoter fails to disclose a scheme when required to do so, the user must make the disclosure. The time limits are explained at paragraph 10.4. A maximum initial penalty of £5,000 plus £600 per day thereafter may be charged on a user who fails to do so (see also section 14).

A non-UK based promoter who has disclosed a scheme will be able to provide his or her clients with the 8-digit reference number issued by the Anti-Avoidance Group in HMRC.

If you are a user of such a scheme please contact the Anti-Avoidance Group for advice if you are unsure whether these rules apply to you – see paragraph 1.7.

### **3.5 Schemes promoted by lawyers (FA 2004, s.310 and SI 2004/1865, para. 6)**

Schemes promoted by lawyers are within the scope of the disclosure rules in the same way as for other promoters.

However, where an adviser who would ordinarily be a promoter is prevented by reason of legal privilege from providing any of the information needed to make a full disclosure, that adviser has no obligation to make a disclosure. Unless there is another promoter who has an obligation to disclose the scheme, the person who uses it is required to make the disclosure. But the client of the lawyer has the option of waiving any right to legal privilege. If legal privilege is waived the lawyer is required to disclose.

The following important points should be noted in relation to waiver of legal privilege:

- any waiver must be made within sufficient time to enable the lawyer to disclose within 5 days of the scheme being made available (see paragraph 10.2), otherwise the client must make the disclosure within 5 or 30 days, as applicable (see paragraph 10.5), of the first transaction; and
- any waiver can be limited by the client so as to apply only to the extent necessary to enable the lawyer to comply with the disclosure obligation and to have no relevance for any other purpose.

Your lawyer or tax adviser will be able to help you but you can also contact the Anti-Avoidance Group in HMRC if you are in doubt – see paragraph 1.7.

Where a lawyer is “marketing” a scheme, as described at paragraph 10.3.2, the lawyer cannot assert legal privilege. This means that such marketing is subject to the disclosure obligation and the lawyer should disclose the scheme (providing the other conditions are met) to the Anti-Avoidance Group in the normal way.

### **3.6 Schemes with no promoter, including “in-house” schemes (FA 2004, s.310)**

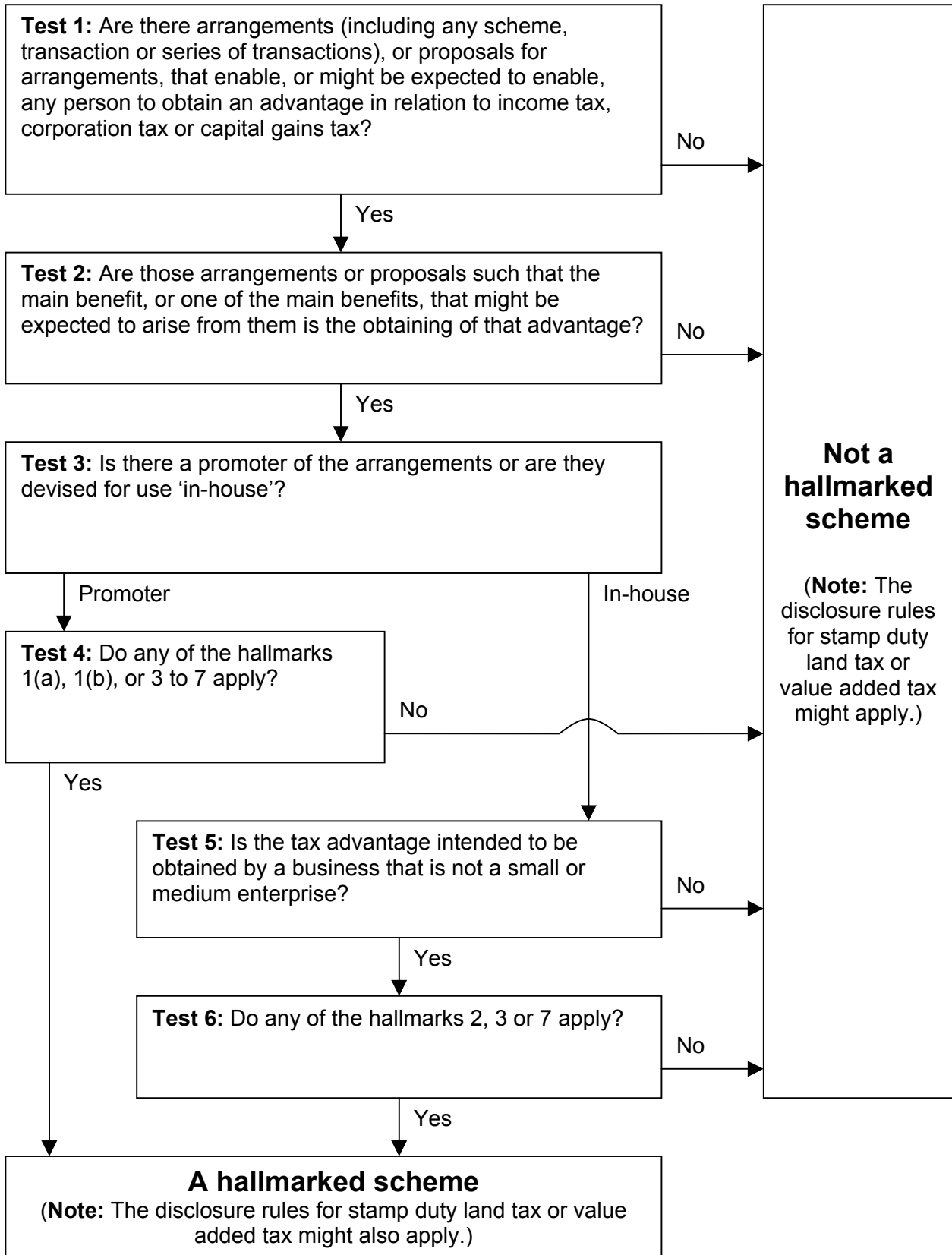
Where there is no person who is a “promoter” in respect of a scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. Whilst these rules can apply to an individual, partnership, trust or company, we expect them to be of most relevance to those companies with their own in-house tax departments.

Hallmarked schemes are only required to be disclosed where the tax advantage is intended to be obtained by a business that is not a small or medium enterprise (see paragraph 5.5).

For stamp duty land tax schemes, any in-house user has to disclose but only if the scheme is in relation to commercial property with a value of at least £5m (see sections 8 and 9).

In both cases, disclosure only applies to schemes that have been implemented; there is no requirement to disclose mere plans and ideas.

#### 4. Determining a hallmarked scheme – Flow chart



## **5. Determining a hallmarked scheme – The tests**

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### **5.1 Test 1: Are there arrangements that enable an IT, CT or CGT tax advantage be obtained? (FA 2004, s.306(1)(a) and (b))**

#### 5.1.1 Meaning of “arrangements” (FA 2004, s.318)

The definition of “arrangements” is widely defined in the primary legislation to include any scheme, transaction or series of transactions.

#### 5.1.2 Meaning of “tax advantage” (FA 2004, s.318)

The definition of “tax advantage” is drawn from the definition of tax advantage in ICTA 1988, s.709. Unlike s.709, the definition makes specific reference to the deferral of tax and the avoidance of an obligation to deduct tax (for example under PAYE). It should not be inferred from this that ICTA 1988, s.709 does not extend to deferral or avoiding an obligation to deduct tax.

In the context of ICTA 1988, s.703 the Courts have considered ICTA 1988, s.709 on a number of occasions. We expect the existing body of case law to apply equally for disclosure purposes. From these cases some general points can be made:

- The definition of tax advantage in ICTA 1988, s.709 is very widely drawn and consequently we expect that FA 2004, s.318 will also be construed widely. It includes the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax and as mentioned the deferral of tax or the avoidance of an obligation to deduct tax.
- Where the scheme is expected to result in tax being avoided or reduced then the long-standing judgement of Lord Wilberforce in CIR v Parker (1966 AC 141) applies and the existence of a tax advantage is tested on a comparative basis.
- In a more recent case Sema Group Pension Fund (2003 STC 95) Lord Justice Parker said that “what the draftsman was manifestly trying to do when defining ‘tax advantage’ in s.709(1) was to cover every situation in which the position of the taxpayer vis-à-vis the Revenue is improved in consequence of the particular transaction or transactions”. This has been regarded by some outside commentators as widening the definition still further, however in our view Sema is consistent with earlier cases.

- A relief or exemption from tax, for example taper relief, substantial shareholdings, loss relief, group relief, etc will give rise to a tax advantage as defined.

In deciding whether the necessary comparison can be made it should be noted that the very wide range of possible ways in which tax arrangements might be structured made it impossible to outline in regulations the range of schemes likely to come within the disclosure rules. Such schemes may involve for example, income being received in capital form or rewards for remuneration being structured to fall outside the provisions of ITEPA or an imbalance between the economic cost of the tax advantage and the value of that advantage to the taxpayer.

### **5.2 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))**

The following general points can be made as to when a tax advantage will be regarded as one of the main benefits:

- In our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what they are buying and the relationship between the tax advantage and any other financial benefits.
- The test is objective and considers the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed.

### **5.3 Test 3: Is there a promoter of the arrangements? (SI 2006/1543, reg. 5(3))**

The purpose of this test is to distinguish between arrangements that are promoted and those that are designed 'in-house' for use by the business that devised it. The distinction is important for two reasons:

- different hallmarks apply to promoted and 'in-house' schemes; and
- 'in-house' schemes are only required to be disclosed when the tax advantage is intended to be obtained by a business that is not a small or medium enterprise (NB this does not apply for stamp duty land tax schemes – see paragraph 3.6).

A scheme is a promoted scheme even where the user is required to disclose the details of it to HMRC as a result of the promoter being either:

- offshore and failing to disclose the scheme to HMRC – see paragraph 3.3.5; or

- a lawyer who is prevented by legal and professional privilege from providing all of the prescribed information to HMRC – see paragraph 3.5.

#### **5.4 Test 4: The hallmarks for arrangements where there is a promoter**

When there is a promoter of the arrangement, it is a hallmarked scheme when any one of the following hallmarks apply:

- Hallmark 1(a): Confidentiality from other promoters – see paragraph 6.2
- Hallmark 1(b): Confidentiality from HMRC – see paragraph 6.2
- Hallmark 3: Premium fee – see paragraph 6.4
- Hallmark 4: Off-market terms 6.5
- Hallmark 5: Standardised tax products – see paragraph 6.6
- Hallmark 6: Loss schemes – see paragraph 6.7
- Hallmark 7: Leasing arrangements – see paragraph 6.8

#### **5.5 Test 5: Is the person intended to obtain the advantage a large business? (SI 2006/1543, regs. 3 and 4)**

If you devise a tax arrangement for use ‘in-house’, you need only consider if it is a hallmarked scheme (and disclose it to HMRC) if the person intended to obtain the tax advantage is a business that is not a small or medium enterprise.

“Businesses” are:

- companies;
- partnerships; and
- any other person whose profits are charged to income tax as trading or property income.

Guidance on whether a business is a small or medium enterprise for the purposes of the 2003 EC Recommendation tests is at CIRD91400. See in particular the flow chart at CIRD92850.

#### **5.6 Test 6: The hallmarks for ‘in-house’ arrangements**

When the arrangement is designed ‘in-house’, it is a hallmarked scheme when any one of the following hallmarks apply:

- Hallmark 2: Confidentiality from HMRC – see paragraph 6.3
- Hallmark 3: Premium fee – see paragraph 6.4
- Hallmark 7: Leasing arrangements – see paragraph 6.8

## 6. The hallmarks

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### 6.1 About the hallmarks

The legislation sets out a number of descriptions of arrangements that are collectively referred to as ‘hallmarks’ in this guidance.

Some of these are broadly similar to the filters that existed prior to 1 August 2006 and are designed to capture new and innovative tax arrangements. However, others are designed to capture areas of specific concern. These may include schemes that are well known or commonly used.

The hallmarks are not mutually exclusive – an arrangement may be a hallmarked scheme by virtue of one or more of the hallmarks.

It is expected that the range of hallmarks will change over time, such as to test perceived changes in the avoidance market place or the effectiveness of an anti-avoidance measure.

The absence of a hallmark should not be regarded as an indicator that tax arrangements not caught constitute practices that are acceptable to HMRC.

Similarly, we do not regard all tax arrangements that include or meet a hallmark description as practices that are unacceptable to us – whilst we have tried to keep burdens to a minimum, you may have to tell us about schemes that may not be considered to be avoidance.

### 6.2 Hallmarks 1(a) and (b): Confidentiality where promoter involved

#### 6.2.1 The legislation

Hallmarks 1(a) and (b) are prescribed at regulation 6 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 6**

(1) Arrangements are prescribed if they satisfy—

- (a) Conditions 1 and 2; or
- (b) Conditions 1 and 3.

(2) The Conditions are as follows.

#### *Condition 1*

Any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements.

#### *Condition 2*

It might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures a tax advantage to be kept confidential from any other promoter at any time in the period beginning with the opening date and ending with the appropriate date.

*Condition 3*

The promoter would, but for the requirements of these Regulations, wish to keep the way in which that element secures that advantage confidential from Her Majesty's Revenue and Customs for some or all of the period beginning with the opening date and ending with the appropriate date, and a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

(3) In a case where—

- (a) by virtue of regulation 6 of the Promoters Regulations, no person is to be treated as the promoter in relation to the arrangements, or
- (b) by virtue of section 309(1) of FA 2004 (duty of person dealing with promoter outside United Kingdom), a user of the arrangement has a duty to provide prescribed information,

paragraph (2) shall have effect as if for Condition 3 there were substituted

*“Condition 3*

The user of the arrangements wishes to keep confidential from Her Majesty's Revenue and Customs the way that element secures that advantage for some or all of the period beginning with the opening date and ending with the appropriate date.”.

(4) In this regulation—

“the appropriate date” has the meaning given in regulation 8(1) of the Information Regulations, and the provisions of regulation 8 of those Regulations (prescribed information under section 313 of FA 2004: timing and manner of delivery) apply for the purposes of determining that date; and

“the opening date” means the date of the first transaction forming part of the arrangements.

6.2.2 Hallmark 1(a): Confidentiality from competitors

This hallmark only applies where there is a promoter of the arrangements (see paragraph 5.3).

The test requires the person with a *prima facie* duty to disclose the arrangements to ask themselves the hypothetical question:

- *Might it reasonably be expected that **any promoter** of the arrangements would wish the way in which **any element** of those arrangements (including the way in which they are structured) gives rise to and secures the expected tax advantage to be kept confidential from **any other promoter**,*
- *at **any time** between the date of the first transaction forming part of the arrangements and the date (if the arrangements were notified) by which users of it would be required to notify HMRC of the reference number (see paragraph 6.2.5)?*

The test would be answered in the affirmative if an element of the scheme were sufficiently new and innovative that a promoter would want the details to remain secret in order to maintain their competitive advantage and ability to earn fees.

The test is unrelated to:

- any general rule or agreement by a client that they keep advice confidential; or
- whether any fees charged would be at a premium level.

The use of an explicit confidentiality agreement before revealing full details of the scheme to a client by advisers who do not normally use such agreements may indicate that the test is met.

However, even if certain sectors promoting the scheme would routinely insist on an explicit confidentiality agreement from their clients, HMRC would accept the test is not met if the scheme is reasonably well known in the tax community. This can be evidenced from, for example, articles in the tax press, textbooks or case law.

### 6.2.3 Hallmark 1(b): Confidentiality from HMRC

This hallmark only applies where there is a promoter of the arrangements (see paragraph 5.3).

Normally the person that must apply this hallmark is a promoter, when he must ask himself the questions:

- *Do I wish to keep confidential from HMRC the way **any element** of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage (see paragraph 6.2.4),*  
*at **any time** between the date of the first transaction forming part of the scheme and the date (if the scheme were disclosed) by which users of it would be required to notify HMRC of the scheme reference number (see paragraph 6.2.5)?*

- *Is a reason for doing so to facilitate the repeated or continued use of that element, or substantially the same element, in the future?* (This may be, for example, in order to secure fee income in the future. There is more on “continued and repeated use” at paragraph 6.2.6.)

However, where the person with a duty to disclose the arrangements is the scheme user, he must ask himself the question:

- *Do I wish to keep confidential from HMRC the way **any element** of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage* (see paragraph 6.2.4),
- *at **any time** between the date of the first transaction forming part of the scheme and the date (if the scheme were disclosed) by which I would be required to notify HMRC of the scheme reference number* (see paragraph 6.2.5)?

In either case the relevant question(s) must be consciously answered at the time the relevant trigger for disclosure arises. (Note: Where the relevant question is asked at a time other than when the scheme is implemented, such as when the scheme is made available, the time frame part of the test remains by reference to the date of implementation – see also paragraph 6.2.5.)

Promoters will answer the relevant questions in one of the following ways:

- I wish to keep an element of the scheme confidential from HMRC in order to facilitate repeated or continued use of that element, or substantially the same element, in future;
- I do not wish to keep any element of the scheme confidential in order to facilitate repeated or continued use of that element, or substantially the same element, in the future but, and disregarding any obligation of confidentiality, I nevertheless wish to keep it confidential from HMRC for other reasons; or
- I do not wish to keep any element of the scheme confidential from HMRC.

A promoter is not required to make disclosure under this hallmark where the answer falls within the second or third bullet.

Scheme users are not required to make disclosure under this hallmark where the answer to their relevant question is that as for the third bullet above.

For both promoters and scheme users, the relevant questions to be asked are not hypothetical questions. They do not ask what another promoter may do; what HMRC knows; or how HMRC, the Treasury or Parliament may react if they knew about the scheme (although this may be in the promoter or user’s mind when he forms his decision).

HMRC will expect promoters and users to answer the test fairly and act in accordance with the decision they make.

HMRC will not:

- assume that because a scheme was not disclosed that the promoter wanted to keep it confidential from HMRC (likewise, a promoter is not required to disclose everything just to prove there was nothing to disclose); or
- carry out “fishing expeditions” to determine what schemes have not been disclosed under this hallmark.

If HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Factors that we could consider as being indicative that the promoter wanted to keep it confidential from HMRC include:

- How new, innovative and aggressive the scheme is. Schemes that promoters are aware to be known to HMRC are not caught by the hallmark. These can be evidenced from, for example, technical guidance notes, case law, or past correspondence with a case officer in HMRC where the detail of how the scheme works has been made clear.
- Whether a promoter imposes an obligation upon potential clients, whether in writing or verbally, to keep the details of the scheme confidential from third parties including HMRC. This factor would not be considered if the agreement is a general agreement.
- Whether confidentially agreements, general or specific, between a promoter and client allow the client to disclose information to HMRC without referral to the promoter.
- The use of explicit warnings in marketing material or other communications to a client to the effect that the scheme may have a limited “shelf life” because Parliament may act to close it once it became known.
- The degree of co-operation to requests for information from HMRC concerning a specific scheme and the reasons for not providing information.

#### 6.2.4 Hallmark 1(b): “Any element” of the arrangements

The hallmark asks whether the promoter or scheme user (as applicable) wants to keep any element of the arrangements confidential from HMRC. This could include part of a bespoke arrangement where the totality of the scheme will not be repeated.

### 6.2.5 Hallmark 1(b): Confidential “at any time”

The hallmark asks whether the promoter or scheme user (as applicable) wants to keep an element of the scheme (including the way it is structured) confidential from HMRC at any point in time between the date on which it is implemented and the date by which users would be required to notify HMRC of the scheme reference number (normally the filing date for the affected tax return – see section 12.3).

It is not relevant if it is wished that the scheme be kept confidential before or after this time frame. Equally, it is not relevant whether it is wished that it be kept confidential during the whole of the time frame, only at some point during it.

### 6.2.6 Hallmark 1(b): Repeated and continued use of the element

The hallmark asks, where applicable, whether the promoter wants to keep an element of the scheme (including the way it is structured) confidential from HMRC in order to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

By “repeated use”, the test is examining whether the key element that achieves the tax advantage is being kept confidential in order to insert it into further schemes used by either other clients or the same client. It could apply, for example, where the totality of the scheme is expected to be repeatable in its generic form time and again, or where the key element was conceived as part of a bespoke scheme and then recorded on a register for use in other schemes in the future.

By “continued use”, the test is examining whether the element that achieves the tax advantage is being kept confidential in order to allow the tax advantage to accrue over time or the scheme to run its course.

## **6.3 Hallmark 2: Confidentiality where no promoter involved**

### 6.3.1 The legislation

Hallmark 2 is prescribed at regulation 7 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 7**

Arrangements are prescribed if—

- (a) no person is a promoter in relation to them;
- (b) the intended user of the arrangements is a business which is not a small or medium-sized enterprise;
- (c) any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements;
- (d) the user of those arrangements wishes the way in which that element is

- expected to secure a tax advantage to be kept confidential from Her Majesty's Revenue and Customs for some or all of the period—
- (i) beginning with the day on which he enters into the first transaction forming part of the notifiable arrangements, and
  - (ii) ending with the latest time at which he would first have had to provide Her Majesty's Revenue and Customs with information under section 313 of FA 2004 in accordance with regulation 8 of the Information Regulations or otherwise include information about the arrangements in a return; and
- (e) a reason for the user's wishing to keep that element confidential from Her Majesty's Revenue and Customs is to facilitate repeated or continued use of the same element, or substantially the same element, in the future.

### 6.3.2 Confidentiality from HMRC

This hallmark only applies to schemes devised for use 'in-house'. It does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

It is similar to hallmark 1(b) in that the in-house person has to consider their own circumstances and not those of hypothetical third party promoters. So the test for a person using an in-house scheme is, having entered into a transaction forming part of the arrangements:

- *Do I wish to keep confidential from HMRC the way **any element** of the arrangements (including the way they are structured) gives rise to and secures the expected tax advantage (see paragraph 6.2.4),*
- *at **any time** between the date of the first transaction forming part of the scheme and the date (if the scheme were disclosed) by which I would be required to notify HMRC of the reference number (see paragraph 6.2.5)?*

Again the test is not circular in that it does not mean that all undisclosed schemes are, by default, schemes that a taxpayer wishes to keep confidential and so should have been disclosed. The guidance on this at paragraph 6.2.3 applies equally here.

As for hallmark 1(b), if HMRC discover a scheme that has not been disclosed we will, when considering whether the test has been applied correctly, examine all the evidence and form a balanced view as to why it was not disclosed. Factors that we could consider as being indicative that keeping it confidential from HMRC was wanted include:

- How new, innovative and aggressive the scheme is. Schemes that taxpayers are aware to be known to HMRC are not caught by the hallmark. These can be evidenced from, for example, technical guidance notes, case law, or past correspondence with a case officer in HMRC where the detail of how the scheme works has been made clear.
- The degree of co-operation to requests for information from HMRC concerning a specific scheme.
- Whether a taxpayer imposes an obligation upon other parties to the scheme, whether in writing or verbally, to keep the details of the scheme confidential from HMRC.

### 6.3.3 The timing rule

The timing rule is by reference to the date on which the arrangements are implemented and the due date for filing an affected return.

It is not relevant if it is wished that the scheme be kept confidential before or after this time frame or that they would be disclosed on a return.

Equally, it is not important whether it is wished that the details be kept confidential during the whole of the time frame, only at any point during it.

## **6.4 Hallmark 3: Premium fee**

### 6.4.1 The legislation

Hallmark 3 is prescribed at regulation 8 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 8**

(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements to disclose information under these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

But arrangements are not prescribed by this regulation if—

- (a) no person is a promoter in relation to them; and
- (b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

(2) For the purposes of paragraph (1), and in relation to any arrangements, a “premium fee” is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage

expected to be obtained arises; and which is—

- (a) to a significant extent attributable to that tax advantage, or
- (b) to any extent contingent upon the obtaining of that tax advantage.

#### 6.4.2 Applying the hallmark

This hallmark applies to both promoted and ‘in-house’ arrangements. For ‘in-house’ arrangements, it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

The hallmark contains a hypothetical test that does not depend on a premium fee actually being received. It focuses on whether **any** promoter **could** charge a premium fee if he chose to do so. Whether or not the actual promoter charges a premium fee is not sufficient, although the hallmark would be met if he does so. The question is whether it might reasonably be expected that a promoter could charge a premium fee if he wished to do so.

The test should be applied from the perspective of a client who is experienced in receiving tax advice or other services of the type being provided. Our assumption is that where a client regards the advice as valuable and not generally available he would be prepared to pay a premium for it. Equally, by contrast, if similar advice was available elsewhere the client would be unwilling to pay more than a normal fee for it.

We know that the size of fee charged is not the only reason why a client may choose a particular accounting or law firm. So the hallmark is no more than a broad attempt to identify tax advice that is innovative and valuable and which the promoter can use to obtain premium fees from a client who is experienced in receiving services of the type being provided.

#### 6.4.3 Is the fee significantly attributable to, or contingent on, the advantage?

It is recognised that almost any fee obtained in relation to tax planning can to some extent be said to be attributable to obtaining a tax advantage. So a “premium fee” for this purpose is a fee that is to a significant extent attributable to the tax advantage or is contingent upon a tax advantage being obtained.

In other words the hallmark works on the assumption that where a promoter is able to market a tax arrangement that is innovative then not all promoters will be in a similar position and potential users will be prepared to pay more to the promoter for that scheme.

When applying the hallmark you need to consider whether a fee could be charged in respect of any element of the tax arrangement such that it would to a significant extent be attributable to, or contingent upon, the expected tax advantage. So a fee is not a premium fee solely on account of factors such as:

- The adviser’s location – e.g. fees could be expected to be higher in London

- The urgency of the advice – a fee that is higher due to the adviser having to give the advice urgently is not a premium fee for that reason alone
- The size of the transaction – if a large amount is at stake on a deal, the tax adviser may wish to increase his fee to reflect the greater level of exposure
- The skill or reputation of the adviser – some advisers normally charge more for advice than others to reflect the perceived higher quality of advice they offer
- The scarcity of appropriately skilled staff – some areas of tax advice are more complex and fees may be higher to reflect this.

## 6.5 Hallmark 4: Off market terms

### 6.5.1 The legislation

Hallmark 4 is prescribed at regulation 9 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 9**

- (1) Arrangements are prescribed if—
- (a) the tax advantage expected to be obtained under the arrangements arises, to more than an incidental degree, from the inclusion in those arrangements of one or more financial products;
  - (b) a promoter, or a person connected with the promoter, becomes party to one or more of those financial products; and
  - (c) the price of the financial product or products differs significantly from that which might reasonably be expected to apply in the open market upon its being, or their being, made available to the other party when compared with a product that is, or products that are, the same as, or substantially similar to, the product or products in question.
- (2) For the purpose of paragraph (1) a financial product is—
- (a) a loan;
  - (b) a contract which—
    - (i) is a derivative contract for the purposes of Schedule 26 to the Finance Act 2002;
    - (ii) would be such a derivative contract if paragraph 4 of that Schedule (contracts which are excluded by virtue of their underlying subject matter) were omitted; or

- (iii) would be a derivative contract falling within sub-paragraph (i) or (ii) if it were a contract of a company;
- (c) an agreement for the sale and repurchase of securities of the kind described in paragraphs (a) to (c) of subsection (1) of section 730A of ICTA 1988;
- (d) a stock lending arrangement within the meaning given by section 263B(1) of the Taxation of Chargeable Gains Act 1992;
- (e) a share; or
- (f) a contract, not being one of the above, which, whether alone or in combination with one or more other contracts (including any of the above), in substance represents the making of a loan, or the advancing or depositing of money, whatever its form and falls to be accounted for on that basis.

This paragraph is subject to the following qualifications.

(3) This regulation does not apply if the only financial products involved in the arrangements are assets held within an account which satisfies the conditions in the Individual Savings Accounts Regulations 1998.

(4) For the purposes of this regulation a contract, or a combination of contracts, falls to be accounted for as a loan, or as the advancing or depositing of money, if the person entering into the arrangements—

- (a) is, in accordance with generally accepted accounting practice, required to treat the contract, or the combination of contracts, as a loan, deposit or other financial asset or obligation, or
- (b) would be so required if the person were a company to which the Companies Act 1985 applied.

This is subject to the following qualification.

(5) Anything which is a finance lease for the purposes of generally accepted accounting practice does not fall to be accounted for as a loan for the purposes of this regulation.

(6) In this regulation “generally accepted accounting practice” has the meaning given by section 50 of the Finance Act 2004.

### 6.5.2 About the hallmark

This hallmark only applies where there is a promoter of the arrangements (see paragraph 5.3).

It is intended to catch promoters that provide financial products, such as banks and other financial institutions, who escape being caught by the premium fee hallmark (paragraph 6.4) by building what would otherwise be a premium fee into the price of the product. An example could be charging only a small fee for a scheme whilst building in a premium through higher interest charges on loans and so on.

The hallmark is met when the four tests below are met.

### 6.5.3 Test 1 – Is a financial product included in the tax arrangements?

Financial products are:

- loans, including all forms of borrowing and lending and all securities e.g. a “QCB”;
- derivatives contracts – i.e. anything within the definition of derivative in FA 2002, Sch. 26, whether or not the user of the scheme is liable to corporation tax;
- repos – i.e. any agreement for the sale and repurchase of securities of the kind described in paragraphs (a) to (c) of subsection (1) of section 730A of the Income and Corporation Taxes Act 1988;
- stock lending agreements within the meaning of section 263B(1) of the Taxation of Chargeable Gains Act 1992;
- shares, including a share; and
- anything which in accordance with UK accounting practice is in substance a loan or lending of money.

Specifically excluded are ISAs and finance leasing. (**Note:** Hallmark 7 may apply – see paragraph 6.8.)

Where more than one valid accounting treatment is possible, the finance leasing exclusion applies by reference to the accounting treatment which will actually be adopted. For example, a product which will not be accounted for as a finance lease under International Financial Reporting Standards is not covered by this exclusion, notwithstanding that it might have been accounted for as a finance lease if domestic Accounting Standards had been applied.

### 6.5.4 Test 2 – Does the tax advantage arise to “more than an incidental degree” from the inclusion of a financial product in the tax arrangements?

The hallmark does not apply when the financial products included in the tax arrangements either do not contribute to the tax advantage or are incidental to how the advantage arises.

It is, however, important to recognise that the test is whether the tax advantage is expected to arise from the arrangements and not simply from the financial product. Our design assumption was that only rarely would a tax advantage derive directly from the financial product itself and more typically the effect of the financial product would be to alter the balance between the economic cost of obtaining the tax advantage and the tax value itself.

For example a scheme might involve the artificial depreciation of an asset (which is not a financial product) to secure an income tax loss. The acquisition of the asset might be funded from cash resources or by borrowing. Where the asset was acquired by borrowing, the loan would be a financial product within the rules even though the apparent value of the tax advantage was no different from what would be obtained had no loan been used.

It might be argued that any tax advantage does not arise to more than an incidental degree from the inclusion of the loan within the arrangements. We believe that this would be too narrow a view. Even a loan on normal terms is in our view a disclosable financial product (subject to all the other tests) where it alters the overall economic analysis of the scheme for example, by changing the economic value of the expected tax advantage. Also in many cases using loans may be the only way in which the taxpayer is able to enter the transaction at all.

Where shares, repos and so on are concerned we expect in most situations the significance or otherwise of the financial product will be clear. We would not expect the disclosure of arrangements concerning the disposal of real property where the only possible financial product was a short-term loan arrangement between the vendor and purchaser. Likewise merely because a purchaser borrowed the funds necessary to complete the purchase would not bring the vendors arrangements within the rules.

#### 6.5.5 Test 3 – Is the promoter or a person connected with him party to the financial products?

The hallmark only applies when the promoter or a person connected with him is party to one or more of the financial product that helps give rise to the advantage. This might include, for example, a bank that is party to a loan, derivative or other financial product it has designed or made available. It also applies to any promoter who is party to the scheme.

#### 6.5.6 Test 4 – Does the price differ from what might reasonably be expected?

In a normal competitive market a promoter who has an innovative tax arrangement idea from which he wishes to generate a profit has an advantage over others. That promoter would then be able, if he chose, to price financial products at a rate that differs from that which the customer would be offered if he invited other banks to quote for an equivalent kind of financial product that lacked the tax innovation. So this test is met where any of the terms of a financial product differ significantly from the terms that could be obtained in the open market for a similar financial product.

## 6.6 Hallmark 5: Standardised tax products

### 6.6.1 The legislation

Hallmark 5 is prescribed at regulations 10 and 11 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 10**

(1) Arrangements are prescribed if the arrangements are a standardised tax product.

But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.

(2) For the purposes of paragraph (1) arrangements are a product if—

(a) the arrangements have standardised, or substantially standardised, documentation—

(i) the purpose of which is to enable the implementation, by the client, of the arrangements; and

(ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;

(b) a client must enter into a specific transaction or series of transactions, and

(c) that transaction or that series of transactions are standardised, or substantially standardised in form.

(3) For the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.

(4) For the purpose of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person.

#### **Regulation 11: Arrangements excepted from [hallmark] 5**

(1) The arrangements specified in this regulation are—

(a) those described in paragraph (2); and

(b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1<sup>st</sup> August 2006.

(2) The arrangements referred to in paragraph (1)(a) are—

(a) arrangements which consist solely of one or more plant or

machinery leases (see regulation 14);

- (b) an enterprise investment scheme (Chapter 3 of Part 7 of ICTA 1988 and Schedules 5B and 5BA to TCGA 1992);
- (c) arrangements using a venture capital trust (see section 842AA of, and Schedule 15B to, ICTA 1988 and Schedule 5C to TCGA 1992);
- (d) arrangements qualifying under the corporate venturing scheme (see Schedule 15 to the Finance Act 2000);
- (e) arrangements qualifying for community investment tax relief (see Schedules 16 and 17 to the Finance Act 2002);
- (f) an account which satisfies the conditions in the Individual Savings Account Regulations 1998;
- (g) an approved share incentive plan (see Chapter 6 of Part 7 of, and Schedule 2 to, ITEPA 2003);
- (h) an approved share option scheme (see Chapter 7 of Part 7 of, and Schedule 3 to, ITEPA 2003);
- (i) an approved CSOP scheme (see Chapter 8 of Part 7 of, and Schedule 4 to, ITEPA 2003);
- (j) the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 (enterprise management incentives)—
  - (i) together only with such other steps as are reasonably necessary in all the circumstances for the purposes of facilitating it, or
  - (ii) which fall to be notified to the Board in accordance with Part 7 of that Schedule;
- (k) a registered pension scheme (see section 150(2) of FA 2004);
- (l) an overseas pension scheme in respect of which tax relief is granted in the United Kingdom under section 615 of ICTA 1988 (exemption from tax for superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom);
- (m) a pension scheme which is a relevant non-UK pension scheme within the meaning given by paragraph 1(5) of Schedule 34 to FA 2004;
- (n) a scheme to which section 731 of ITTOIA 2005 applies (periodical payments of personal injury damages).

### 6.6.2 About the hallmark

This hallmark only applies where there is a promoter of the arrangements (see paragraph 5.3) and, other than some exceptions, is intended to capture what are often referred to as “mass marketed schemes”.

The fundamental characteristic of such schemes is their ease of replication rather than the volume of take-up or how they are made available – the number of clients, or potential clients, can vary enormously; as can the way in which they are “marketed”. Schemes with this replication characteristic have variously been described to us as “shrink-wrapped” or “plug and play” schemes. Essentially, all the client purchases is a prepared tax product that requires little, if any, modification to suit his circumstances. To adopt it would not require him to receive significant additional professional advice or services.

The hallmark is met when the five tests below are met and the product does not fall within one of the exceptions.

### 6.6.3 Test 1 – Are the arrangements a product?

This test is intended to limit disclosure to those arrangements that are offered to potential clients as a finished “product”, rather than a package of proposed arrangements and additional services.

To be a “product” the arrangements will have standardised, or substantially standardised, documentation the form of which has been determined by the promoter, do not require tailoring to the client’s circumstances to any material extent, and which enable the client to implement the arrangements. As a minimum this will mean that standardised contracts, agreements or other written understandings between the parties to the arrangements are provided to the client. Instructions on how to implement the scheme might, typically, also be included, as may a copy of Counsel’s Opinion.

To be a “product” the arrangements will also commit the client to enter either a specific standardised (or substantially standardised) transaction, or more usually a number of specific standardised (or substantially standardised) transactions, comprising the scheme. For example, a client who enters into the scheme may be required to join a specific partnership, take out a specific loan from a specific provider, buy a specific financial instrument etc.

### 6.6.4 Test 2 – Is the product a tax product?

This test is intended to limit disclosure to those arrangements that are tax driven – i.e. absent the tax advantage, it is highly unlikely that the product would exist, or if it did that any client would buy it.

The test asks whether it would be reasonable for an informed observer to conclude, having studied the arrangements, that **the**, not a, main purpose of the product is to enable the person entering into it to obtain a tax advantage. An informed observer is a person who is independent and has knowledge of the Taxes Act, such as a Special Commissioner. He need not necessarily be a tax practitioner.

#### 6.6.5 Test 3 – Is the tax product made available generally?

As mentioned earlier, the manner in which schemes caught by this hallmark are promoted can vary enormously. At one end of the spectrum the scheme promoter could enter into a proactive campaign or aggressive marketing strategy. At the other (especially for established schemes) he could simply react to a casual enquiry for “ideas” from a potential client or offer him a product having identified a potential need, such as whilst carrying out consultancy work. Consequently, this test is not based on how or why a scheme is promoted but how available it is to potential users – i.e. whether or not it is bespoke.

Subject to the other tests and exceptions, the hallmark will apply to any “tax product” that a promoter makes available for implementation to two or more potential clients.

#### 6.6.6 Test 4 – Was the tax arrangement first made available on or after 1<sup>st</sup> August 2006?

The hallmark does not apply when the arrangements, or substantially the same arrangements (see paragraph 10.2.4 for guidance on “substantially the same”), forming the tax product, were made available before 1<sup>st</sup> August 2006. It is irrelevant whether a given legal entity made them available prior to 1<sup>st</sup> August 2006; what is important is whether any person made them available prior to this date.

A promoter will pass this test when:

- he has specific knowledge about the earlier arrangements and has taken reasonable steps to confirm they had been made available before 1st August 2006; or
- the existence and substance of the arrangements can be clearly evidenced from tax manuals or publications.

#### 6.6.7 Test 5 – Is the tax product not within an exception?

There are a number of tax products that are excepted from disclosure. The list of exceptions is found at regulation 11 to the relevant legislation – reproduced at paragraph 6.6.1 above.

### 6.6.8 Packaged solutions

Accountants and other promoters of tax arrangements often maintain a “solutions register” that enables them to offer the same or similar solution to more than one client. The ‘solution’ will often require transactions of a specific nature to be carried out, possibly in a pre-ordained sequence; clauses to be inserted into contracts; etc. It will be a matter of scale and degree as to whether schemes on these registers fall within this hallmark.

In general, we would not expect such schemes to be caught where, before they can be implemented, the relevant transactions and/or documentation require significant tailoring to suit the client’s circumstances; or there are other circumstances where the input from a professional goes substantially beyond rudimentary oversight and checking.

## **6.7 Hallmark 6: Loss schemes**

### 6.7.1 The legislation

Hallmark 6 is prescribed at regulation 12 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 12**

Arrangements are prescribed if—

- (a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements; and
- (b) the arrangements are such that an informed observer (having studied them) could reasonably conclude—
  - (i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and
  - (ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax.

### 6.7.2 About the hallmark

This hallmark only applies where there is a promoter of the arrangements (see paragraph 5.3) and is intended to capture various loss creation schemes that are typically used by wealthy individuals.

The schemes vary considerably in detail but are normally designed so that they generate trading losses for wealthy individuals that can then be offset against income tax and capital gains tax liabilities or generate a repayment.

The hallmark is met when the two tests below are met.

### 6.7.3 Test 1 – Is more than one individual expected to implement the tax arrangements?

This test is met if the promoter expects that there will be more than one individual client for each set of arrangements having the same, or substantially the same, form.

### 6.7.4 Test 2 – Is the main benefit of the arrangements an expected loss for use against IT or CGT liabilities?

The test is whether an informed observer would reasonably conclude, having studied the details, that **the**, not a, main benefit of the arrangements is to provide all or some of the individual participants with losses that will be used to reduce their income tax or capital gains tax liabilities or generate a repayment. An informed observer is a person who is independent and has knowledge of the Taxes Act, such as a Special Commissioner. He need not necessarily be a tax practitioner.

This will normally be the case where it would be reasonable to expect that the tax relief expected by the “investors” is greater than the total amount of the investment which represents real personal risk. For example, the amount an individual invests in the scheme may be geared up by a non-recourse loan or limited recourse loan from sources connected with the scheme and the arrangements such that however little income the scheme generates the tax relief will be greater than the amount the individual has, in economic substance, contributed.

This test does not catch genuine business start-ups where any losses are an unintended, albeit possibly predictable, consequence.

## **6.8 Hallmark 7: Leasing arrangements**

### 6.8.1 The legislation

Hallmark 7 is prescribed at regulations 13 to 17 to the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543):

#### **Regulation 13**

- (1) Arrangements are prescribed if—
- (a) the arrangements include a plant or machinery lease (see regulation 14);
  - (b) one of the additional conditions is met (see regulation 15);
  - (c) the relevant value condition is met (see regulation 16); and
  - (d) the lease is not a short-term lease (see regulation 17).
- (2) But arrangements are not prescribed by this regulation if—
- (a) no person is a promoter in relation to them; and
  - (b) the tax advantage which may be obtained under the arrangements

is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

**Regulation 14: Meaning of “plant or machinery lease”**

- (1) A “plant or machinery lease” is any of the following—
- (a) any agreement or arrangement to which paragraph (2) applies,
  - (b) any other agreement or arrangement to the extent that paragraph (3) applies to it,
  - (c) where plant or machinery is the subject of a sale and finance leaseback, as defined in section 221 of CAA 2001, the finance lease mentioned in subsection (1)(c) of that section;

and in these Regulations “lease”, “lessor” and “lessee” are to be construed accordingly.

- (2) This paragraph applies to an agreement or arrangement—
- (a) under which a person (the lessor) grants to another person (the lessee) the right to use plant or machinery for a period, and
  - (b) which, in accordance with generally accepted accounting practice, falls (or would fall) to be treated as a lease.
- (3) This paragraph applies to an agreement or arrangement to the extent that—
- (a) in accordance with generally accepted accounting practice, it falls (or would fall) to be treated as a lease, and
  - (b) it meets the conditions in paragraph (4).
- (4) The conditions are that, for the purposes of generally accepted accounting practice,—
- (a) the agreement or arrangement conveys, or falls (or would fall) to be regarded as conveying, the right to use an asset, and
  - (b) the asset is plant or machinery.
- (5) In the case of an agreement or arrangement that falls (or would fall) within paragraph (2) or (3) immediately after the commencement of the term of the lease, the condition in paragraph (2)(b) or (3)(a) (as the case may be) is to be taken to be met as respects any time in the pre-commencement period.
- (6) For the purposes of paragraph (5), the “pre-commencement period” is the period that—
- (a) begins with the inception of the lease, and
  - (b) ends with the commencement of the term of the lease.
- (7) In paragraph (6)(a), “inception”, in relation to a plant or machinery lease,

means the earliest date on which all of the following conditions are met—

- (a) there is a contract in writing for the lease between the lessor and the lessee;
- (b) the contract is unconditional, or (if the contract is conditional) the conditions have been met; and
- (c) no terms remain to be agreed.

**Regulation 15: The additional conditions**

(1) The first additional condition is that the arrangements are designed in such a way that one or more of the plant or machinery leases, comprised in the arrangements, are or would be entered into by—

- (a) one party who has or would have a right or entitlement to claim capital allowances under Part 2 of CAA 2001 (plant and machinery allowances) in respect of the expenditure incurred on the plant or machinery, and
- (b) another party who is not, or would not be, within the charge to corporation tax.

(2) A lease satisfies this condition if sub-paragraphs (a) and (b) of paragraph (1) are met, regardless of whether there are or would be (in addition to the parties mentioned in those sub-paragraphs) other parties to the lease who satisfy neither of those conditions.

(3) A party who acts merely as a guarantor under the lease is to be disregarded for the purposes of paragraph (1)(b).

(4) The second additional condition is that the arrangements include provision designed to—

- (a) remove from the lessor the whole, or the greater part, of any risk, which would otherwise fall directly or indirectly upon the lessor, of sustaining a loss if payments due under the lease are not made in accordance with its terms, and
- (b) do so by the provision of money or a money debt.

For the purposes of this paragraph “money” and “money debt” have the same meanings as they have in section 702(6) of ITEPA 2003.

(5) The third additional condition is that the arrangements are designed to consist of, or include—

- (a) a sale and finance leaseback arrangement (within the meaning of section 221 of CAA 2001), or
- (b) a lease and finance leaseback (within the meaning of section 228F(5) of CAA 2001).

The third additional condition is subject to the following paragraphs of this

regulation.

- (6) In a case falling within paragraph (5)(a) the third additional condition does not apply if the arrangements are designed in such a way that—
- (a) the assets leased or to be leased under the sale and finance leaseback are or will be unused and not second-hand at the time when the assets are acquired or created; and
  - (b) the interval between the acquisition or creation of the asset and the sale of the asset under the sale and finance leaseback arrangement is not more than four months.
- (7) The third additional condition does not apply if plant or machinery which is, or which the promoter expects to become, a fixture, is leased with relevant land, unless the plant or machinery is used for storage or production.

Here “used for storage or production” means used for the purposes of—

- (a) storing, moving or displaying goods to be sold in the course of a trade;
  - (b) manufacturing goods or materials;
  - (c) subjecting goods or materials to a process;
  - (d) storing goods or materials—
    - (i) which are to be used in the manufacture of other goods or materials;
    - (ii) which are to be subjected to a process in the course of a trade;
    - (iii) which having been subjected in the course of a trade to process, manufactured or produced, have not yet been delivered to a purchaser; or
    - (iv) upon their arrival in the United Kingdom from a place outside it.
- (8) But paragraph (7) does not apply (so that, accordingly, the third additional condition is met) if the arrangements are designed in such a way that—
- (a) the qualifying expenditure incurred on the fixture referred to in paragraph (7) amounts or will amount to more than 50% of the aggregate value of the assets subject to the lease, and
  - (b) the rent payable under the lease is directly or indirectly dependent on the availability of capital allowances under Part 2 of CAA 2001 in respect of expenditure on any plant or machinery comprised in the lease.
- (9) In determining the value of the assets comprised in the lease the following rules apply.

*Rule 1*

The value of the land subject to the lease is the market value of the lessor's interest.

*Rule 2*

The value of the plant or machinery subject to the lease is to be determined in the same manner as for the purposes of regulation 16(1).

(10) In this regulation—

“fixture” has the meaning given by section 173(1) of CAA 2001;

“relevant land” has the meaning given by section 173(2) of CAA 2001.

**Regulation 16: The relevant value condition**

(1) The relevant value condition is met if—

- (a) the lower of the cost to the lessor, or the market value, of any one asset forming part of the plant and machinery leased or to be leased under the arrangements is at least £10,000,000; or
- (b) the aggregate of the lower of the costs to the lessor, or the market values, of all of the assets forming part of the plant and machinery leased or to be leased under the arrangements is at least £25,000,000.

(2) For the purposes of paragraph (1) the market value of plant or machinery leased or to be leased under arrangements is to be determined on the assumption of a disposal—

- (a) by an absolute owner;
- (b) free from all encumbrances; and
- (c) in the open market.

(3) “Absolute owner” in the application of paragraph (2)(a) to Scotland, means the owner.

**Regulation 17: Short-term leases**

(1) For the purposes of regulation 13(1)(d) a lease whose term is 2 years or less is a short-term lease.

But a lease is not a short-term lease if any of the following Conditions apply.

In those Conditions “L” is the lessee.

(2) Condition A is that the lease contains an option exercisable by L to extend the term so that the total term exceeds 2 years.

(3) Condition B is that at the time of the inception of the lease, other

arrangements have been entered into which contemplate the extension of the lease to L which, if carried out, would extend the term of the lease so that it exceeds 2 years.

- (4) Condition C is that—
- (a) a person leases an asset to L under a lease that would, apart from this paragraph, be a short-term lease,
  - (b) the inception of that lease is on or after the date on which these Regulations come into force,
  - (c) at or about the time of the inception of that lease, arrangements are entered into for the asset to be leased to one or more other persons under one or more other leases, and
  - (d) in the aggregate, the term of the lease to L and the terms of the leases to such of those other persons as are connected with L exceed 2 years.

#### 6.8.2 About the hallmark

This hallmark applies to both promoted and 'in-house' arrangements and is met when both:

- all of tests 1 to 3 described below are met; and
- any one of the three additional conditions are met.

For 'in-house' arrangements, it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

#### 6.8.3 Test 1 – Does the arrangement include a plant or machinery lease?

The hallmark only applies if the arrangement includes a plant or machinery lease. In brief, this is:

- any agreement or arrangement under which a person grants to another person the right to use plant or machinery for a period and which in accordance with generally accepted accounting practice falls, or would fall, to be treated as a lease;
- any other agreement or arrangement to the extent that, in accordance with generally accepted accounting practice falls (or would fall) to be treated as a lease, the agreement conveys (or falls or would fall to be regarded as conveying) the right to use an asset, and the asset is plant or machinery; or
- the finance lease where plant or machinery is the subject of a sale and finance leaseback as defined in section 221 of the Capital Allowances Act 2001.

#### 6.8.4 Test 2 – Is the lease of high value?

The hallmark only applies to high value plant or machinery leases. It is a high value lease when, of the assets forming part of the plant and machinery leased or to be leased under it,

- the cost to the lessor of any one asset or its market value (whichever is lower) is at least £10m, or
- the cost to the lessor of all the assets or their market value (whichever is lower) is at least £25m.

Facilities to lease assets with an individual value of £10m or to the aggregate value of at least £25m are caught by this test even if there is no guarantee that the £25m threshold will be reached and should be disclosed when the facilities are made available.

Where a succession of leases are made to the same parties, or persons connected with them, and they are negotiated at the same time or as part of the same series of negotiations (that is, as part of the “arrangements”), the value of the plant or machinery to be leased under all the leases should be aggregated.

The acquisition of assets with an aggregate value of more than £25m (and no individual asset is at least £10m) does not have to be disclosed if the assets are to be leased to a variety of clients and no individual lease meets the £10m or £25m threshold, as appropriate.

#### 6.8.5 Test 3 – Is the lease a long lease?

The hallmark only applies where the lease is not a short-term lease.

The meaning of “short-term lease” is different from that of “short lease” in new section 701 of CAA 2001, which is being introduced by Schedule 8 to the Finance Bill 2006. A short-term lease is one whose term is 2 years or less but does not include leases that:

- contain an option allowing the lessee to extend the lease beyond 2 years;
- at the time of inception, other arrangements have been entered into that contemplate an extension beyond 2 years;  
or
- are incepted on or after 1<sup>st</sup> August 2006 with the intention that the assets be leased under it to one or more other persons such that the aggregate term exceeds 2 years.

#### 6.8.6 Additional condition 1 – Does the lease involve a party outside the charge to corporation tax?

This additional condition applies where the arrangement includes one or more plant or machinery lease entered, or to be entered, into by:

- a party who is entitled to claim capital allowances (on plant and machinery) in relation to the leased asset, and
- a party who is not, or would not be, within the charge to corporation tax.

It does not matter how many parties there are to the lease. Where there are more than two parties involved the arrangement is a hallmarked scheme if there are, or would be, parties to the lease meeting each of the above bullets.

A manufacturer may, of course, be a lessor and so a party to the lease. But a manufacturer of leased equipment is not a party to the lease merely by virtue of being a supplier to the lessor.

A party that acts solely as a guarantor is not taken into account in considering whether this condition is met. However you need to consider whether the guarantee provided is such that the second additional condition is met.

#### 6.8.7 Additional condition 2 – Does the arrangement involve the removal of risk from the lessor?

This additional condition applies where the arrangement includes provision that:

- removes the whole, or the greater part, of the risk that would otherwise fall directly or indirectly upon the lessor if payments due under the lease were not made in accordance with its terms; and
- does so by the provision of money or a money debt.

“Money” includes money expressed in a currency other than sterling.

“Money debt” means any obligation that falls to be, or may be, settled by the payment of money, or the transfer of a right to settlement under an obligation which is itself a money debt. It covers all trade debts, as well as other money debts, such as debentures.

#### 6.8.8 Additional condition 3 – Does the arrangement involve a finance leaseback?

This additional condition applies where the arrangements consist of, or include:

- a sale and finance leaseback arrangement, or
- a lease and finance leaseback.

However, there are two exceptions to this general rule.

First, this additional condition does not apply where the arrangements consist of, or include a sale and finance leaseback arrangement and, at the time the sale and finance leaseback is entered into, the assets leased, or to be leased, are new. By this it is meant that the assets:

- at the time they are acquired or created by the seller, are unused and not second-hand, and
- were acquired or created by the seller not more than 4 months before the sale part of the sale and finance leaseback arrangement.

Second, it is recognised that many property transactions consist of sale or lease and finance leaseback; and most property includes plant or machinery such as central heating and air conditioning. It is not intended that the simple sale and leaseback of plant or machinery within a typical building such as an office block fall within this additional condition.

The hallmark does not attempt to define the type of plant or machinery that is excluded when leased with land. Instead it takes the approach that the arrangements do not need to be disclosed where—

- the plant or machinery is, or is expected to become, a fixture that is part of the leased land,
- the plant or machinery does not exceed half the value of the leased assets, and
- the rent payable under the lease is not directly or indirectly dependent on the availability of capital allowances.

However, leases involving plant and machinery used for storage or production do not fall within this exemption – see the definition at regulation 15(7) reproduced at paragraph 6.8.1 above.

So, for example, if a factory is sold and leased back where the production line plant in the factory has a value of over £25m (or contains equipment with an individual value of over £10m) it will need to be disclosed.

But the sale and leaseback of an office block costing £100m with £35m of plant or machinery that does not meet the definition of “plant used for storage or production” will not need to be disclosed under this condition.

## **7. National Insurance contributions related schemes**

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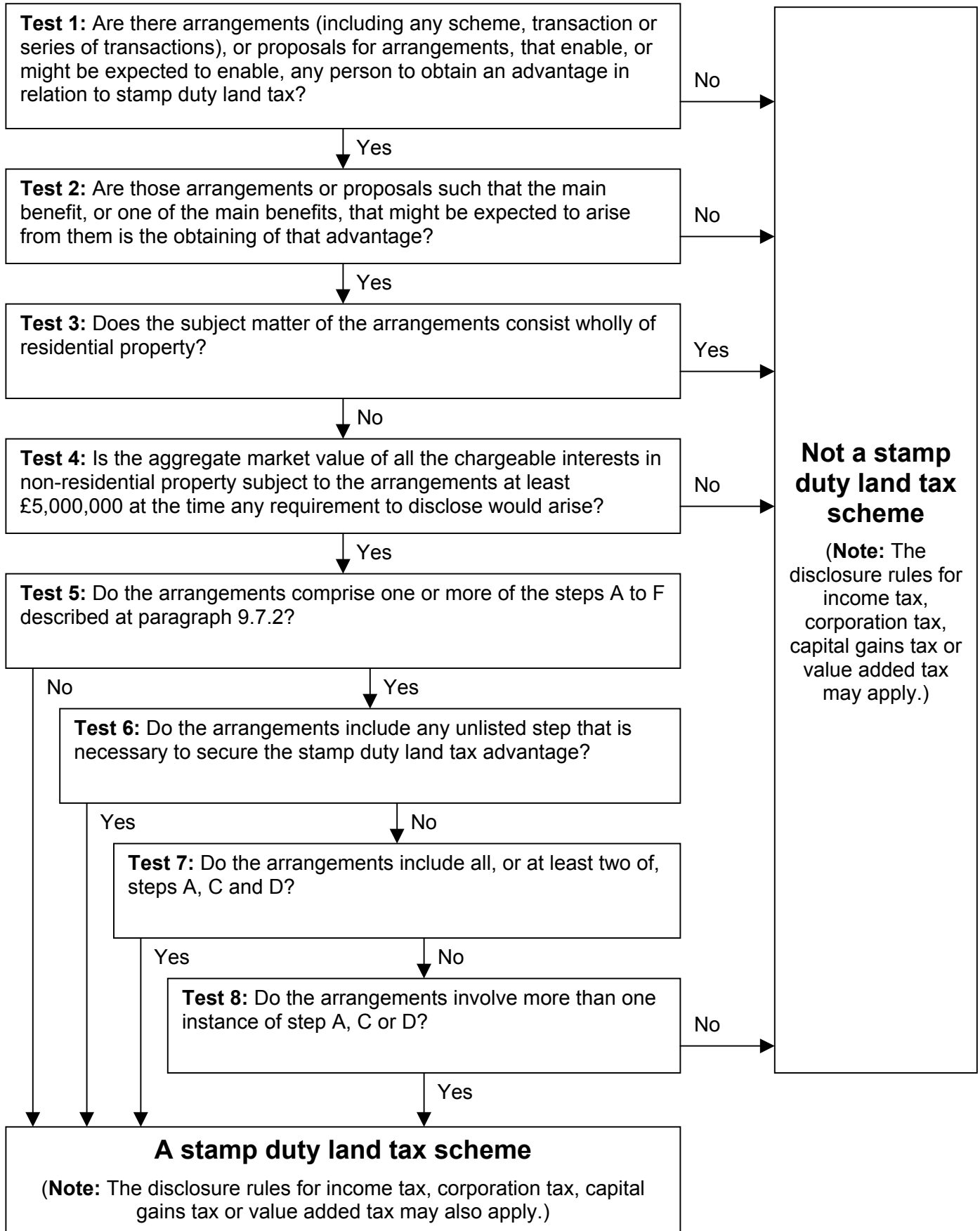
### **7.1 Current position**

Section 7 of The National Insurance Contributions Act, which received Royal Assent on 30th March 2006, provides a power for the Treasury to make regulations applying the income tax disclosure provisions to NICs.

Draft regulations were published in October 2005. These were issued before the Pre-Budget Report announced changes to the income tax disclosure regime (see paragraph 1.3). Consequently, a revised set of draft regulations will be issued in due course.

The intention remains that for schemes concerning income tax and NICs there will, in practice, be a single disclosure regime.

## 8. Determining a stamp duty land tax scheme – Flow chart



## **9. Determining a stamp duty land tax scheme – The tests**

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### **9.1 General**

The hallmarks at section 6, including the “confidentiality”, “premium fee” and “off market test” hallmarks do not apply to this section.

### **9.2 Test 1: Are there arrangements that enable an SDLT advantage be obtained? (FA 2004, s.306(1)(a) and (b) and s.318)**

The guidance at paragraph 5.1 applies to this section in the same way as it does for section 5.

**Note:** The definition of “arrangements” used for disclosure purposes is wider than the concept of “linked transactions” used for stamp duty land tax purposes (FA 2003, s.108).

### **9.3 Test 2: Is the advantage a main benefit of the arrangements? (FA 2004, s.306(1)(c))**

The guidance at paragraph 5.2 applies to this section in the same way as it does for section 5.

### **9.4 Test 3: Wholly residential property?**

Disclosure is not required if the arrangement is to be used wholly for residential property.

“Residential property” has the meaning used for stamp duty land tax purposes and is defined at FA 2003, s.116. You will find guidance on this in the Stamp Duty Tax Manual at SDLTM20070.

### **9.5 Test 4: Market value of non-residential property**

Disclosure is also not required if the total market value of the chargeable interests in each non-residential property for which the arrangement is to be used is below £5 million.

“Market value” has the meaning used for stamp duty land tax purposes, which is determined as for the purposes of the Taxation of Chargeable Gains Act 1992.

For the purposes of ascertaining the market value, you must take account of all chargeable interests held by all connected persons in the property. “Chargeable interest” is defined in FA 2003, s.48 and you will find guidance in the Stamp Duty Land Tax manual at SDLTM00280. “Connected persons” are those falling within the description in the Income and Corporation Taxes Act 1988, s.839.

The relevant time for determining the market value, is the time at which the arrangement would, if the market value of the non-residential property were at least £5 million, become disclosable. That is the date of the event that triggers the disclosure (see section 10).

## **9.6 Tests 3 and 4: Frequently asked questions**

A common question asked by professional advisers in relation to the draft regulations was “how will I know if the arrangement is to be used only for residential property or non-residential property under £5 million – any arrangement could theoretically be used for property of any description or value?”

The starting point is that the tests apply at the time of the event that triggers the potential requirement to disclose a scheme. There are two possible “triggers”, depending upon the type of scheme.

### 9.6.1 Marketed arrangements

For marketed arrangements the trigger is making proposals available for implementation by any person – see paragraph 10.3.2. We expect that in most cases the scheme will be made available to specific users. In that case, the promoter should apply the test:

- Will the arrangements be used, at least in part, for non-residential property with a value of £5 million or more in respect of the persons to whom the scheme has been made available?

If the answer is “I don’t know”, the promoter must notify the scheme.

In some cases, the scheme may be made available at a time when no specific users have been identified. For example, the promoter may communicate proposals at arms length via a distributor (see paragraph 10.3.5). In such cases, the promoter cannot know the details of the property for which the arrangements are to be used and must notify the scheme.

### 9.6.2 Bespoke arrangements

For bespoke arrangements, the trigger is that the promoter becomes aware that a transaction forming part of the arrangements has taken place – see paragraph 10.3.3. In such cases the promoter should apply the test:

- Will the arrangements be used, at least in part, for non-residential property with a value of £5 million or more to the property which is the subject of the transactions that have triggered the potential disclosure?

If the answer to either test is “I don’t know”, the promoter must notify the scheme.

### 9.6.3 In-house arrangements

Where users are required to disclose an arrangement, we expect that they will always know the details, including the market value, of the property for which the scheme is to be used. Consequently, we expect they will know, at the time that disclosure would normally be required, whether or not the transaction(s) forming part of the arrangements that triggers the disclosure requirement relates, at least in part, to non-residential property with a value of £5 million or more. If it does – or if the user does not know the answer – the user must notify the scheme.

### 9.6.4 Using the same arrangements with future unknown properties

In the circumstances described in paragraphs 9.6.1 and 9.6.2 there will usually be a theoretical possibility that the same arrangements could be used in future for other properties and the value of those properties is inevitably unknown. This situation alone does not require the arrangements to be notified. If and when either proposals are made available to further clients, or the promoter becomes aware of further transactions involving different clients or property, then the promoter should apply the tests again in relation to the new circumstances.

## **9.7 Tests 5 to 8: Introduction to steps A to F**

### 9.7.1 General

The Schedule to the regulations contains a list of six “steps” (A to F). You are **not** required to notify schemes that comprise one or more of those steps (test 5). However, this is subject to:

- an overarching rule that **any** arrangement that contains an unlisted step – where that unlisted step is necessary for securing the stamp duty land tax advantage – is not exempted from disclosure (test 6); and
- certain restrictions on using combinations of steps or multiples of the same step (tests 7 and 8 – see paragraph 9.9 below).

The purpose of tests 5 to 8 is to remove the need to notify certain tax arrangements that HMRC is already fully aware of (in terms of content and extent), so that disclosure would serve no purpose.

The steps A to F have been described to us as “existing toolkit”. We believe a better term would be “existing building blocks”. For stamp duty land tax purposes, we are not interested in the existing building blocks in themselves. But we are interested in the ways in which the building blocks are put together to form more complex products. Hence the limits on the ways in which steps A to F can be used in combination.

The fact that any particular scheme is exempted from disclosure by the application of tests 5 to 8 should not be taken as an indication that HMRC either finds the scheme acceptable, or that we accept that it works under current law. It merely signifies that we already know about it.

### 9.7.2 The six steps – A summary

The six listed steps are:

- **Step A** – The acquisition of a chargeable interest in land by a special purpose vehicle (SPV);
- **Step B** – Claims to certain reliefs (see paragraph 9.8.1 below)
- **Step C** – The sale of shares in a SPV which holds chargeable interests in land, to a person who is not connected to either the SPV or the vendor;
- **Step D** – Not electing to waive the exemption from VAT (i.e. not “opting to tax”);
- **Step E** – Structuring a transaction as the transfer of a going concern for VAT purposes; and
- **Step F** – The creation of a partnership to which a property, which subject to a land transaction, is to be transferred.

### 9.7.3 The six steps – The legislation

The six steps are listed in the Schedule to The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868):

The steps are as follows.

#### **Step A: Acquisition of a chargeable interest by special purpose vehicle**

The acquisition of a chargeable interest in land by a company created for that purpose (“a special purpose vehicle”).

#### **Step B: Claims to relief**

Making—

- (a) a single claim to relief under any of the following provisions of the Finance Act 2003—
  - (i) section 57A (sale and leaseback arrangements);
  - (ii) section 60 (compulsory purchase facilitating development);
  - (iii) section 61 (compliance with planning obligation);
  - (iv) section 64 (demutualisation of building society);
  - (v) section 64A (initial transfer of assets to trustees of unit trust

- scheme);
- (vi) section 65 (incorporation of limited liability partnership);
- (vii) section 66 (transfers involving public bodies);
- (viii) section 67 (transfer in consequence of reorganisation of parliamentary constituencies);
- (ix) section 69 (acquisition by bodies established for national purposes);
- (x) section 71 (certain acquisitions by registered social landlords);
- (xi) section 74 (collective enfranchisement by leaseholders);
- (xii) section 75 (crofting community right to buy);
- (xiii) Schedule 6 (disadvantaged areas relief);
- (xiv) Schedule 6A (relief for certain acquisitions of residential property);
- (xv) Schedule 7 (group relief and reconstruction acquisition reliefs);
- (xvi) Schedule 8 (charities relief); or
- (xvii) Schedule 9 (right to buy, shared ownership leases etc.);
- (b) one or more claims to relief under any one of the following provisions of the Finance Act 2003—
  - (i) section 71A (alternative property finance: land sold to financial institution and leased to individual);
  - (ii) section 72 (alternative property finance in Scotland: land sold to financial institution and leased to individual);
  - (iii) section 72A (alternative property finance in Scotland: land sold to financial institution and individual in common); or
  - (iv) section 73 (alternative property finance: land sold to financial institution and resold to individual).

**Step C: Sale of shares in special purpose vehicle**

The sale of shares in a special purpose vehicle, which holds a chargeable interest in land, to a person with whom neither the special purpose vehicle, nor the vendor, is connected.

**Step D: Not exercising election to waive exemption from VAT**

No election is made to waive exemption from value added tax contained in paragraph 2 of Schedule 10 to the Value Added Tax Act (treatment of buildings and land for value added tax purposes).

**Step E: Transfer of a business as a going concern**

Arranging the transfer of a business, connected with the land which is the subject of the arrangements, in such a way that it is treated for the purposes of value added tax as the transfer of a going concern.

## **Step F: Undertaking a joint venture**

The creation of a partnership (within the meaning of paragraph 1 of Schedule 15 to the Finance Act 2003) to which the property which subject to a land transaction is to be transferred.

### **9.8 Approach to tests 5 to 8**

The way to approach the steps is as follows:

- Identify all the single listed steps comprised in the arrangement. Paragraph 9.8.1 provides guidance on what constitutes a single step B.
- Identify any unlisted steps in the arrangement that are necessary to secure the expected stamp duty land tax advantage (if there are any such steps, the scheme is not exempted from disclosure – see paragraph 9.7.1 above).
- If the arrangement involves a combination of steps, or more than one instance of the same step, refer to tests 7 to 8 (paragraph 9.9 below) to see if that combination or multiple falls within the arrangements exempted from disclosure.

#### 9.8.1 Single step B

A single instance of step B consists of either:

- a single claim to one of the reliefs listed under step B(a)(i) to (a)(xvii) in the Schedule (see paragraph 9.7.3); or
- one or more claims to one the reliefs listed under step B(b)(i) to (b)(iv) in the Schedule (see paragraph 9.7.3).

Note: For this purpose a claim can still be a ‘single claim’ even if it is one of a number of identical claims being made in respect of separate and distinct properties. So, for example, where two properties are transferred from group company A to group company B, each of the two claims to group relief is a ‘single claim’ for this purpose.

Examples of single step B:

- A single claim to charities relief is one step B (single use of a relief in group (a)); and
- Two claims to alternative property finance: land sold to financial institution and leased to individual constitute one step B (multiple use of a relief in group (b)).

We will accept that a single step B(a)(xv) includes actions taken or not taken with the intention of ensuring that, within the context of the withdrawal of group, reconstruction or acquisition relief:

- the purchaser ceases to a member of the same group as the vendor; or
- control of the acquiring company changes; or
- arrangements for either of the above events are entered into;

on or after the end of the period of three years beginning with the effective date of the relief, rather than before the end of that period.

A “single claim” to a relief means step B does not include any arrangement that comprises more than one claim to the same listed relief within group (a) of the Schedule. Nor do such schemes constitute multiples of step B. They are not within step B at all. For example:

- Two claims to group relief fall outside step B ( two claims to the same listed relief); and
- A claim to group relief and a claim to reconstruction relief also fall outside step B (two claims to the same listed relief – although these are separate reliefs, they are listed together in group (a)(xv)).

Any such arrangement is not excepted from disclosure.

An arrangement that comprises the use of two or more different listed reliefs will amount to two or more separate instances of step B. For example:

- A claim to charities relief and a claim to group relief constitute two separate steps B (use of two separately listed reliefs);
- A claim to group relief and a claim to alternative property finance: land sold to financial institution and leased to individual constitute two separate steps B (use of two separately listed reliefs).

In such cases, you should refer to paragraph 9.9 to see whether the combination is excepted from disclosure.

### **9.9 Tests 7 and 8: Combination steps**

Rules 1 and 2 of the schedule to The Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868) specify which combinations of steps, or multiples of the same step, can be used as part of the excepted arrangements. These two rules are separate (i.e. they are not two legs of a single rule in which Rule 2 is merely an extension of Rule 1). It is necessary to consider Rule 2 even where Rule 1 is not in point.

#### 9.9.1 SI 2005/1868: Rule 1 to the schedule

This rule merely confirms that arrangements exempted from disclosure can include any combination of steps B, D, E and F, including multiple uses of the same step.

#### 9.9.2 Tests 7 and 8 (SI 2005/1868, Rule 2 to the schedule)

These tests provide that arrangements are not excluded from disclosure if they:

- include any combination of steps A, C and D; or
- involve a multiple use of any of steps A, C or D.

#### 9.9.3 Examples of arrangements exempted from disclosure

Examples of arrangements exempted from disclosure include schemes that consist of:

- two steps B;
- two steps B and a single step A; and
- two Steps B and two steps F.

#### 9.9.4 Examples of arrangements not exempted from disclosure

Examples of arrangements that are **not** exempted from disclosure include schemes that consist of:

- two claims to group relief (double use of the same relief does not fall within step B at all – see paragraph 9.8.1 above);
- two steps A only;
- two steps B and single steps A and D; and
- two steps B and two steps A.

## **10. When to disclose a hallmarked or stamp duty land tax scheme**

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### **10.1 General**

Section 3 explains who is required to disclose a hallmarked or stamp duty land tax scheme. In general, it is the scheme promoter who has to disclose. However, the user may have to disclose where an offshore promoter or lawyer markets the scheme, or it is devised for use 'in house'.

A scheme may have been first made available to clients before an obligation to disclose it arises, such as prior to the introduction of the disclosure rules. In such cases the scheme is to be disclosed once it has been made available on or after the obligation to disclose has arisen.

### **10.2 Schemes where the promoter must disclose**

#### 10.2.1 Time limits (FA 2004, s.308(1) and (3), and SI 2004/1864, reg. 4(2) and (3))

Where a promoter is required to disclose he must do so within 5 days of the earlier of the date on which he:

- makes the scheme available for implementation by another person – see paragraph 10.3; or
- becomes aware that the scheme has been implemented by a transaction taking place that forms part it.

For marketed schemes, the first of these tests is likely to be met before the second. So the time for disclosure would normally be by reference to that earlier date.

However, where the activity of the promoter is restricted to the creation of bespoke schemes, the disclosure requirement arises only when he becomes aware that a transaction forming part of the scheme has taken place (see also paragraph 10.3.3). This ensures that where the bespoke planning goes through a number of iterations each of the iterations need not be disclosed.

In practice, there may only be minimal timing difference between the time a bespoke scheme is disclosed compared to a marketed scheme.

#### 10.2.2 Transition to hallmarked schemes from 1<sup>st</sup> August 2006

A hallmarked scheme may have been made available to a client or clients prior to 1<sup>st</sup> August 2006, but not have been disclosable in accordance with rules for employment and financial products that existed prior to that date.

Where the time limit for disclosure is by reference to when the scheme was made available, the scheme is not disclosable under the new rules for hallmarked schemes until such time as it is made available to a client on or after 1<sup>st</sup> August. (**Note:** Where hallmark 5 applies (standardised tax products) there is an over-riding exemption from disclosure if the relevant arrangements were first made available prior to 1<sup>st</sup> August 2006 – see paragraph 6.6.6.)

Where the time limit for disclosure is by reference to when the promoter first becomes aware that a scheme has been implemented, the scheme is disclosable when such an event happens on or after 1<sup>st</sup> August, even if the associated planning or actual implementation took place prior to that date.

#### 10.2.3 Exemption for co-promoters (FA 2004, s.308(4))

Where two or more persons are promoters in respect of a scheme designed for, or made available for implementation by, the same client they can agree between them who should make the disclosure. That single disclosure will discharge the obligation of all of the promoters involved. Where the promoters are unable to agree about any aspect of the rules any of the promoters involved can make the disclosure to the Anti-Avoidance Group in HMRC. This will mean that a client may have to disclose two or more numbers in respect of the same scheme.

We will not seek to penalise promoters who have relied upon written assurances given to them by other promoters that either the disclosure obligation has been complied with or does not arise providing it was reasonable in the circumstances to rely upon the assurance given.

#### 10.2.4 Exemption for substantially the same scheme (FA 2004, s.308(5))

A promoter is required to disclose the same scheme only once. Minor changes, for example, to suit the requirements of different clients need not be separately disclosed providing the revised proposal remains substantially the same.

What constitutes a change in a scheme or arrangement so that it is no longer substantially the same is a matter which will need to be considered on each occasion.

In our view a scheme is no longer substantially the same if the effect of any change would be to make any previous disclosure misleading in relation to the second (or subsequent) client.

In general providing the tax analysis is substantially the same we will regard schemes as “substantially the same” where the only change is a different client including a different company in the same group.

We will not regard schemes as substantially the same where there are changes to deal with changes in the law or accounting treatment, changes in the tax attributes e.g. schemes creating income losses instead of capital losses or other legal and commercial issues.

However, special care must be taken where an existing tax product is used as part of an otherwise bespoke scheme. This has been described to us as “the use of existing toolkit”.

Where a piece of “existing toolkit” is used as part of a separate scheme for the same or different client then it may be that the resulting scheme is so different from the earlier planning idea that the disclosure position needs to be considered afresh. In some situations this might involve the client being given two or more numbers for example, where the scheme involves a combination of ideas that were themselves disclosed and allocated a number.

#### 10.2.5 Exemption when clearance application made (SI 2004/1864, para 5)

There are special rules to avoid duplication of information where the arrangement includes transactions for which a statutory clearance exists. In practice to date these rules have been little used.

They apply for the purposes of:

- ICTA 1988, s.215 (Purchase of own shares by an unquoted company)
- ICTA 1988, s.225 (Company demergers)
- ICTA 1988, s.444A (Transfer of business)
- ICTA 1988, s.707 (Transactions in securities)
- TCGA 1992, s.138, 139, 140B or 140D (Reconstruction of company or trade).

Where a company or other person able to apply for statutory clearance has a reasonable intention of submitting a clearance application in respect of a transaction that forms part of a scheme designed or made available for implementation by a promoter, both the promoter disclosure and the clearance application can be made at the same time.

Where the user of the scheme decides not to make a clearance request then the promoter must make the disclosure no later than 5 working days following the day on which reasonable intention to make a clearance application ceased or the normal “relevant date” if this is later.

In any case where a transaction occurs prior to the submission of a clearance application then the disclosure must be made within 5 working days of any transaction that is part of the scheme occurring.

Clearance applications will be considered in the usual way and clearance will not be refused merely on the grounds that some part of the proposed transaction involves a disclosable scheme.

Disclosures made in this way should be sent with the clearance application.

It should be noted that combining the clearance with disclosure is optional and promoters can if they wish disclose in the usual way. However any clearance given may be void if the existence of a scheme within the transaction for which clearance is requested is not mentioned in the application. For example, where a number has been issued by the Anti-Avoidance Group this information should be included as part of the clearance application.

### **10.3 The “made available for implementation by another person” test**

#### 10.3.1 General

A scheme is regarded as being made available for implementation by another person when it:

- (a) has been developed to such a stage that the promoter has a high degree of confidence in the tax analysis applying to it; and
- (b) is communicated to a potential user in sufficient detail that he could be expected to:
  - understand the way in which the scheme works, including its key elements;
  - the expected tax advantages; and
  - decide whether or not to enter into it.

#### 10.3.2 Marketed schemes

By marketed schemes we mean schemes planned with no specific client in mind or possibly marketed to a class of user for example wealthy individuals, large companies or employers. The promoter may actively seek the potential user or make the product available in response to a general request for tax efficient ideas.

Such products may require some alteration to suit specific clients but the way in which the tax advantage is expected to be achieved remains as originally planned or pre-packaged and can be applied almost irrespective of the characteristics of the user.

A marketed scheme will typically be “made available for implementation by another person” when the promoter:

- communicates what is essentially a fully formed proposal to existing or potential clients, or
- provides an existing proposal to a client in respect of arrangements that would otherwise comprise a bespoke scheme (see below).

That a marketed scheme is tailored to the particular user does not affect the time limit for making disclosure. Similarly the proposal need not be marketed to the user or potential user in written form but could be by way of oral presentation of the proposal.

Where two or more schemes are made available to a client or potential client who later chooses to proceed with only one of them, both of the schemes must be disclosed.

### 10.3.3 Bespoke schemes

By bespoke schemes we mean a tax arrangement designed in response to a client's specific tax management issue.

A promoter who designs such a scheme is not normally regarded as "making it available for implementation by another person", with the relevant date being determined only by reference to when the scheme transaction takes place – see paragraph 10.2.1.

### 10.3.4 Internal approval processes

Most promoters have internal approval processes for new products. Schemes are accepted as being "made available for implementation by another person" when they are first put to a client after receiving approval.

This will not apply in any situation where the user has entered into any part of the scheme before the promoter's approval process has been completed.

### 10.3.5 Communications to non-users

Where the promoter communicates a scheme to a second person that acts as a distributor to potential users we will regard both parties as making the scheme available for implementation. However, the co-promoter rule allows that only one of the parties need make a disclosure (see paragraph 10.2.3). Regardless of who makes the disclosure, we would expect the scheme reference number to be provided to the scheme user.

However, where a promoter communicates an idea to another person for incorporation into their own scheme, only the second party is regarded as making a scheme available for implementation. The resulting scheme will need to be disclosed in the normal way unless it is substantially the same as one that they have previously disclosed – see paragraph 10.2.4.

## **10.4 Schemes marketed by offshore promoters**

### 10.4.1 Time limits (FA 2004, s.309 and SI 2004/1864, reg. 4(4))

Where a non-UK based promoter fails to comply with any disclosing obligation the user must disclose (see paragraph 3.3.5). He must do so within 5 days of entering into the first transaction forming part of the scheme (see paragraph 10.7).

We will not seek to penalise users who have relied upon written assurances given to them by non-UK based promoters that either the disclosure obligation has been complied with or does not arise, providing it was reasonable in the circumstances to rely upon the assurance given. Where disclosure has been made, the scheme reference number allocated to it by the Anti-Avoidance Group in HMRC should be provided to the user. The Anti-Avoidance Group can confirm whether a genuine reference number has been provided. Contact details are at paragraph 1.7.

### 10.4.2 Transition to hallmarked schemes from 1st August 2006

Where a promoter has not disclosed a hallmarked scheme that is implemented on or after 1<sup>st</sup> August it is disclosable, even if the associated planning took place prior to that date. (**Note:** Where hallmark 5 applies (standardised tax products) there is an over-riding exemption from disclosure if the relevant arrangements were first made available prior to 1<sup>st</sup> August 2006 – see paragraph 6.6.6.)

## **10.5 Schemes marketed by lawyers**

### 10.5.1 Time limits (FA 2004, s.310 and SI 2004/1864, regs. 4(5), (5ZA) and (5A))

Where a promoter is a lawyer and legal and professional privilege prevents him from providing all or part of the prescribed information to HMRC the user must disclose (see paragraph 3.5). Disclosure must normally be made within 5 days of entering into the first transaction forming part of the scheme (see paragraph 10.7). However, the time period is 30 days where the scheme is a stamp duty land tax scheme.

### 10.5.2 Transition to hallmarked schemes from 1st August 2006

Where a lawyer has not disclosed a hallmarked scheme that is implemented on or after 1<sup>st</sup> August it is disclosable, even if the associated planning took place prior to that date. (**Note:** Where hallmark 5 applies (standardised tax products) there is an over-riding exemption from disclosure if the relevant arrangements were first made available prior to 1<sup>st</sup> August 2006 – see paragraph 6.6.6.)

## 10.6 Schemes with no promoter, including “in-house” schemes

### 10.6.1 Time limits (FA 2004, s.310 and SI 2004/1864, reg. 4(2))

Where there is no promoter the user must disclose (see paragraphs 3.3.4 and 3.6). He must do so within 30 days of entering into the first transaction forming part of the scheme (see paragraph 10.7).

### 10.6.2 Transition to hallmarked schemes from 1<sup>st</sup> August 2006

A hallmarked scheme that is implemented on or after 1<sup>st</sup> August is disclosable, even if the associated planning took place prior to that date.

Hallmarked schemes that were implemented prior to 1<sup>st</sup> August 2006 are only disclosable if they fell to be a disclosable financial or employment tax arrangement under earlier rules. The due date for reporting schemes under the earlier rules continues to be the filing date for the return period in which the first transaction of the scheme was implemented.

It is accepted that this means that some schemes implemented on or after 1<sup>st</sup> August 2006 will be disclosed before schemes that have been implemented at an earlier time.

## 10.7 The “first transaction” test

The due date for making disclosure, where the user is required to make the disclosure, is by reference to the first transaction forming part of the scheme.

In the majority of cases where disclosure is required, it is likely that the tax department or individual is fully aware that the scheme is to be implemented and can monitor as to when the first transaction takes place.

In other cases, especially in larger organisations, systems should be put in place to identify and report disclosable schemes within the relevant time limit. What those systems are depends on individual circumstances. However they should be **reasonable and proportionate** to the risk.

In general, we expect the adopted system to involve the people who have the ability and authority to purchase, design or implement the sorts of schemes that are disclosable. These will normally be people within the tax department itself. Such people should be identified and be made sufficiently aware of the adopted system in order that disclosure can be made on time. The system should be reviewed periodically, at least once a year.

It is, however, accepted that there may be exceptional circumstances where a disclosable scheme is not captured by the adopted system in sufficient time for the disclosure to be made within the relevant time limit. In some cases the scheme may not be discovered until the end of year audit and tax computation. Concerns have arisen, in particular, over a UK tax advantage arising as a main benefit following:

- a controlled foreign company entering into local tax planning arrangements;
- unusual accountancy treatment;
- commercial transactions being carried out by non-tax specialists without the knowledge of the tax department; or
- the size of the tax benefit being too small for the tax department to be aware of it.

You should make disclosure of the scheme as soon as you are aware that it is late with an explanation as to why. If there is a reasonable excuse a penalty will not be imposed (see section 14).

## **11. How to make a disclosure**

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### **11.1 The forms to complete**

There are four different forms available for use in the following circumstances:

- AAG 1 – Notification of scheme by promoter
- AAG 2 – Notification of scheme by user where the promoter is off-shore
- AAG 3 – Notification of scheme by user in other circumstances (e.g. where legal privilege applies or the scheme is devised for use ‘in-house’)
- AAG 5 – Continuation sheet

### **11.2 How to obtain and submit the forms**

You can make an online disclosure by clicking the relevant links on the Anti-Avoidance Group website at <http://www.hmrc.gov.uk/aiu/index.htm>.

You can obtain PDF and WORD versions of the forms by clicking the relevant links on the same web page, or by contacting the Anti-Avoidance Group (Intelligence) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should then be sent by either post or e-mail to the Anti-Avoidance Group (Intelligence) at the address shown at paragraph 1.7.

### **11.3 The information to be provided**

#### **11.3.1 General (SI 2004/1864, reg. 3)**

Briefly, the regulations prescribe that the following information must be provided:

- The name and address of the promoter or other person required to make the disclosure.
- Details of the provisions, in the Prescribed Description of Arrangements Regulations that make the scheme disclosable – see paragraph 11.3.3.
- A summary of the proposal/arrangements and the name by which it/they are known – see paragraph 11.3.4.
- Information explaining the elements and how the expected tax advantage arises – see paragraph 11.3.4.
- The statutory provisions on which that tax advantage is based – see paragraph 11.3.4.

### 11.3.2 Legal advice (FA 2004, s.314)

Legal privilege may apply to certain advice given by lawyers to their clients. Legally privileged information need not be disclosed.

### 11.3.3 The prescribed arrangement(s)

The relevant forms have a list of the relevant provisions.

For hallmarked schemes, the relevant hallmark (see section 6) should be indicated. For some schemes, more than one hallmark may apply. Here you need only indicate one hallmark. However, in order to allow HMRC to monitor the value of the hallmarks, we would prefer you to indicate the main applicable hallmark.

For stamp duty land tax schemes, only the “SDLT Regulations” option should be marked.

### 11.3.4 Explaining the scheme

Sufficient information is required to be provided such so that an Officer of the Board of HMRC is able to understand how the expected tax advantage is intended to arise. The explanation should be in straightforward terms and should identify the steps involved and the relevant UK tax law. Common technical or legal terms and concepts need not be explained in depth.

If the scheme is complex then copies of any prospectus or scheme diagrams will help us understand what is proposed but even where you send such documents you must still use form AAG 1. Where such documents are supplied there is no objection to these documents excluding information that would identify a client.

## **12. Scheme reference numbers relating to hallmarked schemes**

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### **12.1 General**

The Anti-Avoidance Group in HMRC (see paragraph 1.7) issues a unique scheme reference number for each disclosure of a hallmarked scheme it receives. The number is issued within 30 days of the Anti-Avoidance Group receiving the disclosure.

The reference numbers are 8 digits in length and are issued to either scheme promoters or, where they have the liability to make disclosure, the scheme user.

Scheme reference numbers will now be issued where the scheme has been designed for use 'in-house'.

### **12.2 Promoters of hallmarked schemes (FA 2004, s.312)**

Promoters are required to provide the reference numbers allocated by the Anti-Avoidance Group to clients who use their schemes. Promoters may find it more convenient to issue the number to their clients when it is received although the strict statutory requirement does not require this. Promoters should ensure that they inform their clients of their obligation to include the reference number on their tax return or form AAG 4 (see paragraph 12.3 below).

#### **Warning:**

A promoter can incur a penalty for failing to provide the user of a hallmarked scheme with the reference number (see section 14).

### **12.3 Users of hallmarked schemes (FA 2004, s.313)**

Users of disclosed hallmarked schemes are required to notify HMRC that they have used or are using it, in most cases simply by entering the scheme reference number on their tax return(s). The user must also state the earliest year in which the tax advantage is expected to arise (if you are a user, the promoter will be able to advise you on this).

The user of a disclosed hallmarked scheme will obtain the scheme reference number for the scheme he uses from either the person who disclosed the scheme or directly from the Anti-Avoidance Group (because the user had an obligation to disclose). Irrespective of how the user obtains the scheme reference number, he is still required to enter it on his return(s).

The first return on which the information should be included is that covering the year of assessment, accounting period or tax year in which the scheme reference number is received, or in which the expected tax advantage arises, whichever is the earlier.

The reference number and information must be provided on each return in which the tax advantage arises until it has been exhausted or until it is clear that no further tax advantage will arise.

Where the use of a scheme involves an in-year claim for example for a coding adjustment, reduction in any payment on account or quarterly payment there is no statutory requirement to disclose any reference number in the claim. However, it will be helpful if relevant reference numbers are shown on any such claims etc.

You must **not** put scheme reference numbers in “white space” areas of tax returns.

Users who do not have to complete a tax return, or have a return that does not include a box in which to write the scheme reference number, should complete form AAG 4. This should be sent to the Anti-Avoidance Group (Intelligence) within HMRC such that it is received no later than the normal filing dates for returns. For schemes providing a PAYE tax advantage this will be 19th May. For other schemes it is 31st January for individual, partnership, and trust users and 12 months from the end of the accounting period for corporate users.

**Warning:**

A scheme user can incur penalties for failing to disclose the scheme reference number on tax returns or form AAG 4 (see section 14).

**12.4 How to obtain and submit form AAG 4**

You can obtain and submit form AAG 4 online by clicking the relevant links on the Anti-Avoidance Group website at <http://www.hmrc.gov.uk/aiu/index.htm>.

You can obtain PDF and WORD versions of the forms by clicking the relevant links on the same web page, or by contacting the Anti-Avoidance Group (Intelligence) within HMRC at the address shown at paragraph 1.7. Alternatively, paper copies can be obtained from the order line by telephoning 08459 000404 or by faxing on 08459 000604. The completed forms should be sent by either post or e-mail to the Anti-Avoidance Group (Intelligence) at the address shown at paragraph 1.7.

**12.5 Is an individual or a small and medium enterprise (SME) exempt from notifying reference numbers?**

No. Individuals who are not in business (e.g. employees) and SMEs are not required to determine (and disclose) if they use in-house hallmarked schemes (see paragraph 5.5). However, they are still required to declare on their tax return or form AAG 4 any scheme reference numbers issued or provided to them by a promoter that relate to schemes they use.

## **12.6 Employers using schemes**

This paragraph applies where a scheme is expected to result in a PAYE tax advantage and involves one or more directors or employees or persons connected to directors or employees or the employer.

Where a promoter has disclosed the scheme to HMRC it will be given a reference number and the promoter is obliged to notify this number to the user in the usual way.

The employer must notify the use of the arrangement on form AAG 4 directly to HMRC no later than 19th May following either the end of the tax year in which the scheme reference number is received, or the expected tax advantage arises, whichever is the earlier.

Where an employee is expected to obtain a tax advantage from a scheme, the employee is not required to include a reference number on his or her return on the basis the employer as user will submit a form AAG 4. Employers do not therefore need to include the reference number on their personal SA return or CTSA return (where the employer is a company).

## **13. Scheme reference numbers relating to stamp duty land tax schemes**

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### **13.1 Promoters of stamp duty land tax schemes**

For stamp duty land tax schemes the Anti-Avoidance Group in HMRC will issue a reference number to promoters solely to help the promoter identify the scheme to internal and external stakeholders. This will help to ensure that the same scheme is not disclosed more than once, either by the same promoter or by other co-promoters.

There is no statutory obligation on the promoter to provide a user with the reference number. We recommend that promoters do not pass on reference numbers to users in case the user is confused. If a promoter does provide the user with the number, they should make clear that it is for reference purposes only and that the user is not required to notify the number to HMRC in any way.

A promoter cannot incur a penalty for failure to issue the user of a stamp duty land tax scheme with a reference number.

### **13.2 Users of stamp duty land tax schemes**

There is no obligation for the users of stamp duty land tax schemes to include a reference number issued by the Anti-Avoidance Group (or any other additional information) either on or with a land transaction return (form SDLT1). Paragraph 13.1 explains that HMRC will issue a promoter with a reference number solely to help reduce the compliance burden on the promoter and for no other purpose. Consequently, the user cannot incur a penalty for failure to declare a reference number on a return.

## 14. Penalties

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### 14.1 Penalties for non-compliance by scheme promoters (FA 2004, s.315)

Promoters are liable to a penalty if they fail to comply with their obligations. The penalties are described in section 98C (1) of the Taxes Management Act 1970.

A penalty may be charged where a promoter fails, without reasonable excuse, to:

- make a disclosure to the Anti-Avoidance Group in HMRC when required to do so; or
- advise the scheme user of the reference number issued by the Anti-Avoidance Group when required to do so.

In both instances there is an initial penalty and a daily penalty. The maximum initial penalty for failing to disclose when required to do so is £5,000 for each failure. If the failure continues after the initial penalty has been imposed then an additional penalty of £600 per day can be imposed.

The Special Commissioners are responsible for imposing any initial penalty and there is a right of appeal.

HMRC can impose the further daily penalty or penalties where the promoter fails to comply after the Special Commissioners have imposed an initial penalty.

### 14.2 Penalties for non-compliance by scheme users (FA 2004, s.315)

Scheme users may be liable to a penalty where without reasonable excuse they fail to:

- disclose a scheme when required to do so; or
- declare on their tax return the scheme reference number

These are described in section 98C(3) of the Taxes Management Act 1970.

#### 14.2.1 Failure to disclose a scheme

The penalty is the same as for promoters – i.e. an initial penalty of £5,000 and daily penalties of £600 per day for continued failure.

#### 14.2.2 Failure to declare a scheme reference number

The penalty will increase for each failure as follows:

- 1st failure penalty £100
- 2nd failure penalty £500
- 3rd and subsequent failure penalty £1000

There is a right of appeal against the penalty to the Special Commissioners and onwards to the High Court on a point of law.

It is important to note that the penalty is per failure and not per year.

### **14.3 Reasonable excuse**

No penalty will be charged where the promoter or user (as applicable) has a reasonable excuse and the failure to comply is remedied within a reasonable time after the excuse ceased. Consideration of reasonable excuse will include whether the promoter or user has clearly followed current guidance or has otherwise made a reasonable judgement in determining whether or not a disclosure is required.