Penalties for enablers FAQs

Schedule 16 of Finance (No.2) Act 2017 introduces new penalties for enablers of defeated tax arrangements (the 'penalties for enablers' rules).

These new penalties allow HMRC to tackle all aspects of the marketing and supply of avoidance schemes. They build upon the rules targeting promoters of tax avoidance schemes (POTAS) introduced by Finance Act 2014, but have a much wider scope, extending beyond those who promote tax avoidance schemes to those involved at any step in their development, design, management or implementation.

The penalties for enablers rules came into effect on 16 November 2017 (being the date Finance (No.2) Act 2017 received Royal Assent). They only apply to tax arrangements entered into and enabling action taken on or after that date.

A recent ATT technical article Penalties for enablers of defeated tax arrangements provides a short summary of the new rules and their scope. This follow up article is intended to address what the penalties for enablers rules mean in practice for members by considering some *Frequently Asked Questions (FAQs).*

This is a complex area, and the below is only intended as an introduction to the areas which members might wish to consider. It is not intended to act as detailed guidance, and should not be relied upon by ATT or CIOT members. HMRC's draft guidance (which can be found here) should be consulted for further information.

1. **If I act in line with the requirements of Professional Conduct in Relation to Taxation (PCRT) am I exempt from the penalties for enablers rules?**

The penalties for enablers legislation does not specifically exempt those who act in accordance with the requirements of PCRT.

However, there are some similarities between the types of behaviour addressed by PCRT and the penalties for enablers rules. In particular, the latest version of the PCRT (which took effect from 1 March 2017 and can be found here) states at paragraph 2.29 that:

"Members must not create, encourage or promote tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation."

This similarity is acknowledged in HMRC's draft guidance on the penalties for enablers rules, which notes that a person who acts in accordance with PCRT is unlikely to come within their scope.

2. **Could I be regarded as an enabler if I entered a scheme on my client's tax return which is subsequently defeated?**

The penalties for enablers rules include *managers of avoidance arrangements* within the definition of an enabler.

A person is a *manager of arrangements* if:

- In the course of their business they are responsible for the organisation or management of the arrangements, **and**

- When doing so they knew, or could reasonably be expected to have known, that the arrangements were abusive tax arrangements.

This could include ensuring the required paperwork is in place to implement the arrangements, or facilitating transactions which form part of them.

However, HMRC's draft guidance indicates that this will not normally extend to completing or filing a return, even if this reflects a tax advantage from abusive arrangements, provided that is all that has been done. Provided that tax agent has taken no part in setting up or entering into the arrangements this alone should not result in their being an enabler.

A member who is requested to reflect the results of a tax avoidance scheme in a client's return should however consider whether they would be complying with the requirements of PCRT, regardless of whether they fall within the penalties for enablers rules.

In this respect it should be noted that PCRT states at Paragraph 3.6:

"A member should take care not to be associated with the presentation of facts he knows or believes to be incorrect or misleading nor to assert tax positions in a tax return which he considers have no sustainable basis."

And at Paragraph 4.50:

"A member should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis based on the information provided to him"

More information on PCRT can be found on the ATT website here.

In their comments on HMRC's draft guidance the CIOT and ATT expressed concern that Example 8 (which discusses an adviser who was not involved in the original arrangements but is filing the user's tax return) does not accurately reflect how a member complying with PCRT would act in those circumstances. HMRC are currently considering all comments received in finalising their guidance.

3. Can I help a client extricate themselves from an avoidance scheme without falling foul of the penalties for enablers regime?

The penalties for enablers rules provide a safeguard for those whose only connection with abusive tax arrangements is helping a user withdraw from them.

An adviser helping a client in this way will not be considered to be a *manager of arrangements* provided that:

- They merely facilitate the client's withdrawal from the arrangements, and are not involved in managing their continued implementation, and
- It is reasonable to assume that obtaining of a tax advantage is not one of the client's purposes in withdrawing from the arrangements (i.e. they are not enabling their client to enter an exit strategy which, of itself, is seeking to obtain a tax advantage).

HMRC's draft guidance indicates that, even if exiting arrangements will result in some of the original tax advantage remaining, an adviser will not be an enabler by virtue of managing arrangements provided the taxpayer's purpose was not to seek a tax advantage. However, the adviser could be an enabler if they devise exit arrangements that secure the same or a different tax advantage that are themselves abusive.

4. Will I be regarded as an enabler if I refer a client on to another person who provides avoidance schemes?

The penalties for enablers rules include *marketers of arrangements* within the definition of enabler.

A person is a *marketer of arrangements* if, in the course of their business, they either:

- Propose the arrangements to the taxpayer, or
- Communicate information to the taxpayer, or another person, about a proposal for the arrangements with a view to the taxpayer entering into them.

This definition means the penalties for enablers rules can apply both to those who actively market tax avoidance arrangements, and those who refer clients onto them.

It should be noted that making such a referral may also be in contravention of PCRT, which requires members to not *encourage* tax planning arrangements or structures which are highly contrived and seek to exploit legislative shortcomings. See the PCRT Frequently asked questions on the ATT website for more detail.

5. Is there a risk I will be an enabler if I prepare accounts, board minutes etc. which are used as part of an avoidance scheme?

The penalties for enablers rules include *managers of avoidance arrangements* within the definition of enabler.

A person is a *manager of arrangements* if:

- In the course of their business they are responsible for the organisation or management of the arrangements, **and**
- When doing so they knew, or could reasonably be expected to have known, that the arrangements were abusive tax arrangements.

This could include ensuring the required paperwork is in place to implement the arrangements, or facilitating transactions which form part of them.

However, HMRC's draft guidance indicates that simply performing a statutory function or a service (e.g. preparing board minutes, completing or filing a return, making filings at Companies House or Land Registry, auditing statutory accounts), even where these reflect a tax advantage from abusive tax arrangements, will not be managing or organising those arrangements provided that is all that has been done.

6. Can I give a client a second opinion on an avoidance scheme?

The penalties for enablers rules include *designers of avoidance arrangements* within the definition of an enabler.

A person is a *designer of arrangements* if, in the course of their business, they are to any extent responsible for the design of the arrangements, or a proposal which was implemented by them.

This can include providing advice or an opinion that is taken into account in the design of the arrangements or proposal.

However, a person providing advice will only be deemed to be a *designer* if:

- That advice, or any part of it, suggests arrangements or alterations which it is reasonable to assume are made with a view to giving rise to a tax advantage, **and**
- The person knew, or could reasonably be expected to have known, that the advice was likely to be used to design an abusive tax arrangement.

For these purposes advice will not be taken to *suggest* anything if it is merely put forward for consideration, but the advice can reasonably be read as recommending against that approach.

For example, the following would not be held to be a *designer*:

- An adviser who merely gives a client a second opinion on abusive arrangements, without suggesting any alterations.
- An adviser giving a second opinion which does suggest changes for consideration, but highlights the risks associated with those changes in such a way that the advice as a whole cannot be read as recommending them.

With regard to the second of these, section 5.2.4.3 onwards of HMRC's draft guidance provides more information as to when advice may be reasonably read as recommending against anything put forward for consideration.

7. I am an employee of a company / firm – could I be an enabler?

A key requirement of each of the categories of enabler, other than an *enabling participant* (see below), is that the activity in question has to be performed in the course of a business carried on by that person.

This means that an employee cannot normally be an enabler in relation to their activities, as these will have been performed as part of their employment, and not in the course of a business carried on by them. Instead the enabler would be the employing business the employee is acting on behalf of.

The exception is where an employee acts as an *enabling participant*, meaning that:

- They enter into the arrangements, or a transaction forming part of them, **and**
- Those arrangements could not have been expected to result in a tax advantage without their involvement (or the involvement of another person in the same capacity), **and**
- At the time they enter into the arrangements or transaction, they knew, or could reasonably be expected to have known, that they were abusive.

Where these conditions are met an employee may be considered to be an enabler.

It should always be remembered that, regardless of the penalties for enablers rules, employees are subject to the requirements of PCRT in the same way as other ATT members.

8. When are tax arrangements *defeated*?

The penalties for enablers rules only apply where a person has entered into abusive tax arrangements which are subsequently defeated.

For these purposes arrangements are defeated if either:

- The tax advantage originally claimed in a return or other document has been counteracted, or
- HMRC have made an assessment that counteracts the expected tax advantage from the arrangements.

A tax advantage is *counteracted* where:

- adjustments are made to the taxpayer's position, either by HMRC or the taxpayer, to eliminate or reduce a tax advantage, or
- HMRC makes an assessment on the basis that the tax advantage does not arise, either in part or in whole.

In both cases, the counteraction must be final, meaning the position can no longer be varied, either on appeal or otherwise. This can include where a contract settlement has been entered into.

Where a proposal for the same arrangements has been implemented more than once (e.g. by multiple taxpayers), HMRC cannot assess a penalty until they reasonably believe that more than 50% of the users of those related arrangements have been defeated.

It should be noted that, as well as being defeated, tax arrangements also have to be abusive for the penalties for enablers rules to apply. The definition of when tax arrangements are abusive is based upon the *double reasonableness* test in the General Anti-Abuse Rule (GAAR). The ATT technical article Penalties for enablers of defeated tax arrangements provides more information on the definition of abusive for these purposes.

9. What responsibility do I have as an adviser to monitor schemes which may be defeated?

As noted above, the definition of *defeated* can include an adjustment made to a return or a HMRC assessment that counteracts the tax advantage previously claimed. Therefore, any scheme reflected in a return which remains open to enquiry or discovery assessment is potentially within scope.

It should however be noted that the penalties for enablers rules will only apply where a scheme is entered into, and the enabling activity takes place, on or after 16 November 2017. Schemes which were entered into before this date are not in scope.

Your personal responsibilities regarding prior returns of clients should be covered in your Engagement Letter.

10. Are there any reporting requirements under the penalties for enablers rules?

There is no requirement for either taxpayers or their agents to self-assess whether the penalties for enablers rules will apply.

Instead, where a person's use of abusive tax arrangements has been defeated and all other procedural requirements of the rules have been met (including obtaining an opinion from the GAAR Advisory Panel) HMRC will assess each enabler that is liable for a penalty and notify them.

HMRC must also notify a suspected enabler at several stages in the process and give them the chance to make representations or appeal, including:

- Where they are considering making a referral to the GAAR Advisory Panel in respect of arrangements.
- When a decision to make a referral has been made, and when a referral is actually made.

- Where they believe arrangements are equivalent to those on which the GAAR Advisory Panel has issued a final decision notice.