

SCHEDULES

SCHEDULE 20

Section 162

PENALTIES FOR ENABLERS OF OFFSHORE TAX EVASION OR NON-COMPLIANCE

PART 1

LIABILITY FOR PENALTY

Liability for penalty

- 1 (1) A penalty is payable by a person (P) who has enabled another person (Q) to carry out offshore tax evasion or non-compliance, where conditions A and B are met.
- (2) For the purposes of this Schedule—
 - (a) Q carries out “offshore tax evasion or non-compliance” by—
 - (i) committing a relevant offence, or
 - (ii) engaging in conduct that makes Q liable (if the applicable conditions are met) to a relevant civil penalty,where the tax at stake is income tax, capital gains tax or inheritance tax, and
 - (b) P “has enabled” Q to carry out offshore tax evasion or non-compliance if P has encouraged, assisted or otherwise facilitated conduct by Q that constitutes offshore tax evasion or non-compliance.
- (3) The relevant offences are-
 - (a) an offence of cheating the public revenue involving offshore activity, or
 - (b) an offence under section 106A of TMA 1970 (fraudulent evasion of income tax) involving offshore activity,
 - (c) an offence under section 106B, 106C or 106D of TMA 1970 (offences relating to certain failures to comply with section 7 or 8 by a taxpayer chargeable to income tax or capital gains tax on or by reference to offshore income, assets or liabilities).
- (4) The relevant civil penalties are—
 - (a) a penalty under paragraph 1 of Schedule 24 to FA 2007 (errors in taxpayer’s document) involving an offshore matter or an offshore transfer (within the meaning of that Schedule),
 - (b) a penalty under paragraph 1 of Schedule 41 to FA 2008 (failure to notify etc) in relation to a failure to comply with section 7(1) of TMA 1970 involving offshore activity,
 - (c) a penalty under paragraph 6 of Schedule 55 to FA 2009 (failure to make return for 12 months) involving offshore activity,
 - (d) a penalty under paragraph 1 of Schedule 21 to FA 2015 (penalties in connection with relevant offshore asset moves).

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- (5) Condition A is that P knew when P's actions were carried out that they enabled, or were likely to enable, Q to carry out offshore tax evasion or non-compliance.
- (6) Condition B is that—
- (a) in the case of offshore tax evasion or non-compliance consisting of the commission of a relevant offence, Q has been convicted of the offence and the conviction is final, or
 - (b) in the case of offshore tax evasion or non-compliance consisting of conduct that makes Q liable to a relevant penalty—
 - (i) Q has been found to be liable to such a penalty, assessed and notified, and the penalty is final, or
 - (ii) a contract has been made between the Commissioners for Her Majesty's Revenue and Customs and Q under which the Commissioners undertake not to assess the penalty or (if it has been assessed) not to take proceedings to recover it.
- (7) For the purposes of sub-paragraph (6)(a)—
- (a) “convicted of the offence” means convicted of the full offence (and not for example of an attempt), and
 - (b) a conviction becomes final when the time allowed for bringing an appeal against it expires or, if later, when any appeal against conviction has been determined.
- (8) For the purposes of sub-paragraph (6)(b)(i) a penalty becomes final when the time allowed for any appeal or further appeal relating to it expires or, if later, any appeal or final appeal relating to it is determined.
- (9) It is immaterial for the purposes of condition B that—
- (a) any offence of which Q was convicted, or
 - (b) any penalty for which Q was found to be liable,
- relates also to other tax evasion or non-compliance by Q.
- (10) In this Schedule “other tax evasion or non-compliance by Q” means conduct by Q that—
- (a) constitutes an offence of cheating the public revenue or an offence of fraudulent evasion of tax, or
 - (b) makes Q liable to a penalty under any provision of the Taxes Acts, but does not constitute offshore tax evasion or non-compliance.
- (11) Nothing in condition B affects the law of evidence as to the relevance if any of a conviction, assessment of a penalty or contract mentioned in sub-paragraph (6) for the purpose of proving that condition A is met in relation to P.
- (12) In this Schedule “conduct” includes a failure to act.

Meaning of “involving offshore activity” and related expressions

- 2 (1) This paragraph has effect for the purposes of this Schedule.
- (2) Conduct involves offshore activity if it involves—
- (a) an offshore matter,
 - (b) an offshore transfer, or

- (c) a relevant offshore asset move.
- (3) Conduct involves an offshore matter if it results in a potential loss of revenue that is charged on or by reference to—
- (a) income arising from a source in a territory outside the United Kingdom,
 - (b) assets situated or held in a territory outside the United Kingdom,
 - (c) activities carried on wholly or mainly in a territory outside the United Kingdom, or
 - (d) anything having effect as if it were income, assets or activities of the kind described above.
- (4) Where the tax at stake is inheritance tax, assets are treated for the purposes of sub-paragraph (3) as situated or held in a territory outside the United Kingdom if they are so held or situated immediately after the transfer of value by reason of which inheritance tax becomes chargeable.
- (5) Conduct involves an offshore transfer if—
- (a) it does not involve an offshore matter,
 - (b) it is deliberate (whether or not concealed) and results in a potential loss of revenue,
 - (c) the condition set out in paragraph 4AA of Schedule 24 to FA 2007 is satisfied.
- (6) Conduct involves a relevant offshore asset move if at a time when Q is the beneficial owner of an asset (“the qualifying time”)—
- (a) the asset ceases to be situated or held in a specified territory and becomes situated or held in a non-specified territory,
 - (b) the person who holds the asset ceases to be resident in a specified territory and becomes resident in a non-specified territory, or
 - (c) there is a change in the arrangements for the ownership of the asset,
- and Q remains the beneficial owner of the asset, or any part of it, immediately after the qualifying time.
- (7) Paragraphs 4(2) to (4) of Schedule 21 to FA 2015 apply for the purposes of sub-paragraph (6) above as they apply for purposes of paragraph 4 of that Schedule.
- (8) In sub-paragraph (6) above, “specified territory” has the same meaning as in paragraph 4(5) of Schedule 21 to FA 2015.

Amount of penalty

- 3 (1) The penalty payable under paragraph 1 is (except in a case mentioned in sub-paragraph (2)) the higher of—
- (a) 100% of the potential lost revenue, or
 - (b) £3,000.
- (2) In a case where P has enabled Q to engage in conduct which makes Q liable to a penalty under paragraph 1 of Schedule 21 to FA 2015, the penalty payable under paragraph 1 is the higher of—
- (a) 50% of the potential lost revenue in respect of the original tax non-compliance, and
 - (b) £3,000.

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- (3) In sub-paragraph (2)(a) “the original tax non-compliance” means the conduct that incurred the original penalty and “the potential lost revenue” (in respect of that non-compliance) is—
- (a) the potential lost revenue under Schedule 24 to FA 2007,
 - (b) the potential lost revenue under Schedule 41 to FA 2008, or
 - (c) the liability to tax which would have been shown on the return (within the meaning of Schedule 55 to FA 2009),
- according to whether the original penalty was incurred under paragraph 1 of Schedule 24, paragraph 1 of Schedule 41 or paragraph 6 of Schedule 55.

Potential lost revenue: enabling Q to commit relevant offence

- 4 (1) The potential lost revenue in a case where P is liable to a penalty under paragraph 1 for enabling Q to commit a relevant offence is the same amount as the potential lost revenue applicable for the purposes of the corresponding relevant civil penalty (determined in accordance with the relevant sub-paragraph of paragraph 5).
- (2) Where Q’s offending conduct is—
- (a) an offence of cheating the public revenue involving offshore activity, or
 - (b) an offence under section 106A of TMA 1970 involving offshore activity,
- the corresponding relevant civil penalty is the penalty which Q is liable for as a result of that offending conduct.
- (3) Where Q’s offending conduct is an offence under section 106B, 106C or 106D of TMA 1970, the corresponding relevant civil penalty is—
- (a) for an offence under section 106B of TMA 1970, a penalty under paragraph 1 of Schedule 41 to FA 2008,
 - (b) for an offence under section 106C of TMA 1970, a penalty under paragraph 6 of Schedule 55 to FA 2009, and
 - (c) for an offence under section 106D of TMA 1970, a penalty under paragraph 1 of Schedule 24 to FA 2007.
- (4) In determining any amount of potential lost revenue for the purposes of this paragraph, the fact Q has been prosecuted for the offending conduct is to be disregarded.

Potential lost revenue: enabling Q to engage in conduct incurring relevant civil penalty

- 5 (1) The potential lost revenue in a case where P is liable to a penalty under paragraph 1 for enabling Q to engage in conduct that makes Q liable (if the applicable conditions are met) to a relevant civil penalty is to be determined as follows.
- (2) In the case of a penalty under paragraph 1 of Schedule 24 to FA 2007 involving an offshore matter or an offshore transfer, the potential lost revenue is the amount that under that Schedule is the potential lost revenue in respect of Q’s conduct.
- (3) In the case of a penalty under paragraph 1 of Schedule 41 to FA 2008 in relation to a failure to comply with section 7(1) of TMA 1970 involving offshore activity, the potential lost revenue is the amount that under that Schedule is the potential lost revenue in respect of Q’s conduct.

- (4) In the case of a penalty under paragraph 6 of Schedule 55 to FA 2009 involving offshore activity, the potential lost revenue is the liability to tax which would have been shown in the return in question (within the meaning of that Schedule).

Treatment of potential lost revenue attributable to both offshore tax evasion or non-compliance and other tax evasion or non-compliance

- 6 (1) This paragraph applies where any amount of potential lost revenue in a case falling within paragraph 4 or 5 is attributable not only to Q's offshore tax evasion or non-compliance but also to any other tax evasion or non-compliance by Q.
- (2) In that case the potential lost revenue in respect of Q's offshore tax evasion or non-compliance is to be taken for the purposes of assessing the penalty to which P is liable as being or (as the case may be) including such share as is just and reasonable of the amount mentioned in sub-paragraph (1).

Reduction of penalty for disclosure etc by P

- 7 (1) If P (who would otherwise be liable to a penalty under paragraph 1)—
- (a) makes a disclosure to HMRC of—
- (i) a matter relating to an inaccuracy in a document, a supply of false information or a failure to disclose an under-assessment,
- (ii) P's enabling of actions by Q that constituted (or might constitute) a relevant offence or that made (or might make) Q liable to a relevant penalty, or
- (iii) any other matter HMRC regard as assisting them in relation to the assessment of P's liability to a penalty under paragraph 1, or
- (b) assists HMRC in any investigation leading to Q being charged with a relevant offence or found liable to a relevant penalty,

HMRC must reduce the penalty to one that reflects the quality of the disclosure or assistance.

- (2) But the penalty may not be reduced—
- (a) in the case of unprompted disclosure or assistance, below whichever is the higher of—
- (i) 10% of the potential lost revenue, or
- (ii) £1,000, or
- (b) in the case of prompted disclosure or assistance, below whichever is the higher of—
- (i) 30% of the potential lost revenue, or
- (ii) £3,000.

- 8 (1) This paragraph applies for the purposes of paragraph 7.
- (2) P discloses a matter by—
- (a) telling HMRC about it,
- (b) giving HMRC reasonable help in relation to the matter (for example by quantifying an inaccuracy in a document, an inaccuracy attributable to the supply of false information or withholding of information or an under-assessment), and

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- (c) allowing HMRC access to records for any reasonable purpose connected with resolving the matter (for example for the purpose of ensuring that an inaccuracy in a document, an inaccuracy attributable to the supply of false information or withholding of information or an under-assessment is fully corrected).
- (3) P assists HMRC in relation to an investigation leading to Q being charged with a relevant offence or found liable to a relevant penalty by—
- (a) assisting or encouraging Q to disclose all relevant facts to HMRC,
 - (b) allowing HMRC access to records, or
 - (c) any other conduct which HMRC considers assisted them in investigating or assessing Q’s liability to such a penalty.
- (4) Disclosure or assistance by P—
- (a) is “unprompted” if made at a time when P has no reason to believe that HMRC have discovered or are about to discover Q’s offshore tax evasion or non-compliance (including any inaccuracy in a document, supply of false information or withholding of information, or under-assessment), and
 - (b) otherwise is “prompted”.
- (5) In relation to disclosure or assistance, “quality” includes timing, nature and extent.
- 9 (1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1.
- (2) In sub-paragraph 1 “special circumstances” does not include—
- (a) ability to pay, or
 - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
- (a) staying a penalty, or
 - (b) agreeing a compromise in relation to proceedings for a penalty.

Procedure for assessing penalty, etc

- 10 (1) Where a person is found liable for a penalty under paragraph 1 HMRC must—
- (a) assess the penalty,
 - (b) notify the person, and
 - (c) state in the notice the period in respect of which the penalty is assessed.
- (2) A penalty must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.
- (3) An assessment of a penalty—
- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule), and
 - (b) may be enforced as if it were an assessment to tax.
- (4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax that would have been shown in a return.

- (5) Sub-paragraph (6) applies if—
- (a) an assessment in respect of a penalty is based on a liability to tax that would have been shown on a return, and
 - (b) that liability is found by HMRC to have been excessive.
- (6) HMRC may amend the assessment so that it is based upon the correct amount.
- (7) But an amendment under sub-paragraph (6)—
- (a) does not affect when the penalty must be paid, and
 - (b) may be made after the last day on which the assessment in question could have been made under paragraph 11.
- 11 An assessment of a person as liable to a penalty under paragraph 1 may not take place more than 2 years after the fulfilment of the conditions mentioned in paragraph 1(1) (in relation to that person) first came to the attention of an officer of Revenue and Customs.

Appeals

- 12 A person may appeal against—
- (a) a decision of HMRC that a penalty under paragraph 1 is payable by that person, or
 - (b) a decision of HMRC as to the amount of a penalty under paragraph 1 payable by the person.
- 13 (1) An appeal under paragraph 12 is to be treated in the same way as an appeal against an assessment to the tax at stake (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
- (2) Sub-paragraph (1) does not apply—
- (a) so as to require the person bringing the appeal to pay a penalty before an appeal against the assessment of the penalty is determined,
 - (b) in respect of any other matter expressly provided for by this Schedule.
- 14 (1) On an appeal under paragraph 12(a) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 12(b) that is notified to the tribunal, the tribunal may—
- (a) affirm HMRC's decision, or
 - (b) substitute for that decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its own decision for HMRC's, the tribunal may rely on paragraph 7 or 9 (or both)—
- (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point),
 - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of that paragraph was flawed.
- (4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.
- (5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 13(1)).

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Double jeopardy

- 15 A person is not liable to a penalty under paragraph 1 in respect of conduct for which the person—
- (a) has been convicted of an offence, or
 - (b) has been assessed to a penalty under any provision other than paragraph 1.

Application of provisions of TMA 1970

- 16 Subject to the provisions of this Part of this Schedule, the following provisions of TMA 1970 apply for the purposes of this Part of this Schedule as they apply for the purposes of the Taxes Acts—
- (a) section 108 (responsibility of company officers),
 - (b) section 114 (want of form), and
 - (c) section 115 (delivery and service of documents).

Interpretation of Part 1

- 17 (1) This paragraph applies for the purposes of this Schedule.
- (2) References to an assessment to tax, in relation to inheritance tax, are to a determination.

PART 2

APPLICATION OF SCHEDULE 36 TO FA 2008: INFORMATION POWERS

General application of information and inspection powers to suspected enablers

- 18 (1) Schedule 36 to FA 2008 (information and inspection powers) applies for the purpose of checking a relevant person's position as regards liability for a penalty under paragraph 1 as it applies for checking a person's tax position, subject to the modifications in paragraphs 19 to 21.
- (2) In this Part of this Schedule "relevant person" means a person an officer of Revenue and Customs has reason to suspect has or may have enabled offshore tax evasion or non-compliance by another person so as to be liable to a penalty under paragraph 1.

General modifications

- 19 In its application for the purpose mentioned in paragraph 18(1) Schedule 36 to FA 2008 has effect as if—
- (a) any provisions which can have no application for that purpose, or are specifically excluded by paragraph 20, were omitted,
 - (b) references to "the taxpayer" were references to the relevant person whose position as regards liability for a penalty under paragraph 1 is to be checked, and references to "a taxpayer" were references to a relevant person,
 - (c) references to a person's "tax position" are to the relevant person's position as regards liability for a penalty under paragraph 1,

- (d) references to prejudice to the assessment or collection of tax included a reference to prejudice to the investigation of the relevant person's position as regards liability for a penalty under paragraph 1,
- (e) references to information relating to the conduct of a pending appeal relating to tax were references to information relating to the conduct of a pending appeal relating to an assessment of liability for a penalty under paragraph 1.

Specific modifications

- 20 The following provisions are excluded from the application of Schedule 36 to FA 2008 for the purpose mentioned in paragraph 18(1)—
- (a) paragraph 24 (exception for auditors),
 - (b) paragraph 25 (exception for tax advisers),
 - (c) paragraphs 26 and 27 (provisions supplementary to paragraphs 24 and 25),
 - (d) paragraphs 50 and 51 (tax-related penalty).
- 21 In the application of Schedule 36 to FA 2008 for the purpose mentioned in paragraph 18(1), paragraph 10A (power to inspect business premises of involved third parties) has effect as if the reference in sub-paragraph (1) to the position of any person or class of persons as regards a relevant tax were a reference to the position of a relevant person as regards liability for a penalty under paragraph 1.

PART 3

PUBLISHING DETAILS OF PERSONS FOUND LIABLE TO PENALTIES

Naming etc of persons assessed to penalty or penalties under paragraph 1

- 22 (1) The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") may publish information about a person if—
- (a) in consequence of an investigation the person has been found to have incurred one or more penalties under paragraph 1 (and has been assessed or is the subject of a contract settlement), and
 - (b) the potential lost revenue in relation to the penalty (or the aggregate of the potential lost revenue in relation to each of the penalties) exceeds £25,000.
- (2) The Commissioners may also publish information about a person if the person has been found to have incurred 5 or more penalties under paragraph 1 in any 5 year period.
- (3) The information that may be published is—
- (a) the person's name (including any trading name, previous name or pseudonym),
 - (b) the person's address (or registered office),
 - (c) the nature of any business carried on by the person,
 - (d) the amount of the penalty or penalties in question,
 - (e) the periods or times to which the actions giving rise to the penalty or penalties relate,
 - (f) any other information that the Commissioners consider it appropriate to publish in order to make clear the person's identity.

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- (4) The information may be published in any manner that the Commissioners consider appropriate.
 - (5) Before publishing any information the Commissioners must—
 - (a) inform the person that they are considering doing so, and
 - (b) afford the person the opportunity to make representations about whether it should be published.
 - (6) No information may be published before the day on which the penalty becomes final or, where more than one penalty is involved, the latest day on which any of the penalties becomes final.
 - (7) No information may be published for the first time after the end of the period of one year beginning with that day.
 - (8) No information may be published if the amount of the penalty—
 - (a) is reduced under paragraph 7 to—
 - (i) 10% of the potential lost revenue (in a case of unprompted disclosure or assistance), or
 - (ii) 30% of potential lost revenue (in a case of prompted disclosure or assistance),
 - (b) would have been reduced to 10% or 30% of potential lost revenue but for the imposition of the minimum penalty,
 - (c) is reduced under paragraph 9 to nil or stayed.
 - (9) For the purposes of this paragraph a penalty becomes final—
 - (a) if it has been assessed, when the time for any appeal or further appeal relating to it expires or, if later, any appeal or final appeal relating to it is finally determined, and
 - (b) if a contract settlement has been made, at the time when the contract is made.
 - (10) In this paragraph “contract settlement”, in relation to a penalty, means a contract between the Commissioners and the person under which the Commissioners undertake not to assess the penalty or (if it has been assessed) not to take proceedings to recover it.
- 23 (1) The Treasury may by regulations amend paragraph 22(1) to vary the amount for the time being specified in paragraph (b).
- (2) Regulations under this paragraph are to be made by statutory instrument.
 - (3) A statutory instrument under this paragraph is subject to annulment in pursuance of a resolution of the House of Commons.