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SCHEDULES

SCHEDULE 16

PENALTIES FOR ENABLERS OF DEFEATED TAX AVOIDANCE

PART 9

INFORMATION

Information and inspection powers: application of Schedule 36 to FA 2008

40 [F1(1) Schedule 36 to FA 2008 (information and inspection powers) applies for the purpose of—

- (a) checking a relevant person's position as regards liability for a penalty under paragraph 1 in relation to particular tax arrangements;
- (b) ascertaining the identity of any other person who has or may have enabled those arrangements,

as it applies for the purpose of checking a person's tax position, subject to the modifications in paragraphs 41 to 43.]

(2) In this paragraph and paragraphs 41 to 43—

“relevant person” means a person an officer of Revenue and Customs has reason to suspect is or may be liable to a penalty under paragraph 1 [F2(or will become or may become so liable if T incurs a defeat)];

“the Schedule” means Schedule 36 to FA 2008.

[F3(3) References in this paragraph and paragraphs 41 and 42 to a person who has or may have enabled particular tax arrangements are to be read in accordance with Part 4 of this Schedule (persons who “enabled” the arrangements), save that—

- (a) references in that Part to the arrangements mentioned in paragraph 1 (however expressed) are to be read as references to the particular tax arrangements, and
- (b) references in that Part to “T” are to be read as references to the person who entered into the particular tax arrangements.]

Textual Amendments

- F1** Sch. 16 para. 40(1) substituted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(4)(a) (with s. 123(12))
- F2** Words in Sch. 16 para. 40(2) inserted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(4)(b) (with s. 123(12))
- F3** Sch. 16 para. 40(3) inserted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(4)(c) (with s. 123(12))

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General modifications of Schedule 36 to FA 2008 as applied

- 41 In its application for [^{F4}a purpose] mentioned in paragraph 40(1) above, the Schedule has effect as if—
- (a) any provisions which can have no application for that purpose 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” were 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 prejudice to [^{F5}—
 - (i) the investigation of the relevant person's position as regards liability for a penalty under paragraph 1 in relation to particular tax arrangements, or (as the case may be)
 - (ii) the identification of any other person who has or may have enabled those arrangements, and]
 - (e) references to a pending appeal relating to tax were to a pending appeal relating to an assessment of liability for a penalty under paragraph 1.

Textual Amendments

- F4** Words in Sch. 16 para. 41 substituted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(5)(a) (with s. 123(12))
- F5** Sch. 16 para. 41(d)(i)(ii) substituted for words (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(5)(b) (with s. 123(12))

Specific modifications of Schedule 36 to FA 2008 as applied

PROSPECTIVE

- 42 (1) The Schedule as it applies for [^{F6}a purpose] mentioned in paragraph 40(1) above has effect with the modifications in sub-paragraphs [^{F7}(1A)] to (6).
- [^{F8}(1A) Paragraph 1 (taxpayer notices) has effect as if the reference to checking the taxpayer's tax position (as modified by paragraph 41 of this Schedule) included a reference to ascertaining the identity of any other person who has or may have enabled the particular tax arrangements in relation to which the relevant person's position as regards liability to a penalty under paragraph 1 is to be checked.
- (1B) Paragraph 10 (power to inspect business premises etc) has effect as if the reference to checking that person's tax position (as modified by paragraph 41 of this Schedule) included a reference to ascertaining the identity of any other person who has or may have enabled the particular tax arrangements in relation to which the relevant person's position as regards liability to a penalty under paragraph 1 is to be checked.]
- (2) 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 to the position of a relevant person as regards liability for a penalty under paragraph 1.

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[^{F9}(2A) Paragraph 25 (tax advisers) is treated as omitted.]

- (3) Paragraph 47 (right to appeal against penalties under the Schedule) has effect as if after paragraph (b) (but not as part of that paragraph) there were inserted the words “but paragraph (b) does not give a right of appeal against the amount of an increased daily penalty payable by virtue of paragraph 49A.
- (4) Paragraph 49A (increased daily default penalty) has effect as if—
- (a) in sub-paragraphs (1)(c) and (2) for “imposed” there were substituted “assessable”;
 - (b) for sub-paragraphs (3) and (4) there were substituted—
 - “(3) If the tribunal decides that an increased daily penalty should be assessable—
 - (a) the tribunal must determine the day from which the increased daily penalty is to apply and the maximum amount of that penalty (“the new maximum amount”);
 - (b) from that day, paragraph 40 has effect in the person's case as if “the new maximum amount” were substituted for “£60”.
 - (4) The new maximum amount may not be more than £1,000.”;
 - (c) in sub-paragraph (5) for “the amount” there were substituted “the new maximum amount”.
- (5) Paragraph 49B (notification of increased daily default penalty) has effect as if—
- (a) in sub-paragraph (1) for “a person becomes liable to a penalty” there were substituted “the tribunal makes a determination”;
 - (b) in sub-paragraph (2) for “the day from which the increased penalty is to apply” there were substituted “the new maximum amount and the day from which it applies”;
 - (c) sub-paragraph (3) were omitted.
- (6) Paragraph 49C is treated as omitted.

Textual Amendments

- F6** Words in Sch. 16 para. 42(1) substituted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(6)(a)(i) (with s. 123(12))
- F7** Word in Sch. 16 para. 42(1) substituted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(6)(a)(ii) (with s. 123(12))
- F8** Sch. 16 para. 42(1A)(1B) inserted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(6)(b) (with s. 123(12))
- F9** Sch. 16 para. 42(2A) inserted (with effect in accordance with s. 123(12) of the amending Act) by Finance Act 2021 (c. 26), s. 123(6)(c) (with s. 123(12))

PROSPECTIVE

- 43 Paragraphs 50 and 51 are excluded from the application of the Schedule for [^{F10}a purpose] mentioned in paragraph 40(1) above.

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Textual Amendments

F10 Words in [Sch. 16 para. 43](#) substituted (with effect in accordance with s. 123(12) of the amending Act) by [Finance Act 2021 \(c. 26\)](#), [s. 123\(7\)](#) (with [s. 123\(12\)](#))

Declarations about contents of legally privileged communications

- 44 (1) Subject to sub-paragraph (5), a declaration under this paragraph is to be treated by—
- (a) HMRC, or
 - (b) in any proceedings before a court or tribunal in connection with a penalty under paragraph 1, the court or tribunal,
- as conclusive evidence of the things stated in the declaration.
- (2) A declaration under this paragraph is a declaration which—
- (a) is made by a relevant lawyer,
 - (b) relates to one or more communications falling within sub-paragraph (3), and
 - (c) meets such requirements as may be prescribed by regulations under sub-paragraph (4).
- (3) A communication falls within this sub-paragraph if—
- (a) it was made by a relevant lawyer (whether or not the one making the declaration),
 - (b) it is legally privileged, and
 - (c) if it were not legally privileged, it would be relied on by a person for the purpose of establishing that that person is not liable to a penalty under paragraph 1 (whether or not that person is the person who made the communication or is making the declaration).
- (4) The Treasury may by regulations impose requirements as to the form and contents of declarations under this paragraph.
- (5) Sub-paragraph (1) does not apply where HMRC or (as the case may be) the court or tribunal is satisfied that the declaration contains information which is incorrect.
- (6) In this paragraph “a relevant lawyer” means a barrister, advocate, solicitor or other legal representative communications with whom may be the subject of a claim to legal professional privilege or, in Scotland, protected from disclosure in legal proceedings on the grounds of confidentiality of communication.
- (7) For the purpose of this paragraph, a communication is “legally privileged” if it is a communication in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings.
- 45 (1) Where a person carelessly or deliberately gives any incorrect information in a declaration under paragraph 44, the person is liable to a penalty not exceeding £5,000.
- (2) For the purposes of this paragraph, incorrect information is carelessly given by a person if the information is incorrect because of a failure by the person to take reasonable care.

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- (3) Paragraphs 19(1), 20, 22(1), 37, 38 and 39(1), (2) and (5) apply in relation to a penalty under this paragraph as they apply in relation to a penalty under paragraph 1, subject to the modifications in sub-paragraphs (4) and (5).
- (4) In its application to a penalty under this paragraph, paragraph 22(1) has effect as if for “the relevant time” there were substituted “the end of 12 months beginning with the date on which facts sufficient to indicate that the person is liable to the penalty came to the Commissioners' knowledge”.
- (5) In its application to a penalty under this paragraph, paragraph 38(3) has effect as if the reference to the arrangements to which the penalty relates were to the arrangements to which the declaration under paragraph 44 relates.
- (6) In paragraph 44 any reference to a penalty under paragraph 1 includes a reference to a penalty under this paragraph.

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