

Status: Point in time view as at 16/11/2017.

Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to Finance Act 2016. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

SCHEDULES

SCHEDULE 18

SERIAL TAX AVOIDANCE

PART 5

PENALTY

Penalty

- 30 (1) A person is liable to pay a penalty if the person incurs a relevant defeat in relation to any arrangements which the person has used in a warning period.
- (2) The penalty is 20% of the value of the counteracted advantage if neither sub-paragraph (3) nor sub-paragraph (4) applies.
- (3) The penalty is 40% of the value of the counteracted advantage if before the relevant defeat is incurred the person has been given, or become liable to be given, one (but not more than one) relevant prior warning notice.
- (4) The penalty is 60% of the value of the counteracted advantage if before the current defeat is incurred the person has been given, or become liable to be given, two or more relevant prior warning notices.
- (5) In this paragraph “relevant prior warning notice” means a warning notice in relation to the defeat of arrangements which the person has used in the warning period mentioned in sub-paragraph (1).
- (6) For the meaning of “the value of the counteracted advantage” see paragraphs 32 to 37.

Simultaneous defeats etc

- 31 (1) If a person incurs simultaneously two or more relevant defeats in relation to different arrangements, sub-paragraphs (2) to (4) of paragraph 30 have effect as if the relevant defeat with the lowest value was incurred last, the relevant defeat with the next lowest value immediately before it, and so on.
- (2) For this purpose the “value” of a relevant defeat is taken to be equal to the value of the counteracted advantage.
- (3) If a person has been given a single warning notice in relation to two or more relevant defeats, the person is treated for the purposes of paragraph 30 as having been given a separate warning notice in relation to each of those relevant defeats.

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Value of the counteracted advantage: basic rule for taxes other than VAT

- 32 (1) In relation to a relevant defeat incurred by virtue of Condition A, B [F¹ or C] [F¹C or F], the “value of the counteracted advantage” is—
- (a) in the case of a relevant defeat incurred by virtue of Condition A, the additional amount due or payable in respect of tax as a result of the counteraction mentioned in paragraph 12(1)(c);
 - (b) in the case of a relevant defeat incurred by virtue of Condition B, the additional amount due or payable in respect of tax as a result of the action mentioned in paragraph 13(1);
 - (c) in the case of a relevant defeat incurred by virtue of Condition C, the additional amount due or payable in respect of tax as a result of the counteraction mentioned in paragraph 14(1)(d) [F²];
 - (d) in the case of a relevant defeat incurred by virtue of Condition F, the additional amount due or payable in respect of tax as a result of the counteraction mentioned in paragraph 16A(1)(d).]
- (2) The reference in sub-paragraph (1) to the additional amount due and payable includes a reference to—
- (a) an amount payable to HMRC having erroneously been paid by way of repayment of tax, and
 - (b) an amount which would be repayable by HMRC if the counteraction mentioned in paragraph (a) [F³ or (c)] [F³(c) or (d)] of sub-paragraph (1) were not made or the action mentioned in paragraph (b) of that sub-paragraph were not taken (as the case may be).
- (3) The following are ignored in calculating the value of the counteracted advantage—
- (a) group relief, and
 - (b) any relief under section 458 of CTA 2010 (relief in respect of repayment etc of loan) which is deferred under subsection (5) of that section.
- (4) This paragraph is subject to paragraphs 33 and 34.

Textual Amendments

- F1** Words in Sch. 18 para. 32(1) substituted (16.11.2017 for specified purposes, 1.1.2018 in so far as not already in force) by [Finance \(No. 2\) Act 2017 \(c. 32\)](#), s. 66(4), [Sch. 17 para. 55\(14\)\(a\)](#)
- F2** Sch. 18 para. 32(1)(d) inserted (16.11.2017 for specified purposes, 1.1.2018 in so far as not already in force) by [Finance \(No. 2\) Act 2017 \(c. 32\)](#), s. 66(4), [Sch. 17 para. 55\(14\)\(a\)](#)
- F3** Words in Sch. 18 para. 32(2)(b) substituted (16.11.2017 for specified purposes, 1.1.2018 in so far as not already in force) by [Finance \(No. 2\) Act 2017 \(c. 32\)](#), s. 66(4), [Sch. 17 para. 55\(14\)\(b\)](#)

Value of counteracted advantage: losses for purposes of direct tax

- 33 (1) This paragraph has effect in relation to relevant defeats incurred by virtue of Condition A, B or C.
- (2) To the extent that the counteracted advantage (see paragraph 35) has the result that a loss is wrongly recorded for the purposes of direct tax and the loss has been wholly used to reduce the amount due or payable in respect of tax, the value of the counteracted advantage is determined in accordance with paragraph 32.

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- (3) To the extent that the counteracted advantage has the result that a loss is wrongly recorded for purposes of direct tax and the loss has not been wholly used to reduce the amount due or payable in respect of tax, the value of the counteracted advantage is—
- (a) the value under paragraph 32 of so much of the counteracted advantage as results from the part (if any) of the loss which is used to reduce the amount due or payable in respect of tax, plus
 - (b) 10% of the part of the loss not so used.
- (4) Sub-paragraphs (2) and (3) apply both—
- (a) to a case where no loss would have been recorded but for the counteracted advantage, and
 - (b) to a case where a loss of a different amount would have been recorded (but in that case sub-paragraphs (2) and (3) apply only to the difference between the amount recorded and the true amount).
- (5) To the extent that a counteracted advantage creates or increases an aggregate loss recorded for a group of companies—
- (a) the value of the counteracted advantage is calculated in accordance with this paragraph, and
 - (b) in applying paragraph 32 in accordance with sub-paragraphs (2) and (3), group relief may be taken into account (despite paragraph 32(3)).
- (6) To the extent that the counteracted advantage results in a loss, the value of it is nil where, because of the nature of the loss or the person's circumstances, there is no reasonable prospect of the loss being used to support a claim to reduce a tax liability (of any person).

Value of counteracted advantage: deferred tax

- 34 (1) To the extent that the counteracted advantage (see paragraph 35) is a deferral of tax (other than VAT), the value of that advantage is—
- (a) 25% of the amount of the deferred tax for each year of the deferral, or
 - (b) a percentage of the amount of the deferred tax, for each separate period of deferral of less than a year, equating to 25% per year,
- or, if less, 100% of the amount of the deferred tax.
- (2) This paragraph does not apply to a case to the extent that paragraph 33 applies.

Meaning of “the counteracted advantage” in paragraphs 33 and 34

- 35 (1) In paragraphs 33 and 34 “the counteracted advantage” means—
- (a) in relation to a relevant defeat incurred by virtue of Condition A, the tax advantage mentioned in paragraph 12(1)(b);
 - (b) in relation to a relevant defeat incurred by virtue of Condition B, the denied advantage in relation to which the action mentioned in paragraph 13(1) is taken;
 - (c) in relation to a relevant defeat incurred by virtue of Condition C, means any tax advantage in respect of which the counteraction mentioned in paragraph 14(1)(c) is made^{F4};

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(d) in relation to a relevant defeat incurred by virtue of Condition F, means any tax advantage in respect of which the counteraction mentioned in paragraph 16A(1)(c) is made.]

(2) In sub-paragraph (1)(c) “counteraction” is to be interpreted in accordance with paragraph 14(5).

Textual Amendments

F4 Sch. 18 para. 35(1)(d) inserted (16.11.2017 for specified purposes, 1.1.2018 in so far as not already in force) by [Finance \(No. 2\) Act 2017 \(c. 32\)](#), s. 66(4), [Sch. 17 para. 55\(15\)](#)

Value of the counteracted advantage: Conditions D and E

- 36 (1) In relation to a relevant defeat incurred by a person by virtue of Condition D or E, the “value of the counteracted advantage” is equal to the sum of any counteracted tax advantages determined under sub-paragraphs (3) to (6).
- (2) In this paragraph “the counteraction” means the counteraction mentioned in paragraph 15(1) or 16(1) (as the case may be).
- (3) If the amount of VAT due or payable by the person in respect of any prescribed accounting period (X) exceeds the amount (Y) that would have been so payable but for the counteraction, the amount by which X exceeds Y is a counteracted tax advantage.
- (4) If the person obtains no VAT credit for a particular prescribed accounting period, the amount of any VAT credit which the person would have obtained for that period but for the counteraction is a counteracted tax advantage.
- (5) If for a prescribed accounting period the person obtains a VAT credit of an amount (Y) which is less than the amount (X) of the VAT credit which the person would have obtained but for the counteraction, the amount by which X exceeds Y is a counteracted tax advantage.
- (6) If the amount (X) of the person's non-deductible tax for any prescribed accounting period is greater than Y, where Y is what would be the amount of the person's non-deductible tax for that period but for the counteraction, then the amount by which X exceeds Y is a counteracted tax advantage, but only to the extent that amount is not represented by a corresponding amount which is the whole or part of a counteracted tax advantage by virtue of sub-paragraphs (3) to(5).
- (7) In this paragraph “non-deductible tax”, in relation to the person who incurred the relevant defeat, means—
- (a) input tax for which the person is not entitled to credit under section 25 of VATA 1994, and
 - (b) any VAT incurred by the person which is not input tax and in respect of which the person is not entitled to a refund from the Commissioners by virtue of any provision of VATA 1994.
- (8) For the purposes of sub-paragraph (7)(b) the VAT “incurred” by a taxable person is—
- (a) VAT on the supply to the person of any goods or services,
 - (b) VAT on the acquisition by the person from another member State of any goods;

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- (c) VAT on the importation of any goods from a place outside the member States.
- (9) References in sub-paragraph (3) to amounts due and payable by the person in respect of a prescribed accounting period include references to—
 - (a) amounts payable to HMRC having erroneously been paid by way of repayment of tax, and
 - (b) amounts which would be repayable by HMRC if the counteraction mentioned in sub-paragraph (3) were not made.

Value of counteracted advantage: delayed VAT

- 37 (1) Sub-paragraph (3) of paragraph 36 has effect as follows so far as the tax advantage which is counteracted as mentioned in that sub-paragraph is in the nature of a delay in relation to the person's obligations with respect to VAT.
- (2) That sub-paragraph has effect as if for “the amount by which X exceeds Y is a counteracted tax advantage” there were substituted, “there is a counteracted tax advantage of—
- “(d) 25% of the amount of the delayed VAT for each year of the delay, or
 - (e) a percentage of the amount of the delayed VAT, for each separate period of delay of less than a year, equating to 25% per year,
- or, if less, 100% of the amount of the delayed VAT ”.

Assessment of penalty

- 38 (1) Where a person is liable for a penalty under paragraph 30, HMRC must assess the penalty.
- (2) Where HMRC assess the penalty, HMRC must—
- (a) notify the person who is liable for the penalty, and
 - (b) state in the notice a tax period in respect of which the penalty is assessed.
- (3) A penalty under this paragraph must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under sub-paragraph (2).
- (4) An assessment—
- (a) is to be treated for procedural purposes as if it were an assessment to tax,
 - (b) may be enforced as if it were an assessment to tax, and
 - (c) may be combined with an assessment to tax.
- (5) An assessment of a penalty under this paragraph must be made before the end of the period of 12 months beginning with the date of the defeat mentioned in paragraph 30(1).

Alteration of assessment of penalty

- 39 (1) After notification of an assessment has been given to a person under paragraph 38(2), the assessment may not be altered except in accordance with this paragraph or on appeal.

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- (2) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the value of the counteracted advantage.
- (3) An assessment may be revised as necessary if operated by reference to an overestimate of the value of the counteracted advantage.

Aggregate penalties

- 40 (1) The amount of a penalty for which a person is liable under paragraph 30 is to be reduced by the amount of any other penalty incurred by the person, or any surcharge for late payment of tax imposed on the person, if the amount of the penalty or surcharge is determined by reference to the same tax liability.
- (2) In sub-paragraph (1) “any other penalty” does not include a penalty under section 212A of FA 2013 (GAAR penalty) or Part 4 of FA 2014 (penalty where corrective action not taken after follower notice etc).
- (3) In the application of section 97A of TMA 1970 (multiple penalties) no account shall be taken of a penalty under paragraph 30.

Appeal against penalty

- 41 (1) A person may appeal against a decision of HMRC that a penalty is payable under paragraph 30.
- (2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by P under paragraph 30.
- (3) An appeal under this paragraph must be made within the period of 30 days beginning with the day on which notification of the penalty is given under paragraph 38.
- (4) An appeal under this paragraph is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC's review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
- (5) Sub-paragraph (4) does not apply—
 - (a) so as to require a person to pay a penalty before an appeal against the assessment of the penalty is determined, or
 - (b) in respect of any other matter expressly provided for by this Part of this Schedule.
- (6) On an appeal under sub-paragraph (1) or (2) the tribunal may—
 - (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC has power to make.
- (7) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of sub-paragraph (4)).

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Penalties: reasonable excuse

- 42 (1) A person is not liable to a penalty under paragraph 30 in respect of a relevant defeat if the person satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that the person had a reasonable excuse for the relevant failure to which that relevant defeat relates (see paragraph 43).
- (2) Sub-paragraph (3) applies if—
- (a) a person has incurred a relevant defeat in respect of which the person is liable to a penalty under paragraph 30, and
 - (b) before incurring that defeat the person had been given, or become liable to be given, an excepted warning notice.
- (3) The person is treated for the purposes of sub-paragraphs (2) to (4) of paragraph 30 (rate of penalty) as not having been given, and not having become liable to be given, the excepted notice (so far as it relates to the relevant defeat in respect of which the person had a reasonable excuse).
- (4) A warning notice is “excepted” for the purposes of this paragraph if the person was not liable to a penalty in respect of the defeat specified in it because the person had a reasonable excuse for the relevant failure in question.
- (5) For the purposes of this paragraph, in the case of a person (“P”)—
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P’s control,
 - (b) where P relies on another person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant failure, and
 - (c) where P had a reasonable excuse for the relevant failure but the excuse had ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.
- (6) In determining for the purposes of this paragraph whether or not a person (“P”) had a reasonable excuse for any action, failure or inaccuracy, reliance on advice is to be taken automatically not to constitute a reasonable excuse if the advice is addressed to, or was given to, a person other than P or takes no account of P’s individual circumstances.

Paragraph 42: meaning of “the relevant failure”

- 43 (1) In paragraph 42 “the relevant failure”, in relation to a relevant defeat, is to be interpreted in accordance with sub-paragraphs (2) to (7).
- (2) In relation to a relevant defeat incurred by virtue of Condition A, “the relevant failure” means the failures or inaccuracies as a result of which the counteraction under section 209 of FA 2013 was necessary
- (3) In relation to a relevant defeat incurred by virtue of Condition B, “the relevant failure” means the failures or inaccuracies in respect of which the action mentioned in paragraph 13(1) was taken.
- (4) In relation to a relevant defeat incurred by virtue of Condition C, “the relevant failure” means the failures or inaccuracies as a result of which the adjustments, assessments, or other action mentioned in paragraph 14(5) are required.

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- (5) In relation to a relevant defeat incurred by virtue of Condition D, “the relevant failure” means the failures or inaccuracies as a result of which the adjustments, assessments or other action mentioned in paragraph 15(5) are required.
- (6) In relation to a relevant defeat incurred by virtue of Condition E, “the relevant failure” means P’s actions (and failures to act), so far as they are connected with matters in respect of which the counteraction mentioned in paragraph 16(1) is required.
- (7) In sub-paragraph (6) “counteraction” is to be interpreted in accordance with paragraph 16(2).
- [^{F5}(8) In relation to a relevant defeat incurred by virtue of Condition F, “the relevant failure” means the failures or inaccuracies as a result of which the adjustments, assessments, or other actions mentioned in paragraph 16A(5) are required.]

Textual Amendments

- F5** Sch. 18 para. 43(8) inserted (16.11.2017 for specified purposes, 1.1.2018 in so far as not already in force) by Finance (No. 2) Act 2017 (c. 32), s. 66(4), **Sch. 17 para. 55(16)**

Mitigation of penalties

- 44 (1) The Commissioners may in their discretion mitigate a penalty under paragraph 30, or stay or compound any proceedings for such a penalty.
- (2) They may also, after judgment, further mitigate or entirely remit the penalty.

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