



# Finance Act 2016

## 2016 CHAPTER 24

### PART 10

#### TAX AVOIDANCE AND EVASION

##### *General anti-abuse rule*

#### **158 General anti-abuse rule: penalty**

- (1) Part 5 of FA 2013 (general anti-abuse rule) is amended as follows.
- (2) After section 212 insert—

##### **“212A Penalty**

- (1) A person (P) is liable to pay a penalty if—
  - (a) P has been given a notice under—
    - (i) paragraph 12 of Schedule 43,
    - (ii) paragraph 8 or 9 of Schedule 43A, or
    - (iii) paragraph 8 of Schedule 43B,stating that a tax advantage arising from particular tax arrangements is to be counteracted,
  - (b) a tax document has been given to HMRC on the basis that the tax advantage arises to P from those arrangements,
  - (c) that document was given to HMRC—
    - (i) by P, or
    - (ii) by another person in circumstances where P knew, or ought to have known, that the other person gave the document on the basis mentioned in paragraph (c), and
  - (d) the tax advantage has been counteracted by the making of adjustments under section 209.

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- (2) The penalty is 60% of the value of the counteracted advantage.
  - (3) Schedule 43C—
    - (a) gives the meaning of “the value of the counteracted advantage”, and
    - (b) makes other provision in relation to penalties under this section.
  - (4) In this section “tax document” means any return, claim or other document submitted in compliance (or purported compliance) with any provision of, or made under, an Act.
  - (5) In this section the reference to giving a tax document to HMRC is to be interpreted in accordance with paragraph 11(g) and (h) of Schedule 43C.”
- (3) After Schedule 43B insert—

“SCHEDULE  
43C

PENALTY UNDER SECTION 212A: SUPPLEMENTARY PROVISION

*Value of the counteracted advantage: introduction*

- 1 Paragraphs 2 to 4 set out how to calculate the “value of the counteracted advantage” for the purposes of section 212A.

*Value of the counteracted advantage: basic rule*

- 2 (1) The “value of the counteracted advantage” is the additional amount due or payable in respect of tax as a result of the counteraction mentioned in section 212A(1)(c).
- (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 were not made.
- (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) For the purposes of this paragraph consequential adjustments under section 210 are regarded as part of the counteraction in question.
- (5) If the counteraction affects the person's liability to two or more taxes, the taxes concerned are to be considered together for the purpose of determining the value of the counteracted advantage.
- (6) This paragraph is subject to paragraphs 3 and 4.

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*Value of counteracted advantage: losses*

- 3 (1) To the extent that the tax advantage mentioned in section 212A(1)(b) (“the tax advantage”) resulted in the wrong recording of a loss 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 2.
- (2) To the extent that the tax advantage resulted in the wrong recording of a loss 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 2 of so much of the tax advantage as results (or would in the absence of the counteraction result) from the part (if any) of the loss which was used to reduce the amount due or payable in respect of tax, plus
  - (b) 10% of the part of the loss not so used.
- (3) Sub-paragraphs (1) and (2) apply both—
- (a) to a case where no loss would have been recorded but for the tax advantage, and
  - (b) to a case where a loss of a different amount would have been recorded (but in that case sub-paragraphs (1) and (2) apply only to the difference between the amount recorded and the true amount).
- (4) To the extent that the tax advantage creates or increases (or would in the absence of the counteraction create or increase) 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 2 in accordance with sub-paragraphs (1) and (2), group relief may be taken into account (despite paragraph 2(3)).
- (5) To the extent that the tax advantage results (or would in the absence of the counteraction result) in a loss, the value of it is nil where, because of the nature of the loss or the person's circumstances, there was 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*

- 4 (1) To the extent that the tax advantage mentioned in section 212A is a deferral of tax, the value of the counteracted 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 3 applies.

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### *Assessment of penalty*

- 5 (1) Where a person is liable for a penalty under section 212A, 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 notification of the penalty is issued.
- (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—
  - (a) the end of the appeal period for the assessment which gave effect to the counteraction mentioned in section 212A(1)(b), or
  - (b) if there is no assessment within paragraph (a), the date (or the latest of the dates) on which that counteraction becomes final.
- (6) The reference in sub-paragraph (5)(b) to the counteraction becoming final is to be interpreted in accordance with section 210(8).

### *Alteration of assessment of penalty*

- 6 (1) After notification of an assessment has been given to a person under paragraph 5(2), the assessment may not be altered except in accordance with this paragraph or paragraph 7, or on appeal.
- (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 it operated by reference to an overestimate of the value of the counteracted advantage.

### *Revision of assessment following consequential relieving adjustment*

- 7 (1) Sub-paragraph (2) applies where a person—
  - (a) is notified under section 210(7) of a consequential adjustment relating to a counteraction under section 209, and
  - (b) an assessment to a penalty in respect of that counteraction of which the person has been notified under paragraph 5(2) does not take account of that consequential adjustment.
- (2) HMRC must make any alterations of the assessment that appear to HMRC to be just and reasonable in connection with the consequential amendment.

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- (3) Alterations under this paragraph may be made despite any time limit imposed by or under an enactment.

#### *Aggregate penalties*

- 8 (1) Sub-paragraph (3) applies where—
- (a) two or more penalties are incurred by the same person and fall to be determined by reference to an amount of tax to which that person is chargeable,
  - (b) one of those penalties is incurred under section 212A, and
  - (c) one or more of the other penalties are incurred under a relevant penalty provision.
- (2) But sub-paragraph (3) does not apply if section 212(2) of FA 2014 (follower notices: aggregate penalties) applies in relation to the amount of tax in question.
- (3) The aggregate of the amounts of the penalties mentioned in subsection (1) (b) and (c), so far as determined by reference to that amount of tax, must not exceed—
- (a) the relevant percentage of that amount, or
  - (b) in a case where at least one of the penalties is under paragraph 5(2) (b) of, or sub-paragraph (3)(b), (4)(b) or (5)(b) of paragraph 6 of, Schedule 55 to FA 2009, £300 (if greater).
- (4) In the application of section 97A of TMA 1970 (multiple penalties) no account shall be taken of a penalty under section 212A.
- (5) “Relevant penalty provision” means—
- (a) Schedule 24 to FA 2007 (penalties for errors),
  - (b) Schedule 41 to FA 2008 (penalties: failure to notify etc),
  - (c) Schedule 55 to FA 2009 (penalties for failure to make returns etc), or
  - (d) Part 5 of Schedule 18 to FA 2016 (penalty under serial tax avoidance regime).
- (6) “The relevant percentage” means—
- (a) 200% in a case where at least one of the penalties is determined by reference to the percentage in—
    - (i) paragraph 4(4)(c) of Schedule 24 to FA 2007,
    - (ii) paragraph 6(4)(a) of Schedule 41 to FA 2008, or
    - (iii) paragraph 6(3A)(c) of Schedule 55 to FA 2009,
  - (b) 150% in a case where paragraph (a) does not apply and at least one of the penalties is determined by reference to the percentage in—
    - (i) paragraph 4(3)(c) of Schedule 24 to FA 2007,
    - (ii) paragraph 6(3)(a) of Schedule 41 to FA 2008, or
    - (iii) paragraph 6(3A)(b) of Schedule 55 to FA 2009,
  - (c) 140% in a case where neither paragraph (a) nor paragraph (b) applies and at least one of the penalties is determined by reference to the percentage in—
    - (i) paragraph 4(4)(b) of Schedule 24 to FA 2007,

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- (ii) paragraph 6(4)(b) of Schedule 41 to FA 2008, or
- (iii) paragraph 6(4A)(c) of Schedule 55 to FA 2009,
- (d) 105% in a case where at none of paragraphs (a), (b) and (c) applies and at least one of the penalties is determined by reference to the percentage in—
  - (i) paragraph 4(3)(b) of Schedule 24 to FA 2007,
  - (ii) paragraph 6(3)(b) of Schedule 41 to FA 2008, or
  - (iii) paragraph 6(4A)(b) of Schedule 55 to FA 2009, and
- (e) in any other case, 100%.

#### *Appeal against penalty*

- 9 (1) A person may appeal against—
  - (a) the imposition of a penalty under section 212A, or
  - (b) the amount assessed under paragraph 5.
- (2) An appeal under sub-paragraph (1)(a) may only be made on the grounds that the arrangements were not abusive or there was no tax advantage to be counteracted.
- (3) An appeal under sub-paragraph (1)(b) may only be made on the grounds that the assessment was based on an overestimate of the value of the counteracted advantage (whether because the estimate was made by reference to adjustments which were not just and reasonable or for any other reason).
- (4) 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 5(2).
- (5) 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).
- (6) Sub-paragraph (5) 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.
- (7) On an appeal against the penalty the tribunal may affirm or cancel HMRC's decision.
- (8) On an appeal against the amount of the penalty the tribunal may—
  - (a) affirm HMRC's decision, or
  - (b) substitute for HMRC's decision another decision that HMRC has power to make.
- (9) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of sub-paragraph (5)).

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### *Mitigation of penalties*

- 10 (1) The Commissioners may in their discretion mitigate a penalty under section 212A, or stay or compound any proceedings for such a penalty.
- (2) They may also, after judgment, further mitigate or entirely remit the penalty.

### *Interpretation*

11 In this Schedule—

- (a) a reference to an “assessment” to tax is to be interpreted, in relation to inheritance tax, as a reference to a determination;
- (b) “direct tax” means—
  - (i) income tax,
  - (ii) capital gains tax,
  - (iii) corporation tax (including any amount chargeable as if it were corporation tax or treated as corporation tax),
  - (iv) petroleum revenue tax, and
  - (v) diverted profits tax;
- (c) a reference to a loss includes a reference to a charge, expense, deficit and any other amount which may be available for, or relied on to claim, a deduction or relief;
- (d) a reference to a repayment of tax includes a reference to allowing a credit against tax or to a payment of a corporation tax credit;
- (e) “corporation tax credit” means—
  - (i) an R&D tax credit under Chapter 2 or 7 of Part 13 of CTA 2009,
  - (ii) an R&D expenditure credit under Chapter 6A of Part 3 of CTA 2009,
  - (iii) a land remediation tax credit or life assurance company tax credit under Chapter 3 or 4 respectively of Part 14 of CTA 2009,
  - (iv) a film tax credit under Chapter 3 of Part 15 of CTA 2009,
  - (v) a television tax credit under Chapter 3 of Part 15A of CTA 2009,
  - (vi) a video game tax credit under Chapter 3 of Part 15B of CTA 2009,
  - (vii) a theatre tax credit under section 1217K of CTA 2009,
  - (viii) an orchestra tax credit under Chapter 3 of Part 15D of CTA 2009, or
  - (ix) a first-year tax credit under Schedule A1 to CAA 2001;
- (f) “tax period” means a tax year, accounting period or other period in respect of which tax is charged;
- (g) a reference to giving a document to HMRC includes a reference to communicating information to HMRC in any form and by any method (whether by post, fax, email, telephone or otherwise),
- (h) a reference to giving a document to HMRC includes a reference to making a statement or declaration in a document.”

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- (4) In section 209 (counteracting the tax advantages), after subsection (7) insert—
- “(8) Where a matter is referred to the GAAR Advisory Panel under paragraph 5 or 6 of Schedule 43, the taxpayer (as defined in paragraph 3 of that Schedule) must not make any GAAR-related adjustments in relation to the taxpayer's tax affairs in the period (the “closed period”) which—
- (a) begins with the 31st day after the end of the 45 day period mentioned in paragraph 4(1) of that Schedule, and
  - (b) ends immediately before the day on which the taxpayer is given the notice under paragraph 12 of Schedule 43 (notice of final decision after considering opinion of GAAR Advisory Panel).
- (9) Where a person has been given a pooling notice or a notice of binding under Schedule 43A in relation to any tax arrangements, the person must not make any GAAR-related adjustments in the period (“the closed period”) that—
- (a) begins with the 31st day after that on which that notice is given, and
  - (b) ends—
    - (i) in the case of a pooling notice, immediately before the day on which the person is given a notice under paragraph 8(2) or 9(2) of Schedule 43A, or a notice under paragraph 8(2) of Schedule 43B, in relation to the tax arrangements (notice of final decision after considering opinion of GAAR Advisory Panel), or
    - (ii) in the case of a notice of binding, with the 30th day after the day on which the notice is given.
- (10) In this section “GAAR-related adjustments” means—
- (a) for the purposes of subsection (8), adjustments which give effect (wholly or in part) to the proposed counteraction set out in the notice under paragraph 3 of Schedule 43;
  - (b) for the purposes of subsection (9), adjustments which give effect (wholly or partly) to the proposed counteraction set out in the notice of pooling or binding (as the case may be).”
- (5) Schedule 43 (general anti-abuse rule: procedural requirements) is amended in accordance with subsections (6) to (9).
- (6) After paragraph 1 insert—

#### 1A “Meaning of “tax appeal”

In this Part “tax appeal” means—

- (a) an appeal under section 31 of TMA 1970 (income tax: appeals against amendments of self-assessment, amendments made by closure notices under section 28A or 28B of that Act, etc), including an appeal under that section by virtue of regulations under Part 11 of ITEPA 2003 (PAYE),
- (b) an appeal under paragraph 9 of Schedule 1A to TMA 1970 (income tax: appeals against amendments made by closure notices under paragraph 7(2) of that Schedule, etc),
- (c) an appeal under section 705 of ITA 2007 (income tax: appeals against counteraction notices),



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- (d) an appeal under paragraph 34(3) or 48 of Schedule 18 to FA 1998 (corporation tax: appeals against amendment of a company's return made by closure notice, assessments other than self-assessments, etc),
  - (e) an appeal under section 750 of CTA 2010 (corporation tax: appeals against counteraction notices),
  - (f) an appeal under section 222 of IHTA 1984 (appeals against HMRC determinations) other than an appeal made by a person against a determination in respect of a transfer of value at a time when a tax enquiry is in progress in respect of a return made by that person in respect of that transfer,
  - (g) an appeal under paragraph 35 of Schedule 10 to FA 2003 (stamp duty land tax: appeals against amendment of self-assessment, discovery assessments, etc),
  - (h) an appeal under paragraph 35 of Schedule 33 to FA 2013 (annual tax on enveloped dwellings: appeals against amendment of self-assessment, discovery assessments, etc),
  - (i) an appeal under paragraph 14 of Schedule 2 to the Oil Taxation Act 1975 (petroleum revenue tax: appeal against assessment, determination etc),
  - (j) an appeal under section 102 of FA 2015 (diverted profits tax: appeal against charging notice etc),
  - (k) an appeal under section 114 of FA 2016 (apprenticeship levy: appeal against an assessment), or
  - (l) an appeal against any determination of—
    - (i) an appeal within paragraphs (a) to (k), or
    - (ii) an appeal within this paragraph.”
- (7) In paragraph 3(2)(e), for “of paragraphs 5 and 6” substitute “of—
  - (i) paragraphs 5 and 6, and
  - (ii) sections 209(8) and (9) and 212A.””
- (8) After paragraph 4 insert—

#### 4A “Corrective action by taxpayer

- (1) If the taxpayer takes the relevant corrective action before the beginning of the closed period mentioned in section 209(8), the matter is not to be referred to the GAAR Advisory Panel.
- (2) For the purposes of this Schedule the “relevant corrective action” is taken if (and only if) the taxpayer takes the steps set out in sub-paragraphs (3) and (4).
- (3) The first step is that—
  - (a) the taxpayer amends a return or claim to counteract the tax advantage specified in the notice under paragraph 3, or
  - (b) if the taxpayer has made a tax appeal (by notifying HMRC or otherwise) on the basis that the tax advantage specified in the notice under paragraph 3 arises from the tax arrangements specified in that notice, the taxpayer takes all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing that advantage.

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- (4) The second step is that the taxpayer notifies HMRC—
  - (a) that the taxpayer has taken the first step, and
  - (b) of any additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.
- (5) Where the taxpayer takes the first step described in sub-paragraph (3)(b), HMRC may proceed as if the taxpayer had not taken the relevant corrective action if the taxpayer fails to enter into the written agreement.
- (6) In determining the additional amount which has or will become due and payable in respect of tax for the purposes of sub-paragraph (4)(b), it is to be assumed that, where the taxpayer takes the necessary action as mentioned in sub-paragraph (3)(b), the agreement is then entered into.
- (7) No enactment limiting the time during which amendments may be made to returns or claims operates to prevent the taxpayer taking the first step mentioned in sub-paragraph (3)(a) before the tax enquiry is closed (whether or not before the specified time).
- (8) No appeal may be brought, by virtue of a provision mentioned in sub-paragraph (9), against an amendment made by a closure notice in respect of a tax enquiry to the extent that the amendment takes into account an amendment made by the taxpayer to a return or claim in taking the first step mentioned in sub-paragraph (3)(a).
- (9) The provisions are—
  - (a) section 31(1)(b) or (c) of TMA 1970,
  - (b) paragraph 9 of Schedule 1A to TMA 1970,
  - (c) paragraph 34(3) of Schedule 18 to FA 1998,
  - (d) paragraph 35(1)(b) of Schedule 10 to FA 2003, and
  - (e) paragraph 35(1)(b) of Schedule 33 to FA 2013.”
- (9) Before paragraph 5 (but after the heading “Referral to GAAR Advisory Panel”) insert—
 

“4B

Paragraphs 5 and 6 apply if the taxpayer does not take the relevant corrective action (see paragraph 4A) by the beginning of the closed period mentioned in section 209(8).”
- (10) In section 103ZA of TMA 1970 (disapplication of sections 100 to 103 in the case of certain penalties)—
  - (a) omit “or” at the end of paragraph (g), and
  - (b) after paragraph (g) insert
    - “(ga) section 212A of the Finance Act 2013 (general anti-abuse rule), or”
- (11) In section 212 of FA 2014 (follower notices: aggregate penalties) (as amended by Schedule 18), in subsection (4)—
  - (a) omit “or” at the end of paragraph (c), and
  - (b) after paragraph (d) insert “, or
  - (e) section 212A of FA 2013 (general anti-abuse rule).”

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- (12) FA 2015 is amended in accordance with subsections (13) and (14).
- (13) In section 120 (penalties in connection with offshore matters and offshore transfers), in subsection (1), omit “and” before paragraph (c) and after paragraph (c) insert—
- “, and
- (d) Schedule 43C to FA 2013 (as amended by FA 2016).”
- (14) In Schedule 20 to that Act, after paragraph 19 insert—

**“General anti-abuse rule: aggregate penalties**

- 20     (1) In Schedule 43C to FA 2013 (general anti-abuse rule: supplementary provision about penalty), sub-paragraph (6) of paragraph 8 is amended as follows.
- (2) After paragraph (b) insert—
- “(ba) 125% in a case where neither paragraph (a) nor paragraph (b) applies and at least one of the penalties is determined by reference to the percentage in—
- (i) paragraph 4(2)(c) of Schedule 24 to FA 2007,
- (ii) paragraph 6(2)(a) of Schedule 41 to FA 2008,
- (iii) paragraph 6(3A)(a) of Schedule 55 to FA 2009,”.
- (3) In sub-paragraph (c) for “neither paragraph (a) nor paragraph (b) applies” substitute “none of paragraphs (a) to (ba) applies.
- (4) In sub-paragraph (d) for “none of paragraphs (a), (b) and (c) applies” substitute “none of paragraphs (a) to (c) applies”.
- (15) The amendments made by this section have effect in relation to tax arrangements (within the meaning of Part 5 of FA 2013) entered into on or after the day on which this Act is passed.

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**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- Sch. 19 para. 12(5)(b) inserted by [2017 c. 32 Sch. 14 para. 49\(2\)\(c\)](#)
- Sch. 19 para. 12(5)(a) word inserted by [2017 c. 32 Sch. 14 para. 49\(2\)\(b\)](#)
- Sch. 19 para. 51(8)(b) words inserted by [2017 c. 32 Sch. 14 para. 48\(2\)](#)
- Sch. 19 para. 53(1) words inserted by [2017 c. 32 Sch. 14 para. 48\(4\)\(a\)](#)
- Sch. 19 para. 53(1) words inserted by [2017 c. 32 Sch. 14 para. 48\(4\)\(b\)](#)
- Sch. 19 para. 12(5)(a) words renumbered as Sch. 19 para. 12(5)(a) by [2017 c. 32 Sch. 14 para. 49\(2\)\(a\)](#)
- Sch. 19 para. 58(1) words substituted by [2017 c. 32 Sch. 14 para. 48\(5\)](#)
- Sch. 20 para. 1(4)(e) inserted by [2021 c. 26 Sch. 27 para. 47\(2\)](#)
- Sch. 20 para. 3(3)(d) and word inserted by [2021 c. 26 Sch. 27 para. 47\(3\)\(b\)](#)
- Sch. 20 para. 5(5) inserted by [2021 c. 26 Sch. 27 para. 47\(5\)](#)
- Sch. 22 para. 2(4B) inserted by [2021 c. 26 Sch. 27 para. 48\(2\)\(c\)](#)
- Sch. 22 para. 3(4A) inserted by [2021 c. 26 Sch. 27 para. 48\(3\)](#)