

SCHEDULES

SCHEDULE 38

TAX AGENTS: DISHONEST CONDUCT

PART 3

POWER TO OBTAIN TAX AGENT'S FILES ETC

Circumstances in which power is exercisable

- 7 (1) The power in paragraph 8 is exercisable only in case A or case B and only with the approval of the tribunal.
- (2) Case A is where a conduct notice has been given to an individual and either—
- (a) the time allowed for giving notice of appeal against the determination has expired without any such notice being given, or
 - (b) notice of appeal against the determination was given within that time, but the appeal has been withdrawn or the determination confirmed.
- (3) Case B is where—
- (a) an individual has been convicted of an offence relating to tax that involves fraud or dishonesty,
 - (b) the offence was committed after the individual became a tax agent (whether or not the individual was still a tax agent when it was committed and regardless of the capacity in which it was committed),
 - (c) either—
 - (i) the time allowed for appealing against the conviction has expired without any such appeal being brought, or
 - (ii) an appeal against the conviction was brought within that time, but the appeal has been withdrawn or the conviction upheld, and
 - (d) no more than 12 months have elapsed since the date on which paragraph (c) was satisfied.
- (4) For the purposes of this paragraph, a determination or conviction that is appealed is not considered to have been confirmed or upheld until—
- (a) the time allowed for bringing any further appeal has expired, or
 - (b) if a further appeal is brought within that time, that further appeal has been withdrawn or determined.
- (5) In this Schedule, a reference to “the tax agent” is—
- (a) in a case falling within case A, a reference to the individual mentioned in sub-paragraph (2), and
 - (b) in a case falling within case B, a reference to the individual mentioned in sub-paragraph (3).

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- (6) It does not matter whether the individual is still a tax agent when the power in paragraph 8 is to be exercised.

File access notice

- 8 (1) Subject to paragraph 7, an officer of Revenue and Customs may by notice in writing require any person mentioned in sub-paragraph (2) to provide relevant documents.
- (2) The persons are—
- (a) the tax agent, and
 - (b) any other person the officer believes may hold relevant documents.
- (3) “Relevant documents” is defined in paragraph 9.
- (4) A notice under this paragraph is referred to as a “file access notice”.
- (5) The person to whom a file access notice is given is referred to as “the document-holder”.

Relevant documents

- 9 (1) “Relevant documents” means the tax agent’s working papers (whenever acting as a tax agent) and any other documents received, created, prepared or used by the tax agent for the purposes of or in the course of assisting clients with their tax affairs.
- (2) It does not matter who owns the papers or other documents.
- (3) The reference in sub-paragraph (1) to clients—
- (a) includes former clients, and
 - (b) is not limited to the clients with respect to whom the tax agent is engaging in or has engaged in dishonest conduct.

Content of notice

- 10 (1) A file access notice may require the provision of—
- (a) particular relevant documents specified in the notice, or
 - (b) all relevant documents in the document-holder’s possession or power.
- (2) A file access notice does not need to identify the clients of the tax agent.
- (3) A file access notice addressed to anyone other than the tax agent must name the tax agent.

Compliance

- 11 A file access notice may require documents to be provided—
- (a) within such period,
 - (b) by such means and in such form, and
 - (c) to such person and at such place,
- as is reasonably specified in the notice or in a document referred to in the notice.
- 12 Unless otherwise specified in the notice, a file access notice may be complied with by providing copies of the relevant documents.

Approval by tribunal

- 13 (1) The tribunal may not approve the giving of a file access notice unless—
- (a) the application for approval is made by or with the agreement of an authorised officer,
 - (b) the tribunal is satisfied that the case falls within case A or case B (see paragraph 7),
 - (c) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,
 - (d) the document-holder and (where different) the tax agent have been told that relevant documents are to be required and given a reasonable opportunity to make representations to an officer of Revenue and Customs, and
 - (e) the tribunal has been given a summary of any representations so made.
- (2) Nothing in sub-paragraph (1) requires the tribunal to determine whether an individual is engaging in or has engaged in dishonest conduct.
- (3) A decision by the tribunal under this paragraph is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).

Documents not in person's possession or power

- 14 A file access notice only requires the document-holder to provide a document if it is in the document-holder's possession or power.

Types of information

- 15 (1) A file access notice does not require the document-holder to provide—
- (a) parts of a document that contain information relating to the conduct of a pending appeal relating to tax, or
 - (b) journalistic material (as defined in section 13 of the Police and Criminal Evidence Act 1984).
- (2) A file access notice does not require the document-holder to provide personal records (as defined in section 12 of the Police and Criminal Evidence Act 1984).
- (3) But a file access notice may require the document-holder to provide documents that are personal records, omitting any information whose inclusion (whether alone or with other information) makes the original documents personal records.

Old documents

- 16 (1) A file access notice does not require the document-holder to provide a relevant document if—
- (a) the whole of the document originated before the back-stop day, and
 - (b) no part of it has a bearing on tax periods ending on or after that day.
- (2) “The back-stop day” is the first day of the period of 20 years ending with the day on which the file access notice is given.

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Privileged communications between professional legal advisers and clients

- 17 (1) A file access notice does not require the document-holder to provide any part of a document that is privileged.
- (2) For the purposes of this paragraph a document is privileged if it is a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications between client and professional legal adviser, could be maintained in legal proceedings.
- (3) Regulations under paragraph 23 of Schedule 36 to FA 2008 (information powers: privileged communications) apply (with any necessary modifications) to disputes under this paragraph as to whether a document is privileged.

Power to copy documents

- 18 If a document is provided pursuant to a file access notice, an officer of Revenue and Customs may take copies of or make extracts from the document.

Power to retain documents

- 19 (1) If a document is provided pursuant to a file access notice, HMRC may retain the document for a reasonable period if an officer of Revenue and Customs thinks it necessary to do so.
- (2) While a document is retained—
- (a) the document-holder may, if the document is reasonably required for any purpose, request a copy of it, and
 - (b) an officer of Revenue and Customs must comply with such a request without charge.
- (3) The retention of a document under this paragraph is not to be regarded as breaking any lien claimed on the document.
- (4) If a document retained under this paragraph is lost or damaged, the Commissioners are liable to compensate the owner of the document for any expenses reasonably incurred in replacing or repairing the document.

Appeal against file access notice

- 20 (1) If the document-holder is a person other than the tax agent, the document-holder may appeal against the file access notice, or any requirement in it, on the ground that it would be unduly onerous to comply with the notice or requirement.
- (2) Notice of appeal must be given—
- (a) in writing to the officer by whom the file access notice was given, and
 - (b) within the period of 30 days beginning with the day on which the file access notice was given.
- (3) It must state the grounds of appeal.
- (4) On an appeal that is notified to the tribunal, the tribunal may confirm, vary or set aside the file access notice or a requirement in it.
- (5) If the tribunal confirms or varies the notice or a requirement in it, the document-holder must comply with the notice or requirement—

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- (a) within such period as is specified by the tribunal, or
 - (b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.
- (6) A decision by the tribunal under this paragraph is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).
- (7) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this paragraph as they have effect in relation to an appeal against an assessment to income tax.

Offence of concealment etc in connection with file access notice

- 21 (1) A person (“P”) commits an offence if P—
- (a) conceals, destroys or otherwise disposes of a required document, or
 - (b) arranges for the concealment, destruction or disposal of a required document.
- (2) A “required document” is a document within sub-paragraph (3) or sub-paragraph (4).
- (3) A document is within this sub-paragraph if at the time when P acts—
- (a) P is required to provide the document by a file access notice, and
 - (b) either—
 - (i) the notice has not been complied with, or
 - (ii) it has been complied with, but P has been notified in writing by an officer of Revenue and Customs that P must continue to preserve the document (and the notification has not been withdrawn).
- (4) A document is within this sub-paragraph if at the time when P acts—
- (a) P is not required to provide the document by a file access notice,
 - (b) P has been informed by an officer of Revenue and Customs that P will be or is likely to be so required, and
 - (c) no more than 6 months have elapsed since P was, or was last, so informed.
- (5) A person guilty of an offence under this paragraph is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum, and
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or both.

Penalty for failure to comply

- 22 (1) A person who fails to comply with a file access notice is liable to a penalty of £300.
- (2) Failing to comply with a file access notice also includes—
- (a) concealing, destroying or otherwise disposing of a required document, or
 - (b) arranging for any such concealment, destruction or disposal.
- (3) “Required document” has the same meaning as in paragraph 21.

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Daily penalty for failure to comply

- 23 If the failure continues after notification of a penalty under paragraph 22 has been issued, the person is liable to a further penalty, for each subsequent day on which the failure continues, of an amount not exceeding £60 for each such day.

Failure to comply with time limit

- 24 A failure to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 22 or 23 if the thing was done within such further time (if any) as an officer of Revenue and Customs may have allowed.

Reasonable excuse

- 25 (1) Liability to a penalty under paragraph 22 or 23 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of this paragraph—
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,
 - (b) if the person relies on another person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure,
 - (c) if the person had a reasonable excuse for the failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.