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SCHEDULES

SCHEDULE 16

Section 65

PENALTIES FOR ENABLERS OF DEFEATED TAX AVOIDANCE

PART 1

LIABILITY TO PENALTY

- 1 Where—
- (a) a person (“T”) has entered into abusive tax arrangements, and
 - (b) T incurs a defeat in respect of the arrangements,
- a penalty is payable by each person who enabled the arrangements.
- 2 (1) Parts 2 to 4 of this Schedule define—
- “abusive tax arrangements”;
 - a “defeat in respect of the arrangements”;
 - a “person who enabled the arrangements”.
- (2) The other Parts of this Schedule make provision supplementing paragraph 1 as follows—
- (a) Part 5 makes provision about the amount of a penalty;
 - (b) Parts 6 to 8 provide for the assessment of penalties, referrals to the GAAR Advisory Panel and appeals against assessments;
 - (c) Part 9 applies information and inspection powers, and makes provision about declarations relating to legally privileged communications;
 - (d) Part 10 confers power to publish details of persons who have incurred penalties;
 - (e) Parts 11 and 12 contain miscellaneous and general provisions.

PART 2

“ABUSIVE” AND “TAX ARRANGEMENTS”: MEANING

- 3 (1) Arrangements are “tax arrangements” for the purposes of this Schedule if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.
- (2) Tax arrangements are “abusive” for the purposes of this Schedule if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances.
- (3) The circumstances to which regard must be had under sub-paragraph (2) include—

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- (a) whether the substantive results, or the intended substantive results, of the arrangements are consistent with any principles on which the relevant tax provisions are based (whether express or implied) and the policy objectives of those provisions,
 - (b) whether the means of achieving those results involves one or more contrived or abnormal steps, and
 - (c) whether the arrangements are intended to exploit any shortcomings in those provisions.
- (4) Where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements.
- (5) Each of the following is an example of something which might indicate that tax arrangements are abusive—
- (a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes;
 - (b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes;
 - (c) the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid;
- but a result mentioned in paragraph (a), (b) or (c) is to be taken to be such an example only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.
- (6) The fact that tax arrangements accord with established practice, and HMRC had, at the time the arrangements were entered into, indicated their acceptance of that practice, is an example of something which might indicate that the arrangements are not abusive.
- (7) The examples given in sub-paragraphs (5) and (6) are not exhaustive.
- (8) In sub-paragraph (5) the reference to income includes earnings, within the meaning of Part 1 of the Social Security Contributions and Benefits Act 1992 or Part 1 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992.

PART 3

“DEFEAT” IN RESPECT OF ABUSIVE TAX ARRANGEMENTS

“Defeat” in respect of abusive tax arrangements

- 4 T (within the meaning of paragraph 1) incurs a “defeat” in respect of abusive tax arrangements entered into by T (“the arrangements concerned”) if—
- (a) Condition A (in paragraph 5) is met, or
 - (b) Condition B (in paragraph 6) is met.

Condition A

- 5 (1) Condition A is that—
- (a) T, or a person on behalf of T, has given HMRC a document of a kind listed in the Table in paragraph 1 of Schedule 24 to FA 2007 (returns etc),

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- (b) the document was submitted on the basis that a tax advantage (“the relevant tax advantage”) arose from the arrangements concerned,
 - (c) the relevant tax advantage has been counteracted, and
 - (d) the counteraction is final.
- (2) For the purposes of this paragraph the relevant tax advantage has been “counteracted” if adjustments have been made in respect of T’s tax position on the basis that the whole or part of the relevant tax advantage does not arise.
- (3) For the purposes of this paragraph a counteraction is “final” when the adjustments in question, and any amounts arising from the adjustments, can no longer be varied, on appeal or otherwise.
- (4) In this paragraph “adjustments” means any adjustments, whether by way of an assessment, the modification of an assessment or return, the amendment or disallowance of a claim, a payment, the entering into of a contract settlement or otherwise.

Accordingly, references to “making” adjustments include securing that adjustments are made by entering into a contract settlement.

- (5) Any reference in this paragraph to giving HMRC a document includes—
- (a) communicating information to HMRC in any form and by any method;
 - (b) making a statement or declaration in a document.
- (6) Any reference in this paragraph to a document of a kind listed in the Table in paragraph 1 of Schedule 24 to FA 2007 includes—
- (a) a document amending a document of a kind so listed, and
 - (b) a document which—
 - (i) relates to national insurance contributions, and
 - (ii) is a document in relation to which that Schedule applies.

Condition B

- 6 (1) Condition B is that (in a case not falling within Condition A)—
- (a) HMRC have made an assessment in relation to tax,
 - (b) the assessment counteracts a tax advantage that it is reasonable to assume T expected to obtain from the arrangements concerned (“the expected tax advantage”), and
 - (c) the counteraction is final.
- (2) For the purposes of this paragraph an assessment “counteracts” the expected tax advantage if the assessment is on a basis which prevents T from obtaining (or obtaining the whole of) the expected tax advantage.
- (3) For the purposes of this paragraph a counteraction is “final”—
- (a) when a relevant contract settlement is made, or
 - (b) if no contract settlement has been made, when the assessment in question and any amounts arising from the assessment can no longer be varied, on appeal or otherwise.

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- (4) In sub-paragraph (3) a “relevant contract settlement” means a contract settlement on a basis which prevents T from obtaining (or obtaining the whole of) the expected tax advantage.

PART 4

PERSONS WHO “ENABLED” THE ARRANGEMENTS

Persons who “enabled” the arrangements

- 7 (1) A person is a person who “enabled” the arrangements mentioned in paragraph 1 if that person is—
- (a) a designer of the arrangements (see paragraph 8),
 - (b) a manager of the arrangements (see paragraph 9),
 - (c) a person who marketed the arrangements to T (see paragraph 10),
 - (d) an enabling participant in the arrangements (see paragraph 11), or
 - (e) a financial enabler in relation to the arrangements (see paragraph 12).
- (2) This paragraph is subject to paragraph 13 (excluded persons).

Designers of arrangements

- 8 (1) For the purposes of paragraph 7 a person is a “designer” of the arrangements if that person was, in the course of a business carried on by that person, to any extent responsible for the design of—
- (a) the arrangements, or
 - (b) a proposal which was implemented by the arrangements;
- but this is subject to sub-paragraph (2).
- (2) Where a person would (in the absence of this sub-paragraph) fall within sub-paragraph (1) because of having provided advice which was used in the design of the arrangements or of a proposal, that person does not because of that advice fall within that sub-paragraph unless—
- (a) the advice is relevant advice, and
 - (b) the knowledge condition is met.
- (3) Advice is “relevant advice” if—
- (a) the advice or any part of it suggests arrangements or an alteration of proposed arrangements, and
 - (b) it is reasonable to assume that the suggestion was made with a view to arrangements being designed in such a way that a tax advantage (or a greater tax advantage) might be expected to arise from them.
- (4) The knowledge condition is that, when the advice was provided, the person providing it knew or could reasonably be expected to know—
- (a) that the advice would be used in the design of abusive tax arrangements or of a proposal for such arrangements, or
 - (b) that it was likely that the advice would be so used.

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- (5) For the purposes of sub-paragraph (3), advice is not to be taken to “suggest” anything—
- (a) which is put forward by the advice for consideration, but
 - (b) which the advice can reasonably be read as recommending against.
- (6) In sub-paragraph (3)—
- (a) the reference in paragraph (a) to arrangements or an alteration of proposed arrangements includes a proposal for arrangements or an alteration of a proposal for arrangements, and
 - (b) the reference in paragraph (b) to arrangements includes arrangements proposed by a proposal.
- (7) For the purposes of this paragraph—
- (a) references to advice include an opinion;
 - (b) advice is “used” in a design if the advice is taken account of in that design.

Managers of arrangements

- 9 (1) For the purposes of paragraph 7 a person is a “manager” of the arrangements if that person—
- (a) was, in the course of a business carried on by that person, to any extent responsible for the organisation or management of the arrangements, and
 - (b) when carrying out any functions in relation to the organisation or management of the arrangements, knew or could reasonably be expected to know that the arrangements involved were abusive tax arrangements.
- (2) Where—
- (a) a person is, in the course of a business carried on by the person, to any extent responsible for facilitating T's withdrawal from the arrangements, and
 - (b) it is reasonable to assume that the obtaining of a tax advantage is not T's purpose (or one of T's purposes) in withdrawing from the arrangements,
- that person is not because of anything done in the course of facilitating that withdrawal to be regarded as to any extent responsible for the organisation or management of the arrangements.

Marketers of arrangements

- 10 For the purposes of paragraph 7 a person “marketed” the arrangements to T if, in the course of a business carried on by that person—
- (a) that person made available for implementation by T a proposal which has since been implemented, in relation to T, by the arrangements, or
 - (b) that person—
 - (i) communicated information to T or another person about a proposal which has since been implemented, in relation to T, by the arrangements, and
 - (ii) did so with a view to T entering into the arrangements or transactions forming part of the arrangements.

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Enabling participants

- 11 For the purposes of paragraph 7 a person is “an enabling participant” in the arrangements if—
- (a) that person is a person (other than T) who enters into the arrangements or a transaction forming part of the arrangements,
 - (b) without that person's participation in the arrangements or transaction (or the participation of another person in the arrangements or transaction in the same capacity as that person), the arrangements could not be expected to result in a tax advantage for T, and
 - (c) when that person entered into the arrangements or transaction, that person knew or could reasonably be expected to know that what was being entered into was abusive tax arrangements or a transaction forming part of such arrangements.

Financial enablers

- 12 (1) For the purposes of paragraph 7 a person is a “financial enabler” in relation to the arrangements if—
- (a) in the course of a business carried on by that person, that person provided a financial product (directly or indirectly) to a relevant party,
 - (b) it is reasonable to assume that the purpose (or a purpose) of the relevant party in obtaining the financial product was to participate in the arrangements, and
 - (c) when the financial product was provided, the person providing it knew or could reasonably be expected to know that the purpose (or a purpose) of obtaining it was to participate in abusive tax arrangements.
- (2) In this paragraph “a relevant party” means T or an enabling participant in the arrangements within the meaning given by paragraph 11.
- (3) Any reference in this paragraph to a person's providing a financial product to a relevant party includes (but is not limited to) the person's doing any of the following—
- (a) providing a loan to a relevant party;
 - (b) issuing or transferring a share to a relevant party;
 - (c) entering into arrangements with a relevant party such that—
 - (i) the person becomes a party to a relevant contract within the meaning of section 577 of CTA 2009 (derivative contracts);
 - (ii) there is a repo in respect of securities within the meaning of section 263A(A1) of TCGA 1992;
 - (iii) the person or the relevant party has a creditor repo, creditor quasi-repo, debtor repo or debtor quasi-repo within the meaning of sections 543, 544, 548 and 549 of CTA 2009;
 - (d) entering into a stock lending arrangement, within the meaning of section 263B(1) of TCGA 1992, with a relevant party;
 - (e) entering into an alternative finance arrangement, within the meaning of Chapter 6 of Part 6 of CTA 2009 or Part 10A of ITA 2007, with a relevant party;
 - (f) entering into a contract with a relevant party which, whether alone or in combination with one or more other contracts—

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- (i) is in accordance with generally accepted accounting practice required to be treated as a loan, deposit or other financial asset or obligation, or
 - (ii) would be required to be so treated by the person if the person were a company to which the Companies Act 2006 applies;
- and references to obtaining a financial product are to be read accordingly.
- (4) The Treasury may by regulations amend sub-paragraph (3).

Excluded persons

- 13 (1) A person who—
- (a) would (in the absence of this paragraph) be regarded for the purposes of this Schedule as having enabled particular arrangements mentioned in paragraph 1, but
 - (b) is a person within sub-paragraph (2),
- is not to be regarded as having enabled those arrangements.
- (2) The persons within this sub-paragraph are—
- (a) T;
 - (b) where T is a company, any company in the same group as T.

Powers to add categories of enabler and to provide exceptions

- 14 (1) The Treasury may by regulations add to the categories of persons who, in relation to arrangements mentioned in paragraph 1, are for the purposes of this Schedule persons who enabled the arrangements.
- (2) The Treasury may by regulations provide that a person who would otherwise be regarded for the purposes of this Schedule as having enabled arrangements is not to be so regarded where conditions prescribed by the regulations are met.
- (3) Regulations under this paragraph may—
- (a) amend this Part of this Schedule;
 - (b) make supplementary, incidental, and consequential provision, including provision amending any other Part of this Schedule;
 - (c) make transitional provision.

PART 5

AMOUNT OF PENALTY

Amount of penalty

- 15 (1) For each person who enabled the arrangements mentioned in paragraph 1, the penalty payable under paragraph 1 is the total amount or value of all the relevant consideration received or receivable by that person (“the person in question”).
- (2) Particular consideration is “relevant” for the purposes of this paragraph if—
- (a) it is consideration for anything done by the person in question which enabled the arrangements mentioned in paragraph 1, and

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- (b) it has not previously been taken into account in calculating the amount of a penalty payable under paragraph 1.
- (3) For the purposes of this paragraph a thing done by a person “enabled” the arrangements mentioned in paragraph 1 if, by doing that thing (alone or with anything else), the person fell within the definition in Part 4 of this Schedule of a person who enabled those arrangements.
- 16 (1) This paragraph applies for the purposes of paragraph 15.
- (2) Where consideration for anything done by a person (“A”) is, under any arrangements with A, paid or payable to a person other than A, it is to be taken to be received or receivable by A.
- (3) The “consideration” for anything done by a person does not include any amount charged by that person in respect of value added tax.
- (4) Consideration attributable to two or more transactions is to be apportioned on a just and reasonable basis.
- (5) Any consideration given for what is in substance one bargain is to be treated as attributable to all elements of the bargain, even though—
- (a) separate consideration is, or purports to be, given for different elements of the bargain, or
- (b) there are, or purport to be, separate transactions in respect of different elements of the bargain.

Reduction of penalty where other penalties incurred

- 17 (1) The amount of a penalty for which a person is liable under paragraph 1 is to be reduced by the amount of any other penalty incurred by the person in respect of conduct for which the person is liable to the penalty under paragraph 1.
- (2) In this paragraph “any other penalty” means a penalty—
- (a) which is a penalty under a provision other than paragraph 1, and
- (b) which has been assessed.

Mitigation of penalty

- 18 (1) HMRC may in their discretion reduce a penalty under paragraph 1.
- (2) In this paragraph the reference to reducing a penalty includes a reference to—
- (a) entirely remitting the penalty, or
- (b) staying, or agreeing a compromise in relation to, proceedings for the recovery of a penalty.

PART 6

ASSESSMENT OF PENALTY

Assessment of penalty

- 19 (1) Where a person is liable for a penalty under paragraph 1 HMRC must—

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- (a) assess the penalty, and
 - (b) notify the person.
 - (2) If—
 - (a) HMRC do not have all the information required to determine the amount or value of the relevant consideration within the meaning of paragraph 15, and
 - (b) HMRC have taken all reasonable steps to obtain that information,HMRC may assess the penalty on the basis of a reasonable estimate by HMRC of that consideration.
 - (3) This paragraph is subject to—
 - (a) paragraphs 21 and 22 (limits on when penalty may be assessed); and
 - (b) Part 7 of this Schedule (requirement for opinion of GAAR Advisory Panel before penalty may be assessed).
- 20 (1) A penalty under paragraph 1 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.
- (2) An assessment of a penalty under paragraph 1—
 - (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.

Special provision about assessment for multi-user schemes

- 21 (1) This paragraph applies where—
 - (a) a proposal for arrangements is implemented more than once, by a number of tax arrangements which are substantially the same as each other (“related arrangements”),
 - (b) paragraph 1 applies in relation to particular arrangements (“the arrangements concerned”) which are one of the number of related arrangements implementing the proposal, and
 - (c) at the time when the person who entered into the arrangements concerned incurs a defeat in respect of them [^{F1}(other than a tribunal or court defeat), neither condition 1 nor condition 2 has been met].
- (2) HMRC may not assess any penalty payable under paragraph 1 in respect of the arrangements concerned until [^{F2}condition 1 or condition 2 is met].
- [^{F3}(2A) Condition 1 is that a defeat that is a tribunal or court defeat is incurred in the case of at least one of the number of related arrangements implementing the proposal.
- (2B) Condition 2 is that the required number or percentage of relevant defeats is reached.
- (2C) For the purposes of this paragraph, a defeat incurred in respect of arrangements is a “tribunal or court defeat” if—
 - (a) condition A (in paragraph 5) is met and the adjustments mentioned in paragraph 5(2) have been confirmed by a tribunal or court, or
 - (b) condition B (in paragraph 6) is met and the assessment mentioned in paragraph 6(2) has been confirmed by a tribunal or court.

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- (2D) An adjustment or assessment (as the case may be) has been confirmed by a tribunal or court if the First-tier Tribunal, the Upper Tribunal or a court has determined in proceedings before it that the adjustment or assessment in question should not be varied.
- (2E) For the purposes of sub-paragraph (2D), disregard variations that do not substantively alter the basis of the adjustment or assessment in question.]
- (3) For the purposes of this paragraph the “required [^{F4}number or] percentage of relevant defeats” is reached when HMRC reasonably believe that [^{F5}—
- (a) the number of related arrangements implementing the proposal is fewer than 21 and defeats have been incurred in the case of 50% or more of those arrangements;
 - (b) the number of related arrangements implementing the proposal is more than 20 but fewer than 44 and defeats have been incurred in the case of 11 or more of those arrangements;
 - (c) the number of related arrangements implementing the proposal is more than 43 but fewer than 200 and defeats have been incurred in the case of 25% or more of those arrangements;
 - (d) the number of related arrangements implementing the proposal is 200 or more and defeats have been incurred in the case of 50 or more of those arrangements.]
- (4) Sub-paragraph (2) does not apply in relation to a penalty if the person liable to the penalty requests assessment of the penalty sooner than the time allowed by sub-paragraph (2).

Textual Amendments

- F1** Words in Sch. 16 para. 21(1)(c) substituted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(2)(a) (with s. 123(9))
- F2** Words in Sch. 16 para. 21(2) substituted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(2)(b) (with s. 123(9))
- F3** Sch. 16 para. 21(2A)-(2E) inserted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(2)(c) (with s. 123(9))
- F4** Words in Sch. 16 para. 21(3) inserted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(2)(d)(i) (with s. 123(9))
- F5** Sch. 16 para. 21(3)(a)-(d) substituted for words (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(2)(d)(ii) (with s. 123(9))

Time limit for assessment

- 22 (1) An assessment of a person as liable to a penalty under paragraph 1 may not take place after the relevant time.
- (2) In this paragraph “the relevant time” means, subject to sub-paragraphs (3) to (6)—
- (a) where a GAAR final decision notice within the meaning of paragraph 24(1) has been given in relation to the arrangements to which the penalty relates, the end of 12 months beginning with the date on which T incurs the defeat mentioned in paragraph 1;

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- (b) where a notice under paragraph 25 has been given to the person mentioned in sub-paragraph (1) above in respect of the arrangements to which the penalty relates, the end of 12 months beginning with the end of the time allowed for making representations in respect of that notice;
 - (c) where—
 - (i) a referral has been made under paragraph 26 in respect of the arrangements to which the penalty relates, and
 - (ii) paragraph (d) does not apply,the end of 12 months beginning with the date on which the opinion of the GAAR Advisory Panel is given on the referral (within the meaning given by paragraph 34(6));
 - (d) where a notice under paragraph 35 has been given to the person mentioned in sub-paragraph (1) above in respect of the arrangements to which the penalty relates, the end of 12 months beginning with the end of the time allowed for making representations in respect of that notice.
- (3) Where—
- (a) paragraph 21 prevented a penalty from being assessed before [^{F6}condition 1 or condition 2 was met], and
 - [^{F7}(b) condition 1 or condition 2 has been met,]
- the relevant time in relation to that penalty is whichever is the later of—
- (i) the relevant time given by sub-paragraph (2), and
 - (ii) the end of 12 months beginning with the date on which [^{F8}the first of condition 1 or condition 2 was met].
- (4) Where under paragraph 21(4) a person requests assessment of a penalty, the relevant time in relation to that penalty is whichever is the later of—
- (a) the relevant time given by sub-paragraph (2), and
 - (b) the end of 12 months beginning with the date on which the request is made,
- and sub-paragraph (3) does not apply to the penalty even if [^{F9}condition 1 or condition 2 is met].
- (5) Sub-paragraph (6) applies where—
- (a) at any time a declaration has been made under paragraph 44 for the purposes of any determination of whether a person is liable to a penalty under paragraph 1 in relation to particular arrangements (“the arrangements concerned”), and
 - (b) subsequently, facts that in the Commissioners' opinion are sufficient to indicate that the declaration contains a material inaccuracy have come to the Commissioners' knowledge.
- (6) The relevant time in respect of any penalty under paragraph 1 payable by that person in relation to the arrangements concerned is whichever is the later of—
- (a) the relevant time given by the preceding provisions of this paragraph, and
 - (b) the end of 12 months beginning with the date on which such facts came to the Commissioners' knowledge.

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Textual Amendments

- F6** Words in Sch. 16 para. 22(3)(a) substituted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(3)(a)(i) (with s. 123(9))
- F7** Words in Sch. 16 para. 22(3)(b) substituted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(3)(a)(ii) (with s. 123(9))
- F8** Words in Sch. 16 para. 22(3)(b)(ii) substituted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(3)(a)(iii) (with s. 123(9))
- F9** Words in Sch. 16 para. 22(4) substituted (with effect in accordance with s. 123(9)-(11) of the amending Act) by Finance Act 2021 (c. 26), s. 123(3)(b) (with s. 123(9))

PART 7

GAAR ADVISORY PANEL OPINION, AND REPRESENTATIONS

Requirement for opinion of GAAR Advisory Panel

- 23 (1) A penalty under paragraph 1 may not be assessed unless—
- (a) the decision that it should be assessed is taken by a designated HMRC officer, and
 - (b) either the condition in sub-paragraph (2) or the condition in sub-paragraph (3) is met.
- (2) The condition in this sub-paragraph is that, when the assessment is made—
- (a) a GAAR final decision notice has been given in relation to—
 - (i) the arrangements to which the penalty relates (“the relevant arrangements”), or
 - (ii) arrangements that are equivalent to the relevant arrangements,
 - (b) where a notice is required by paragraph 25 to be given to the person liable to the penalty, that notice has been given and the time allowed for making representations under that paragraph has expired, and
 - (c) a designated HMRC officer has, in deciding whether the penalty should be assessed, considered—
 - (i) the opinion of the GAAR Advisory Panel which was considered by HMRC in preparing that GAAR final decision notice, and
 - (ii) any representations made under paragraph 25.
- (3) The condition in this sub-paragraph is that, when the assessment is made—
- (a) an opinion of the GAAR Advisory Panel which applies to the relevant arrangements has been given on a referral under paragraph 26,
 - (b) where a notice is required by paragraph 35 to be given to the person liable to the penalty, that notice has been given and the time allowed for making representations under that paragraph has expired, and
 - (c) a designated HMRC officer has, in deciding whether the penalty should be assessed, considered—
 - (i) that opinion of the GAAR Advisory Panel, and
 - (ii) any representations made under paragraph 35.

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- (4) Where a notification of a penalty under paragraph 1 is given, the notification must be accompanied by a report prepared by HMRC of—
- (a) if the condition in sub-paragraph (2) is met, the opinion of the GAAR Advisory Panel which was considered by HMRC in preparing the GAAR final decision notice;
 - (b) if the condition in sub-paragraph (3) is met, the opinion of the GAAR advisory panel mentioned in that sub-paragraph.
- (5) Paragraph 24 contains definitions of terms used in this paragraph.
- 24 (1) In this Schedule a “GAAR final decision notice” means a notice under—
- (a) paragraph 12 of Schedule 43 to FA 2013 (notice of final decision after considering opinion of GAAR Advisory Panel on referral under Schedule 43),
 - (b) paragraph 8 or 9 of Schedule 43A to FA 2013 (notice of final decision after considering opinion of GAAR Advisory Panel), or
 - (c) paragraph 8 of Schedule 43B to FA 2013 (notice of final decision after considering opinion of GAAR Advisory Panel on referral under Schedule 43B).
- (2) For the purposes of this Part of this Schedule, where the GAAR Advisory Panel gives an opinion on a referral under paragraph 26 the arrangements to which the opinion “applies” are—
- (a) the arrangements in respect of which the referral was made (that is, “the arrangements in question” within the meaning given by paragraph 26(1)), and
 - (b) any arrangements that are equivalent to those arrangements.
- (3) For the purposes of this Part of this Schedule, arrangements are “equivalent” to one another if they are substantially the same as one another having regard to—
- (a) their substantive results or intended substantive results,
 - (b) the means of achieving those results, and
 - (c) the characteristics on the basis of which it could reasonably be argued, in each case, that the arrangements are abusive tax arrangements.

Notice where Panel opinion already obtained in relation to equivalent arrangements

- 25 (1) This paragraph applies where a designated HMRC officer is of the view that—
- (a) a person is liable to a penalty under paragraph 1 in relation to particular arrangements (“the arrangements concerned”),
 - (b) no GAAR final decision notice has been given in relation to those arrangements, but those arrangements are equivalent to arrangements in relation to which a GAAR final decision notice has been given (“the GAAR decision arrangements”), and
 - (c) accordingly, the opinion of the GAAR Advisory Panel which was considered by HMRC in preparing that GAAR final decision notice is relevant to the arrangements concerned.
- (2) A designated HMRC officer must give the person mentioned in sub-paragraph (1) a notice in writing—
- (a) explaining that the officer is of the view mentioned there,

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- (b) specifying the arrangements concerned,
 - (c) describing the material characteristics of the GAAR decision arrangements,
 - (d) setting out a report prepared by HMRC of the opinion of the GAAR Advisory Panel which was considered by HMRC in preparing the GAAR final decision notice, and
 - (e) explaining the effect of sub-paragraphs (3) and (4).
- (3) A person to whom a notice under this paragraph is given has 30 days, beginning with the day on which the notice is given, to send to the designated HMRC officer (in writing) any representations that that person wishes to make as to why the arrangements concerned are not equivalent to the GAAR decision arrangements.
- (4) A designated HMRC officer may, on a written request by that person, extend the period during which representations may be made by that person.
- (5) Paragraph 24 contains definitions of the following terms used in this paragraph—
“GAAR final decision notice”;
“equivalent”, in relation to arrangements.

Referral to GAAR Advisory Panel

- 26 (1) A designated HMRC officer may make a referral under this paragraph if—
- (a) the officer considers that a person is liable to a penalty under paragraph 1 in relation to particular arrangements (“the arrangements in question”), and
 - (b) the requirements of paragraph 28 (procedure before making of referral) have been complied with.
- (2) But a referral may not be made under this paragraph if a GAAR final decision notice (within the meaning of paragraph 24(1)) has already been given in relation to—
- (a) the arrangements in question, or
 - (b) arrangements that are equivalent to those arrangements.
- (3) A referral under this paragraph is a referral to the GAAR Advisory Panel of the question whether the entering into and carrying out of tax arrangements such as are described in the referral statement (see paragraph 27) is a reasonable course of action in relation to the relevant tax provisions.
- 27 (1) In this Part of this Schedule “the referral statement”, in relation to a referral under paragraph 26, means a statement made by a designated HMRC officer which—
- (a) accompanies the referral,
 - (b) is a general statement of the material characteristics of the arrangements in question (within the meaning given by paragraph 26(1)), and
 - (c) complies with sub-paragraph (2).
- (2) A statement under this paragraph must—
- (a) contain a factual description of the arrangements in question,
 - (b) set out HMRC's view as to whether those arrangements accord with established practice (as it stood when those arrangements were entered into),
 - (c) explain why it is the designated HMRC officer's view that a tax advantage of the nature described in the statement and arising from tax arrangements having the characteristics described in the statement would be a tax advantage arising from arrangements that are abusive,

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- (d) set out any matters the designated HMRC officer is aware of which may suggest that any view of HMRC or the designated HMRC officer expressed in the statement is not correct, and
- (e) set out any other matters which the designated HMRC officer considers are required for the purposes of the exercise of the GAAR Advisory Panel's functions under paragraphs 33 and 34.

Notice before decision whether to refer

- 28 (1) A referral must not be made under paragraph 26 unless—
- (a) a designated HMRC officer has given each relevant person a notice under this paragraph,
 - (b) in the case of each relevant person, the time allowed for making representations has expired, and
 - (c) in deciding whether to make the referral, a designated HMRC officer has considered any representations made by a relevant person within the time allowed.
- (2) In this paragraph a “relevant person” means any person who at the time of the referral is considered by the officer making the referral to be liable to a penalty under paragraph 1 in relation to the arrangements in question (within the meaning given by paragraph 26(1)).
- (3) A notice under this paragraph is a notice in writing which—
- (a) explains that the officer giving the notice considers that the person to whom the notice is given is liable to a penalty under paragraph 1 in relation to the arrangements in question (specifying those arrangements),
 - (b) explains why the officer considers those arrangements to be abusive tax arrangements,
 - (c) explains that HMRC are proposing to make a referral under paragraph 26 of the question whether the entering into and carrying out of tax arrangements that have the characteristics of the arrangements in question is a reasonable course of action in relation to the relevant tax provisions, and
 - (d) explains the effect of sub-paragraphs (4) and (5).
- (4) Each person to whom a notice under this paragraph is given has 45 days, beginning with the day on which the notice is given to that person, to send written representations to the designated HMRC officer in response to the notice.
- (5) A designated HMRC officer may, on a written request by a person to whom a notice is given, extend the period during which representations may be made by that person.

Notice of decision whether to refer

- 29 Where a designated HMRC officer decides whether to make a referral under paragraph 26, the officer must, as soon as reasonably practicable, give written notice of that decision to each person to whom notice under paragraph 28 was given.

Information to accompany referral

- 30 A referral under paragraph 26 must (as well as being accompanied by the referral statement under paragraph 27) be accompanied by—

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- (a) a declaration that, as far as HMRC are aware, nothing which is material to the GAAR Advisory Panel's consideration of the matter has been omitted from that statement,
- (b) a copy of each notice given under paragraph 28 by HMRC in relation to the referral,
- (c) a copy of any representations received under paragraph 28 and any comments that HMRC wish to make in respect of those representations, and
- (d) a copy of each notice given under paragraph 31 by HMRC.

Notice on making of referral

- 31 (1) Where a referral is made under paragraph 26, a designated HMRC officer must at the same time give to each relevant person a notice in writing which—
- (a) notifies the person of the referral,
 - (b) is accompanied by a copy of the referral statement,
 - (c) is accompanied by a copy of any comments provided to the GAAR Advisory Panel under paragraph 30(c) in respect of representations made by the person,
 - (d) notifies the person of the period under paragraph 32 for making representations, and
 - (e) notifies the person of the requirement under that paragraph to send any representations to the officer.
- (2) In this paragraph “relevant person” has the same meaning as in paragraph 28 (see sub-paragraph (2) of that paragraph).

Right to make representations to GAAR Advisory Panel

- 32 (1) A person who has received a notice under paragraph 31 has 21 days, beginning with the day on which that notice is given, to send to the GAAR Advisory Panel written representations about—
- (a) the notice given to the person under paragraph 28, or
 - (b) any comments provided to the GAAR Advisory Panel under paragraph 30(c) in respect of representations made by the person.
- (2) The GAAR Advisory Panel may, on a written request made by the person, extend the period during which representations may be made.
- (3) If a person sends representations to the GAAR Advisory Panel under this paragraph, the person must at the same time send a copy of the representations to the designated HMRC officer.
- (4) If a person sends representations to the GAAR Advisory Panel under this paragraph and that person made no representations under paragraph 28, a designated HMRC officer—
- (a) may provide the GAAR Advisory Panel with comments on that person's representations under this paragraph, and
 - (b) if such comments are provided, must at the same time send a copy of them to that person.

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Decision of GAAR Advisory Panel and opinion notices

- 33 (1) Where a referral is made to the GAAR Advisory Panel under paragraph 26, the Chair must arrange for a sub-panel consisting of 3 members of the GAAR Advisory Panel (one of whom may be the Chair) to consider it.
- (2) The sub-panel may invite—
- (a) any person to whom notice under paragraph 28 was given, or
 - (b) the designated HMRC officer,
- (or both) to supply the sub-panel with further information within a period specified in the invitation.
- (3) Invitations must explain the effect of sub-paragraph (4) or (5) (as appropriate).
- (4) If a person invited under sub-paragraph (2)(a) supplies information to the sub-panel under this paragraph, that person must at the same time send a copy of the information to the designated HMRC officer.
- (5) If a designated HMRC officer supplies information to the sub-panel under this paragraph, the officer must at the same time send a copy of the information to each person to whom notice under paragraph 28 was given.
- 34 (1) The sub-panel must produce—
- (a) one opinion notice stating the joint opinion of all the members of the sub-panel, or
 - (b) two or three opinion notices which taken together state the opinions of all the members.
- (2) The sub-panel must give a copy of the opinion notice or notices to the designated HMRC officer.
- (3) An opinion notice is a notice which states that in the opinion of the members of the sub-panel, or one or more of those members—
- (a) the entering into and carrying out of tax arrangements such as are described in the referral statement is a reasonable course of action in relation to the relevant tax provisions,
 - (b) the entering into or carrying out of such tax arrangements is not a reasonable course of action in relation to the relevant tax provisions, or
 - (c) it is not possible, on the information available, to reach a view on that matter, and the reasons for that opinion.
- (4) In forming their opinions for the purposes of sub-paragraph (3) members of the sub-panel must—
- (a) have regard to all the matters set out in the referral statement,
 - (b) have regard to the matters mentioned in paragraphs (a) to (c) of paragraph 3(3) and paragraph 3(4), and
 - (c) take account of paragraph 3(5) to (7).
- (5) For the purposes of the giving of an opinion under this paragraph, the arrangements are to be assumed to be tax arrangements.
- (6) For the purposes of this Schedule—

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- (a) an opinion of the GAAR Advisory Panel is to be treated as having been given on a referral under paragraph 26 when an opinion notice (or notices) has been given under this paragraph in respect of the referral, and
- (b) any requirement to consider the opinion of the GAAR Advisory Panel given on such a referral is a requirement to consider the contents of the opinion notice (or notices) given on the referral.

Notice before deciding that arrangements are ones to which Panel opinion applies

- 35 (1) This paragraph applies where—
- (a) an opinion of the GAAR Advisory Panel has been given on a referral under paragraph 26,
 - (b) a designated HMRC officer is of the view that a person is liable to a penalty under paragraph 1 in relation to particular arrangements (“the arrangements concerned”) and that that opinion of the GAAR Advisory Panel applies to those arrangements, and
 - (c) that person is not a person to whom notice under paragraph 28 was given in connection with the referral.
- (2) A designated HMRC officer must give the person mentioned in sub-paragraph (1) (b) a notice in writing—
- (a) explaining that the officer is of the view mentioned in that paragraph,
 - (b) specifying the arrangements concerned,
 - (c) setting out a report prepared by HMRC of the opinion mentioned in sub-paragraph (1)(a), and
 - (d) explaining the effect of sub-paragraphs (3) and (4).
- (3) A person to whom a notice under this paragraph is given has 30 days, beginning with the day on which the notice is given, to send the designated HMRC officer (in writing) any representations as to why the opinion does not apply to the arrangements concerned.
- (4) A designated HMRC officer may, on a written request by that person, extend the period during which representations may be made by that person.
- (5) Paragraph 24(2) defines the arrangements that an opinion given on a referral under paragraph 26 “applies to”.

Requirement for court or tribunal to take Panel opinion into account

- 36 (1) In this paragraph “enabler penalty proceedings” means proceedings before a court or tribunal in connection with a penalty under paragraph 1.
- (2) In determining in enabler penalty proceedings any question whether tax arrangements to which the penalty relates were abusive, the court or tribunal—
- (a) must take into account the relevant Panel opinion, and
 - (b) may also take into account any matter mentioned in sub-paragraph (4).
- (3) In sub-paragraph (2)(a) “the relevant Panel opinion” means the opinion of the GAAR Advisory Panel which under this Part of this Schedule was required to be considered by a designated HMRC officer in deciding whether the penalty should be assessed.
- (4) The matters mentioned in sub-paragraph (2)(b) are—

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- (a) guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into, and
- (b) evidence of established practice at that time.

PART 8

APPEALS

- 37 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.
- 38 (1) An appeal under paragraph 37 is to be treated in the same way as an appeal against an assessment to the tax to which the arrangements concerned relate (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 a person to pay a penalty under paragraph 1 before an appeal against the assessment of the penalty is determined;
 - (b) in respect of any other matter expressly provided for by this Schedule.
- (3) In this paragraph “the arrangements concerned” means the arrangements to which the penalty relates.
- 39 (1) On an appeal under paragraph 37(a) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 37(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 decision for HMRC's, the tribunal may rely on paragraph 18—
- (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
 - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 18 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 38(1)).

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PART 9

INFORMATION

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

40 [F10(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 [F11(or will become or may become so liable if T incurs a defeat)];

“the Schedule” means Schedule 36 to FA 2008.

[F12(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

F10 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))

F11 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))

F12 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))

General modifications of Schedule 36 to FA 2008 as applied

41 In its application for [F13a 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,

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- (d) references to prejudice to the assessment or collection of tax included prejudice to ^{F14}—
 - (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

- F13** 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))
- F14** 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 ^{F15}a purpose] mentioned in paragraph 40(1) above has effect with the modifications in sub-paragraphs ^{F16}(1A)] to (6).
- ^{F17}(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.
- ^{F18}(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”;

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(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

- F15** 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))
- F16** 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))
- F17** 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))
- F18** 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 [F19a purpose] mentioned in paragraph 40(1) above.

Textual Amendments

- F19** 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

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- (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.
- (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.

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- (6) In paragraph 44 any reference to a penalty under paragraph 1 includes a reference to a penalty under this paragraph.

PART 10

PUBLISHING DETAILS OF PERSONS WHO HAVE INCURRED PENALTIES

Power to publish details

- 46 (1) The Commissioners may publish information about a person where—
- (a) the person has incurred a penalty under paragraph 1,
 - (b) the penalty has become final, and
 - (c) either the condition in sub-paragraph (2) or the condition in sub-paragraph (3) is met.
- (2) The condition in this sub-paragraph is that, at the time when the penalty mentioned in sub-paragraph (1) becomes final, 50 or more other penalties which are reckonable penalties have been incurred by the person.
- (3) The condition in this sub-paragraph is that—
- (a) the amount of the penalty mentioned in sub-paragraph (1), or
 - (b) the total amount of that penalty and any other penalties incurred by that person which are reckonable penalties,
- is more than £25,000.
- (4) The information that may be published under this paragraph 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 total number of the penalties in question (that is, the penalty mentioned in sub-paragraph (1) and any penalties that are reckonable penalties in relation to that penalty),
 - (e) the total amount of the penalties in question, and
 - (f) any other information that the Commissioners consider it appropriate to publish in order to make clear the person's identity.
- (5) The information may be published in any way that the Commissioners consider appropriate.
- (6) For the purposes of this Part of this Schedule a penalty becomes “ final ”
- (a) if the penalty has been assessed and paragraph (b) does not apply, at the time when the period for any appeal or further appeal relating to the penalty expires or, if later, when any appeal or final appeal relating to it is finally determined;
 - (b) if a contract settlement has been made in relation to the penalty, at the time when the contract is made;

and “contract settlement” here 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.

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- (7) “Reckonable penalty” has the meaning given by paragraph 47.
- (8) This paragraph is subject to paragraphs 48 to 50.
- 47 (1) A penalty is a “reckonable penalty” for the purposes of paragraph 46 if—
 - (a) it is a penalty under paragraph 1 which becomes final at the same time as, or before, the penalty mentioned in paragraph 46(1),
 - (b) its entry date and the entry date of the penalty mentioned in paragraph 46(1) are not more than 12 months apart, and
 - (c) it is not a penalty which under paragraph 48(1) is to be disregarded.
- (2) For the purposes of this paragraph the “entry date” of a penalty under paragraph 1 is the date (or, if more than one, the latest date) on which the arrangements concerned or any agreement or transaction forming part of those arrangements was entered into by the taxpayer.
- (3) In sub-paragraph (2)—
 - “the arrangements concerned” means the arrangements to which the penalty relates, and
 - “the taxpayer” means the person whose defeat in respect of those arrangements resulted in the penalty being payable.
- (4) For the purposes of this paragraph, the entry date of a penalty is not more than 12 months apart from the entry date of another penalty if—
 - (a) the entry dates of those penalties are the same, or
 - (b) the period beginning with whichever of the entry dates is the earlier and ending with whichever of the entry dates is the later is 12 months or less.

Restrictions on power

- 48 (1) In determining at any time whether or what information may be published in relation to a person under paragraph 46, the following penalties incurred by the person are to be disregarded—
 - (a) a penalty which has been reduced to nil or stayed;
 - (b) a penalty by reference to which information has previously been published under paragraph 46;
 - ^{F20}(c)
 - (d) a penalty that relates to arrangements which are related to arrangements that have already been dealt with (within the meaning given by sub-paragraph (4)).
- (2) For the purposes of sub-paragraph [^{F21}(1)(d)] arrangements are “related to” each other if they—
 - (a) implement the same proposal for tax arrangements, and
 - (b) are substantially the same as each other.
- ^{F22}(3)
- (4) For the purposes of sub-paragraph (1)(d) arrangements have “already been dealt with” if information about the person has already been published under paragraph 46 by reference to a penalty that relates to those arrangements.

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Textual Amendments

- F20** Sch. 16 para. 48(1)(c) omitted (with effect in accordance with s. 123(13) of the amending Act) by virtue of Finance Act 2021 (c. 26), s. 123(8)(a) (with s. 123(13))
- F21** Word in Sch. 16 para. 48(2) substituted (with effect in accordance with s. 123(13) of the amending Act) by Finance Act 2021 (c. 26), s. 123(8)(b) (with s. 123(13))
- F22** Sch. 16 para. 48(3) omitted (with effect in accordance with s. 123(13) of the amending Act) by virtue of Finance Act 2021 (c. 26), s. 123(8)(c) (with s. 123(13))

- 49 (1) Publication of information under paragraph 46 on the basis of a penalty or penalties incurred by a person may not take place after the relevant time.
- (2) In this paragraph “the relevant time” means the end of 12 months beginning with the date on which the penalty became final or, where more than one penalty is involved, the latest date on which any of them became final.
- (3) Sub-paragraph (1) is not to be taken to prevent the re-publishing, or continued publishing, after the relevant time of a set of information published under paragraph 46 before that time.
- (4) Information published under paragraph 46 may not be re-published, or continue to be published, after the end of 12 months beginning with the date on which it was first published.
- (5) Nothing in paragraph 48 applies in relation to determining whether to re-publish (or continue to publish) a set of information already published under paragraph 46.
- 50 Before publishing information under paragraph 46 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.

Power to amend

- 51 The Treasury may by regulations amend this Part of this Schedule so as to alter any of the following—
- (a) the figure for the time being specified in paragraph 46(2);
 - (b) the sum for the time being specified in paragraph 46(3);
 - (c) any period for the time being specified in paragraph 47(1)(b) or (4).

PART 11

MISCELLANEOUS

Double jeopardy

- 52 A person is not liable to a penalty under paragraph 1 in respect of conduct for which the person has been convicted of an offence.

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Application of provisions of TMA 1970

- 53 Subject to the provisions of this Schedule, the following provisions of TMA 1970 apply for the purposes 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).

PART 12

GENERAL

Meaning of “tax”

- 54 (1) In this Schedule “tax” includes any of the following taxes—
- (a) income tax,
 - (b) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,
 - (c) capital gains tax,
 - (d) petroleum revenue tax,
 - (e) diverted profits tax,
 - (f) apprenticeship levy,
 - (g) inheritance tax,
 - (h) stamp duty land tax, and
 - (i) annual tax on enveloped dwellings,
- and also includes national insurance contributions.
- (2) The Treasury may by regulations amend sub-paragraph (1) so as to—
- (a) add a tax to the list of taxes for the time being set out in that sub-paragraph;
 - (b) remove a tax for the time being set out in that sub-paragraph;
 - (c) remove the reference to national insurance contributions;
 - (d) substitute for that reference a reference to national insurance contributions of a particular class or classes;
 - (e) where provision has been made under paragraph (d)—
 - (i) add a class or classes of national insurance contributions to those for the time being specified in that sub-paragraph;
 - (ii) remove a class or classes of national insurance contributions for the time being so specified.
- (3) Regulations under this paragraph may—
- (a) make supplementary, incidental, and consequential provision, including provision amending or repealing any provision of this Schedule;
 - (b) make transitional provision.

Meaning of “tax advantage”

- 55 In this Schedule “tax advantage” includes—
- (a) relief or increased relief from tax,

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- (b) repayment or increased repayment of tax,
- (c) receipt, or advancement of a receipt, of a tax credit,
- (d) avoidance or reduction of a charge to tax, an assessment of tax or a liability to pay tax,
- (e) avoidance of a possible assessment to tax or liability to pay tax,
- (f) deferral of a payment of tax or advancement of a repayment of tax, and
- (g) avoidance of an obligation to deduct or account for tax.

Other definitions

56 (1) In this Schedule—

“abusive tax arrangements” has the meaning given by paragraph 3;

“arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);

“business” includes any trade or profession;

“the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs;

“company” has the same meaning as in the Corporation Tax Acts (see section 1121 of CTA 2010);

“contract settlement” (except in paragraph 46(6)) means an agreement in connection with a person's liability to make a payment to the Commissioners under or by virtue of an enactment;

“a defeat”, in relation to arrangements, is to be read in accordance with paragraph 4;

a “designated HMRC officer” means an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of this Schedule;

“the GAAR Advisory Panel” has the meaning given by paragraph 1 of Schedule 43 to FA 2013;

“group” is to be read in accordance with sub-paragraph (2);

“HMRC” means Her Majesty's Revenue and Customs;

“national insurance contributions” means contributions under Part 1 of the Social Security Contributions and Benefits Act 1992 or Part 1 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992;

a “NICs decision” means a decision under section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 or Article 7 of the Social Security Contributions (Transfer of Functions, etc.) (Northern Ireland) Order 1999 (SI 1999/671) relating to a person’s liability for relevant contributions;

“relevant contributions” means any of the following contributions under Part 1 of the Social Security Contributions and Benefits Act 1992 or Part 1 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992—

- (a) Class 1 contributions;
- (b) Class 1A contributions;
- (c) Class 1B contributions;
- (d) Class 2 contributions which must be paid but in relation to which section 11A of the Act in question (application of certain provisions of the Income Tax Acts) does not apply;

“tax” is to be read in accordance with paragraph 54;

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“tax advantage” is to be read in accordance with paragraph 55.

- (2) For the purposes of this Schedule two companies are members of the same group if—
- (a) one is a 75% subsidiary of the other, or
 - (b) both are 75% subsidiaries of a third company;
- and in this paragraph “75% subsidiary” has, subject to sub-paragraph (3), the meaning given by section 1154 of CTA 2010.
- (3) So far as relating to 75% subsidiaries, section 151(4) of CTA 2010 (requirements relating to beneficial ownership) applies for the purposes of this Schedule as it applies for the purposes of Part 5 of that Act.
- (4) In this Schedule references to an assessment to tax, however expressed—
- (a) in relation to inheritance tax and petroleum revenue tax, include a determination;
 - (b) in relation to relevant contributions, include a NICs decision.

Regulations

- 57 (1) Any regulations under this Schedule must be made by statutory instrument.
- (2) A statutory instrument which contains (alone or with other provision) any regulations within sub-paragraph (3) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the House of Commons.
- (3) Regulations within this sub-paragraph are—
- (a) regulations under paragraph 12;
 - (b) regulations under paragraph 14(1);
 - (c) regulations under paragraph 14(2) which amend or repeal any provision of this Schedule;
 - (d) regulations under paragraph 51;
 - (e) regulations under paragraph 54.
- (4) A statutory instrument containing only—
- (a) regulations under paragraph 14(2) which do not amend or repeal any provision of this Schedule, or
 - (b) regulations under paragraph 44,
- is subject to annulment in pursuance of a resolution of the House of Commons.

Consequential amendments

- 58 In section 103ZA of TMA 1970 (disapplication of sections 100 to 103 of that Act in the case of certain penalties)—
- (a) omit “or” at the end of paragraph (i), and
 - (b) after paragraph (j) insert “or
 - (k) paragraph 1 or 45 of Schedule 16 to the Finance (No. 2) Act 2017 (enablers of defeated tax avoidance etc).”
- 59 In section 54 of ITTOIA 2005 (no deduction allowed for certain penalties etc) at the end of the table in subsection (2) insert—

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“Penalty under Schedule 16 to Various taxes”
 F(No. 2)A 2017

60 In section 1303 of CTA 2009 (no deduction allowed for certain penalties etc) at the end of the table in subsection (2) insert—

“Penalty under Schedule 16 to Various taxes”
 F(No. 2)A 2017

61 In Schedule 34 to FA 2014 (promoters of tax avoidance schemes: threshold conditions), in paragraph 7—

- (a) in paragraph (a), for the words after “promoter” substitute “—
- (i) have been referred to the GAAR Advisory Panel under Schedule 43 to FA 2013 (referrals of single schemes),
 - (ii) are in a pool in respect of which a referral has been made to that Panel under Schedule 43B to that Act (generic referrals), or
 - (iii) have been referred to that Panel under paragraph 26 of Schedule 16 to F(No. 2)A 2017 (referrals in relation to penalties for enablers of defeated tax avoidance),”;
- (b) in paragraph (b), for the words after “referral” substitute “under (as the case may be)—
- (i) paragraph 11(3)(b) of Schedule 43 to FA 2013,
 - (ii) paragraph 6(4)(b) of Schedule 43B to that Act, or
 - (iii) paragraph 34(3)(b) of Schedule 16 to F(No. 2)A 2017,

(opinion of sub-panel of GAAR Advisory Panel that arrangements are not reasonable), and ”.

Commencement

- 62 (1) Subject to sub-paragraphs (2) and (3), paragraphs 1 to 61 of this Schedule have effect in relation to arrangements entered into on or after the day on which this Act is passed.
- (2) In determining in relation to any particular arrangements whether a person is a person who enabled the arrangements, any action of the person carried out before the day on which this Act is passed is to be disregarded.
- (3) The amendments made by paragraph 61 do not apply in relation to a person who is a promoter in relation to arrangements if by virtue of sub-paragraph (2) above that person is not a person who enabled the arrangements.

Status:

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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. A1 para. 8(6)(b) omitted by [2022 c. 3 Sch. 1 para. 32\(b\)](#)
- Sch. A1 para. 8(2) substituted by [2022 c. 3 Sch. 1 para. 32\(a\)](#)