

*Status: Point in time view as at 01/01/2023.*

*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

## SCHEDULES

### SCHEDULE 38

Section 223

#### TAX AGENTS: DISHONEST CONDUCT

##### **Modifications etc. (not altering text)**

- C1** Sch. 38 applied by S.I. 2009/470, reg. 33(1) (as substituted (6.4.2013) by [The Education \(Student Loans\) \(Repayment\) \(Amendment\) Regulations 2013 \(S.I. 2013/607\)](#), regs. 1(1), **9**)
- C2** Sch. 38 applied (with application in accordance with reg. 1(2) of the amending S.I.) by [The Social Security \(Contributions\) \(Amendment and Application of Schedule 38 to the Finance Act 2012\) Regulations 2013 \(S.I. 2013/622\)](#), regs. 1, **41**
- C3** Sch. 38 applied (with application in accordance with reg. 1 of the amending S.I.) by [The Education \(Postgraduate Masters Degree Loans\) Regulations 2016 \(S.I. 2016/606\)](#), regs. 1(1), **24(2)**
- C4** Sch. 38 applied (with application in accordance with reg. 1 of the amending S.I.) by [The Education \(Postgraduate Masters Degree Loans\) Regulations 2016 \(S.I. 2016/606\)](#), regs. 1(1), **43(1)**

### PART 1

#### INTRODUCTION

##### *Overview*

- 1 This Schedule is arranged as follows—
- (a) this Part explains who is a tax agent and what it means to engage in dishonest conduct,
  - (b) Part 2 sets out the process for establishing whether someone is engaging in or has engaged in dishonest conduct,
  - (c) Part 3 confers power on HMRC to obtain relevant documents,
  - (d) Part 4 sets out sanctions for engaging in dishonest conduct,
  - (e) Part 5 provides for assessment of and appeals against penalties, and
  - (f) Parts 6 and 7 contain miscellaneous provisions and consequential amendments.

##### **Commencement Information**

- II** Sch. 38 para. 1 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

##### *Tax agent*

- 2 (1) A “tax agent” is an individual who, in the course of business, assists other persons (“clients”) with their tax affairs.

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- (2) Individuals can be tax agents even if they (or the organisations for which they work) are appointed—
  - (a) indirectly, or
  - (b) at the request of someone other than the client.
- (3) Assistance with a client's tax affairs includes—
  - (a) advising a client in relation to tax, and
  - (b) acting or purporting to act as agent on behalf of a client in relation to tax.
- (4) Assistance with a client's tax affairs also includes assistance with any document that is likely to be relied on by HMRC to determine a client's tax position.
- (5) Assistance given for non-tax purposes counts as assistance with a client's tax affairs if it is given in the knowledge that it will be, or is likely to be, used by a client in connection with the client's tax affairs.

**Commencement Information**

**I2** Sch. 38 para. 2 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

*Dishonest conduct*

- 3 (1) An individual “engages in dishonest conduct” if, in the course of acting as a tax agent, the individual does something dishonest with a view to bringing about a loss of tax revenue.
- (2) It does not matter whether a loss is actually brought about.
- (3) Nor does it matter whether the individual is acting on the instruction of clients.
- (4) A loss of tax revenue would be brought about for these purposes if clients were to—
  - (a) account for less tax than they are required to account for by law,
  - (b) obtain more tax relief than they are entitled to obtain by law,
  - (c) account for tax later than they are required to account for it by law, or
  - (d) obtain tax relief earlier than they are entitled to obtain it by law.
- (5) “Tax” is defined in Part 6 of this Schedule.
- (6) “Tax relief” includes—
  - (a) any exemption from or deduction or credit against or in respect of tax, and
  - (b) any repayment of tax.
- (7) A reference in this paragraph to doing something dishonest includes—
  - (a) dishonestly omitting to do something, and
  - (b) advising or assisting a client to do something that the individual knows to be dishonest.

**Commencement Information**

**I3** Sch. 38 para. 3 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

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## PART 2

### ESTABLISHING DISHONEST CONDUCT

#### *Conduct notice*

- 4 (1) This paragraph applies if HMRC determine that an individual is engaging in or has engaged in dishonest conduct.
- (2) An authorised officer (or an officer of Revenue and Customs with the approval of an authorised officer) may notify the individual of that determination.
- (3) The notice must state the grounds on which the determination was made.
- (4) For the effect of notifying the individual, see paragraphs 7(2) and 29(2).
- (5) A notice under this paragraph is referred to as a “conduct notice”.
- (6) In relation to a conduct notice, a reference to “the determination” is to the determination forming the subject of the notice.

#### **Commencement Information**

**I4** Sch. 38 para. 4 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

#### *Appeal against determination*

- 5 (1) An individual to whom a conduct notice is given may appeal against the determination.
- (2) Notice of appeal must be given—
- (a) in writing to the officer who gave the conduct notice, and
- (b) within the period of 30 days beginning with the day on which the conduct 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 or set aside the determination.
- (5) 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.
- (6) Setting aside a determination does not prevent a further conduct notice being given in respect of the same conduct if further evidence emerges.

#### **Commencement Information**

**I5** Sch. 38 para. 5 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

#### *Offence of concealment etc in connection with conduct notice*

- 6 (1) A person (“P”) commits an offence if, after a relevant event has occurred, P—

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- (a) conceals, destroys or otherwise disposes of a material document, or
  - (b) arranges for the concealment, destruction or disposal of a material document.
- (2) A “relevant event” occurs if—
- (a) a conduct notice is given to an individual, or
  - (b) an individual is informed by an officer of Revenue and Customs that a conduct notice will be or is likely to be given to the individual.
- (3) A “material document” is any document that could be sought under paragraph 8 as a result of the giving of the conduct notice.
- (4) If P acts after the event described in sub-paragraph (2)(a), no offence is committed if P acts—
- (a) after the determination has been set aside,
  - (b) more than 4 years after the conduct notice was given, or
  - (c) without knowledge of that event.
- (5) If P acts before that event but after the event described in sub-paragraph (2)(b), no offence is committed if P acts—
- (a) more than 2 years after the individual was, or was last, so informed, or
  - (b) without knowledge of the event described in sub-paragraph (2)(b).
- (6) P acts without knowledge of an event if P—
- (a) is not the individual with respect to whom the event has occurred, and
  - (b) does not know, and could not reasonably be expected to know, that the event has occurred.
- (7) 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.

**Commencement Information**

**I6** Sch. 38 para. 6 in force at 1.4.2013 by [S.I. 2013/279, art. 2](#)

**PART 3**

POWER TO OBTAIN TAX AGENT'S FILES ETC

**Modifications etc. (not altering text)**

- C5** Sch. 38 Pt. 3 applied (N.I.) by 1992 c. 8, s. 104ZA(2A) (as inserted (1.4.2013) by [Finance Act 2012 \(c. 14\)](#), [Sch. 38 para. 57](#); [S.I. 2013/279, art. 2](#))
- C6** Sch. 38 Pt. 3 applied (E.W.S.) by 1992 c. 5, s. 110ZA(2A) (as inserted (1.4.2013) by [Finance Act 2012 \(c. 14\)](#), [Sch. 38 para. 56](#); [S.I. 2013/279, art. 2](#))

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

**Commencement Information**

**I7** Sch. 38 para. 7 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

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- (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”.

**Commencement Information**

**18** Sch. 38 para. 8 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

*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.

**Commencement Information**

**19** Sch. 38 para. 9 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

*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.

**Commencement Information**

**110** Sch. 38 para. 10 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

*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.

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**Commencement Information**

**I11** Sch. 38 para. 11 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 12 Unless otherwise specified in the notice, a file access notice may be complied with by providing copies of the relevant documents.

**Commencement Information**

**I12** Sch. 38 para. 12 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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).

**Commencement Information**

**I13** Sch. 38 para. 13 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

**Commencement Information**

**I14** Sch. 38 para. 14 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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

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- (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.

**Commencement Information**

**I15** Sch. 38 para. 15 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

**Commencement Information**

**I16** Sch. 38 para. 16 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

**Commencement Information**

**I17** Sch. 38 para. 17 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.



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#### **Commencement Information**

**I18** Sch. 38 para. 18 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

#### *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.

#### **Commencement Information**

**I19** Sch. 38 para. 19 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

#### *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—
- (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).

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- (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.

**Commencement Information**

**I20** Sch. 38 para. 20 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

**Commencement Information**

**I21** Sch. 38 para. 21 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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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**Commencement Information**

**I22** Sch. 38 para. 22 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

**Commencement Information**

**I23** Sch. 38 para. 23 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

**Commencement Information**

**I24** Sch. 38 para. 24 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*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.

**Commencement Information**

**I25** Sch. 38 para. 25 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

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## PART 4

### SANCTIONS FOR DISHONEST CONDUCT

#### *Penalty for dishonest conduct*

- 26 (1) An individual who engages in dishonest conduct is liable to a penalty.
- (2) Subject to paragraph 27, the penalty to which the individual is liable is to be—
- (a) no less than £5,000, and
  - (b) no more than £50,000.
- (3) In assessing the amount of the penalty, regard must be had to—
- (a) whether the individual disclosed the dishonest conduct,
  - (b) whether that disclosure was prompted or unprompted,
  - (c) the quality of that disclosure, and
  - (d) the quality of the individual's compliance with any file access notice in connection with the dishonest conduct.
- (4) An individual “discloses” dishonest conduct by—
- (a) telling HMRC about it,
  - (b) giving HMRC reasonable help in identifying the client or clients concerned and in quantifying the loss of tax revenue (if any) brought about by it, and
  - (c) allowing HMRC access to records for the purpose of ensuring that any such loss is recovered or otherwise properly accounted for.
- (5) A disclosure is “unprompted” if it is made at a time when the individual has no reason to believe that HMRC have discovered or are about to discover the dishonest conduct.
- (6) Otherwise, a disclosure is “prompted”.
- (7) In relation to disclosure or compliance, “quality” includes timing, nature and extent.

#### **Commencement Information**

**I26** Sch. 38 para. 26 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

#### *Special reduction*

- 27 (1) This paragraph applies if HMRC propose to assess an individual to a penalty under paragraph 26 of £5,000.
- (2) If they think it right because of special circumstances, HMRC may take one or more of the following steps—
- (a) reduce the penalty to an amount below £5,000 (which may be nil),
  - (b) stay the penalty, or
  - (c) agree a compromise in relation to proceedings for the penalty.
- (3) “Special circumstances” does not include—
- (a) ability to pay, or
  - (b) the fact that a loss of tax revenue from a client is balanced by an over-payment by another person (whether or not a client).

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**Commencement Information**

**I27** Sch. 38 para. 27 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Power to publish details*

- 28 (1) The Commissioners may publish information about an individual if the individual incurs a penalty under paragraph 26.
- (2) The information that may be published is—
- (a) the individual's name (including any trading name, previous name or pseudonym),
  - (b) the individual's address,
  - (c) the nature of any business carried on by the individual,
  - (d) the amount of the penalty,
  - (e) the periods or times to which the dishonest conduct relates,
  - (f) any other information the Commissioners consider it appropriate to publish in order to make clear the individual's identity, and
  - (g) the link (if there is one) between the dishonest conduct and any inaccuracy, failure or action as a result of which information is published under section 94 of FA 2009 (which relates to deliberate tax defaulters).
- (3) No information may be published under this paragraph if the penalty incurred by the individual is £5,000 or less.
- (4) Subsections (5) to (9) and (11) of section 94 of FA 2009 apply to publishing information about an individual under this paragraph as they apply to publishing information about a person under that section.
- (5) If, in acting as a tax agent, the individual works or worked for an organisation, subparagraph (2)(f) includes power to publish such information about that organisation as the Commissioners consider appropriate in order to make clear the individual's identity.
- (6) Before publishing information about the organisation, the Commissioners must—
- (a) inform the organisation that they are considering doing so, and
  - (b) afford the organisation reasonable opportunity to make representations about whether it should be published.

**Commencement Information**

**I28** Sch. 38 para. 28 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

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## PART 5

### PENALTIES: ASSESSMENT ETC

#### *Assessment of penalties*

- 29 (1) If a person becomes liable to a penalty under Part 3 or 4 of this Schedule, HMRC may assess the penalty.
- (2) But, in the case of a penalty under Part 4, they may only do so if a conduct notice has been given to the person and either—
- (a) the time allowed for giving notice of appeal against the determination has expired without notice of appeal being given, or
  - (b) notice of appeal against the determination was given within the time allowed, but the appeal has been withdrawn or the determination confirmed.
- (3) Paragraph 7(4) applies for the purposes of sub-paragraph (2)(b).
- (4) If HMRC assess a penalty, they must notify the person.

#### **Commencement Information**

**I29** Sch. 38 para. 29 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 30 (1) HMRC may not assess a penalty under this Schedule after the applicable deadline.
- (2) For a penalty under Part 3, the applicable deadline is the end of the period of 12 months beginning with the day on which the person became liable to the penalty.
- (3) For a penalty under Part 4, the applicable deadline is the end of the period of 12 months beginning with the later of—
- (a) the first day on which HMRC may assess the penalty (see paragraph 29(2)), and
  - (b) day X.
- (4) If a loss of tax revenue is brought about by the dishonest conduct, day X is—
- (a) the day immediately following the end of the appeal period for the assessment or determination of the tax revenue lost (or, if more than one client is involved, the end of the last such period), or
  - (b) if there is no such assessment or determination, the day on which the amount of tax revenue lost is ascertained.
- (5) Otherwise, day X is the day on which HMRC ascertain that no loss of tax revenue has been brought about by the dishonest conduct.
- (6) In sub-paragraph (4), “appeal period” means the period during which—
- (a) an appeal could be brought, or
  - (b) an appeal that has been brought has not been withdrawn or determined.

#### **Commencement Information**

**I30** Sch. 38 para. 30 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Status: Point in time view as at 01/01/2023.*

*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

### *Appeal against penalty*

- 31 (1) A person may appeal against a decision of HMRC—
- (a) that a penalty is payable under Part 3 of this Schedule, or
  - (b) as to the amount of a penalty payable under Part 3 or 4 of this Schedule.
- (2) Notice of appeal must be given—
- (a) in writing to HMRC, and
  - (b) before the end of the period of 30 days beginning with the day on which notification of the penalty was issued.
- (3) It must state the grounds of appeal.
- (4) On an appeal under sub-paragraph (1)(a) that is notified to the tribunal, the tribunal may confirm or cancel the decision.
- (5) On an appeal under sub-paragraph (1)(b) that is notified to the tribunal, the tribunal may—
- (a) confirm the decision, or
  - (b) substitute for the decision another decision that HMRC had power to make.
- (6) If, in the case of an appeal against a penalty under Part 4, the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 27 (special reduction)—
- (a) to the same extent as HMRC (which may mean applying the same 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 that paragraph was flawed (when considered in the light of the principles applicable in proceedings for judicial review).
- (7) Subject to this paragraph and paragraph 32, 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.

#### **Commencement Information**

**I31** Sch. 38 para. 31 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

### *Enforcement of penalty*

- 32 (1) A penalty under this Schedule must be paid—
- (a) before the end of the period of 30 days beginning with the day on which notification of the penalty was issued, or
  - (b) if a notice of appeal under paragraph 31 is given, before the end of the period of 30 days beginning with the day on which the appeal is withdrawn or determined.
- (2) A penalty under this Schedule may be enforced as if it were income tax charged in an assessment and due and payable.

#### **Commencement Information**

**I32** Sch. 38 para. 32 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Status: Point in time view as at 01/01/2023.*

*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

### *Double jeopardy*

- 33 A person is not liable to a penalty under this Schedule in respect of anything in respect of which the person has been convicted of an offence.

#### **Commencement Information**

**I33** Sch. 38 para. 33 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 34 (1) A person is not liable to a penalty under this Schedule in respect of anything in respect of which the person is personally liable to a penalty under—
- (a) Schedule 24 to FA 2007 (penalties for errors),
  - (b) Schedule 41 to FA 2008 (penalties for failure to notify etc), [<sup>F1</sup>or]
  - (c) Schedule 55 to FA 2009 (penalties for failure to make a return etc), [<sup>F2</sup>or]
  - (d) Schedule 24 (penalties for failure to make returns etc) or Schedule 25 (penalties for deliberately withholding information) to FA 2021.]
- (2) Sub-paragraph (1) applies where, for example, the person is personally liable by virtue of section 48(3) of VATA 1994 (VAT representatives).

#### **Textual Amendments**

**F1** Word in [Sch. 38 para. 34\(1\)](#) omitted (1.1.2023 for specified purposes) by virtue of [Finance Act 2021 \(c. 26\)](#), s. 118(2), [Sch. 27 para. 41\(a\)](#); [S.I. 2022/1278](#), reg. 2(3)(4)(e)

**F2** [Sch. 38 para. 34\(1\)\(d\)](#) and word inserted (1.1.2023 for specified purposes) by [Finance Act 2021 \(c. 26\)](#), s. 118(2), [Sch. 27 para. 41\(b\)](#); [S.I. 2022/1278](#), reg. 2(3)(4)(e)

#### **Commencement Information**

**I34** Sch. 38 para. 34 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

### *Power to change amount of penalties*

- 35 (1) If it appears to the Treasury that there has been a change in the value of money since the last relevant day, they may by regulations substitute for the sums for the time being specified in paragraphs 22(1), 23, 26(2), 27(1) and (2)(a) and 28(3) such other sums as appear to them to be justified by the change.
- (2) “Relevant day”, in relation to a specified sum, means—
- (a) the day on which this Act is passed, and
  - (b) each day on which the power conferred by sub-paragraph (1) has been exercised in relation to that sum.
- (3) Regulations under this paragraph do not apply to a failure or conduct that began before the day on which they come into force.
- (4) The power to make regulations under this paragraph is exercisable by statutory instrument.
- (5) A statutory instrument containing regulations under this paragraph is subject to annulment in pursuance of a resolution of the House of Commons.



*Status: Point in time view as at 01/01/2023.*

*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

**Commencement Information**

**I35** Sch. 38 para. 35 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

**PART 6**

MISCELLANEOUS PROVISION AND INTERPRETATION

*Application of provisions of TMA 1970*

- 36 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).

**Commencement Information**

**I36** Sch. 38 para. 36 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Tax*

- 37 (1) “Tax” means—
- (a) income tax,
  - (b) capital gains tax,
  - (c) corporation tax,
  - (d) construction industry deductions,
  - (e) VAT,
  - (f) insurance premium tax,
  - (g) inheritance tax,
  - (h) stamp duty land tax,
  - (i) stamp duty reserve tax,
  - (j) petroleum revenue tax,
  - (k) aggregates levy,
  - (l) climate change levy,
  - [<sup>F3</sup>(la) apprenticeship levy,]
  - (m) landfill tax, and
  - (n) any duty of excise other than vehicle excise duty.
- (2) “Construction industry deductions” means construction industry deductions under Chapter 3 of Part 3 of FA 2004.
- (3) “Corporation tax” includes an amount assessable or chargeable as if it were corporation tax.
- (4) “VAT” means—

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*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

- (a) value added tax charged in accordance with VATA 1994,
- (b) amounts recoverable under paragraph 5(2) of Schedule 11 to that Act (amounts shown on invoices as VAT), and
- (c) amounts treated as VAT by virtue of regulations under section 54 of that Act (farmers etc).

#### Textual Amendments

**F3** Sch. 38 para. 37(1)(la) inserted (15.9.2016) by [Finance Act 2016 \(c. 24\)](#), **s. 115** (with **s. 117**)

#### Commencement Information

**I37** Sch. 38 para. 37 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

#### *General interpretation*

- 38 In this Schedule—
- “appointed” includes engaged;
  - “client” (except in paragraph 17)—
    - (a) has the meaning given in paragraph 2(1), and
    - (b) in relation to a particular tax agent, means a client of that tax agent;
  - “the Commissioners” means the Commissioners for Her Majesty's Revenue and Customs;
  - “conduct notice” has the meaning given in paragraph 4;
  - “the document-holder” has the meaning given in paragraph 8;
  - “document” includes a copy of a document (see also section 114 of FA 2008);
  - “file access notice” has the meaning given in paragraph 8;
  - “HMRC” means Her Majesty's Revenue and Customs;
  - “organisation” includes any person or firm carrying on a business;
  - “specify” includes describe;
  - “tax period” means a tax year, accounting period or other period in respect of which tax is charged;
  - “the tribunal” means the First-tier Tribunal or, where determined by or under the Tribunal Procedure Rules, the Upper Tribunal.

#### Commencement Information

**I38** Sch. 38 para. 38 in force at 1.4.2013 by [S.I. 2013/279](#), **art. 2**

- 39 (1) A reference in this Schedule to clients of a tax agent (or to a tax agent's clients) is a reference to the persons whom the agent assists with their tax affairs.
- (2) Sub-paragraph (1) applies even if—
- (a) the agent works for an organisation, and
  - (b) it is the organisation that is appointed to give the assistance.

*Status: Point in time view as at 01/01/2023.*

*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

**Commencement Information**

**I39** Sch. 38 para. 39 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 40 A loss of tax revenue is taken for the purposes of this Schedule to be (or to be capable of being) brought about by dishonest conduct despite the fact that the loss can be recovered or properly accounted for (following discovery of the conduct or otherwise).

**Commencement Information**

**I40** Sch. 38 para. 40 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 41 A reference in this Schedule to working for an organisation includes being a partner or member of an organisation.

**Commencement Information**

**I41** Sch. 38 para. 41 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 42 A reference in a provision of this Schedule to an authorised officer is to an officer of Revenue and Customs who is, or is a member of a class of officers who are, authorised by the Commissioners for the purposes of that provision.

**Commencement Information**

**I42** Sch. 38 para. 42 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- Relationship with other enactments*
- 43 Nothing in this Schedule limits—
- (a) any liability a person may have under any other enactment in respect of conduct in respect of which a person is liable to a penalty under this Schedule, or
  - (b) any power a person may have under any other enactment to obtain relevant documents.

**Commencement Information**

**I43** Sch. 38 para. 43 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

**PART 7**

CONSEQUENTIAL PROVISIONS

*TMA 1970*

- 44 TMA 1970 is amended as follows.

*Status: Point in time view as at 01/01/2023.*

*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

#### Commencement Information

**I44** Sch. 38 para. 44 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#) (with [art. 3](#))

- 45 Omit—
- (a) section 20A (power to call for papers of tax accountant),
  - (b) section 20B (restrictions on powers under section 20A), and
  - (c) section 99 (assisting in preparation of incorrect return etc).

#### Commencement Information

**I45** Sch. 38 para. 45 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#) (with [art. 3](#))

- 46 (1) Section 20BB (falsification etc of documents) is amended as follows.
- (2) In subsection (1)—
- (a) for “subsections (2) to (4)” substitute “ subsections (2) and (3) ”,
  - (b) in paragraph (a), omit “a notice under section 20A above or”,
  - (c) at the end of that paragraph, omit “or”, and
  - (d) omit paragraph (b).
- (3) In subsection (2)—
- (a) in paragraph (a), omit “, the inspector”,
  - (b) at the end of that paragraph, insert “ or ”,
  - (c) at the end of paragraph (b), omit “or”, and
  - (d) omit paragraph (c).
- (4) In subsection (3), for the words from “the notice is given” to the end substitute “ the order is made, unless before the end of that period an officer of Revenue and Customs has notified the person in writing that the order has not been complied with to the officer's satisfaction ”.
- (5) Omit subsection (4).

#### Commencement Information

**I46** Sch. 38 para. 46 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#) (with [art. 3](#))

- 47 In section 20D (interpretation of sections 20 to 20CC)—
- (a) in subsection (1), for “sections 20A and 20BA” substitute “ section 20BA ”, and
  - (b) omit subsection (2).

#### Commencement Information

**I47** Sch. 38 para. 47 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#) (with [art. 3](#))

- 48 In section 103 (time limits for penalties)—
- (a) omit subsection (3), and

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*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

- (b) in subsection (4), for “neither subsection (1) nor subsection (3) above applies” substitute “subsection (1) does not apply”.

**Commencement Information**

**I48** Sch. 38 para. 48 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 49 In section 103ZA (disapplication of sections 100 to 103)—
- (a) omit “or” at the end of paragraph (e), and
  - (b) at the end of paragraph (f) insert “, or
  - (g) Schedule 38 to FA 2012 (tax agents: dishonest conduct).”

**Commencement Information**

**I49** Sch. 38 para. 49 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 50 In section 118 (interpretation), in the definition of “tax”, omit the words from “except that” to the end.

**Commencement Information**

**I50** Sch. 38 para. 50 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*OTA 1975*

- 51 In Schedule 2 to OTA 1975 (management and collection of petroleum revenue tax), in the Table in paragraph 1(1), omit the entry relating to section 99 of TMA 1970.

**Commencement Information**

**I51** Sch. 38 para. 51 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*IHTA 1984*

- 52 In section 247 of IHTA 1984 (provision of incorrect information), omit subsection (4).

**Commencement Information**

**I52** Sch. 38 para. 52 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Social Security Contributions and Benefits Act 1992*

- 53 In section 16 of the Social Security Contributions and Benefits Act 1992 (applications of Income Tax Acts and destination of Class 4 contributions), in subsection (1)(c), after “2009” insert “and of Schedule 38 to the Finance Act 2012”.

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*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

**Commencement Information**

**I53** Sch. 38 para. 53 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

- 54 In paragraph 7B of Schedule 1 to that Act (collection of contributions other than through PAYE system), the reference in sub-paragraph (5A) to Part 10 of TMA 1970 includes a reference to this Schedule.

**Commencement Information**

**I54** Sch. 38 para. 54 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Social Security Contributions and Benefits (Northern Ireland) Act 1992*

- 55 In paragraph 7B of Schedule 1 to the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (collection of contributions other than through PAYE system), the reference in sub-paragraph (5A) to Part 10 of TMA 1970 includes a reference to this Schedule.

**Commencement Information**

**I55** Sch. 38 para. 55 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Social Security Administration Act 1992*

- 56 In section 110ZA of the Social Security Administration Act 1992 (Class 1, 1A, 1B or 2 contributions: powers to call for documents etc), after subsection (2) insert—
- “(2A) Part 3 of Schedule 38 to the Finance Act 2012 (power to obtain tax agent’s files etc) applies in relation to relevant contributions as in relation to tax and, accordingly—
- (a) the cases described in paragraph 7 of that Schedule (case A and case B) include cases involving conduct or an offence relating to relevant contributions,
  - (b) (whether the case involves conduct or an offence relating to tax or relevant contributions) the papers and other documents that may be sought under that Part include ones relating to relevant contributions, and
  - (c) the other Parts of that Schedule apply so far as necessary to give effect to the application of Part 3 by virtue of this subsection.”

**Commencement Information**

**I56** Sch. 38 para. 56 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*Status: Point in time view as at 01/01/2023.*

*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

*Social Security Administration (Northern Ireland) Act 1992*

57 In section 104ZA of the Social Security Administration (Northern Ireland) Act 1992 (Class 1, 1A, 1B or 2 contributions: powers to call for documents etc), after subsection (2) insert—

“(2A) Part 3 of Schedule 38 to the Finance Act 2012 (power to obtain tax agent's files etc) applies in relation to relevant contributions as in relation to tax and, accordingly—

- (a) the cases described in paragraph 7 of that Schedule (case A and case B) include cases involving conduct or an offence relating to relevant contributions,
- (b) (whether the case involves conduct or an offence relating to tax or relevant contributions) the papers and other documents that may be sought under that Part include ones relating to relevant contributions, and
- (c) the other Parts of that Schedule apply so far as necessary to give effect to the application of Part 3 by virtue of this subsection.”

**Commencement Information**

**I57** Sch. 38 para. 57 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)

*FA 2003*

58 (1) FA 2003 is amended as follows.

(2) In section 93 (information powers)—

- (a) in subsection (2), omit the entries relating to Parts 3 and 4 of Schedule 13, and
- (b) omit subsections (3) to (6).

(3) Omit section 96 (penalty for assisting in preparation of incorrect return etc).

(4) In Schedule 13 (stamp duty land tax: information powers)—

- (a) omit Parts 3 and 4, and
- (b) for paragraph 53 substitute—

“53 (1) A person commits an offence if the person intentionally—

- (a) falsifies, conceals, destroys or otherwise disposes of a relevant document, or
- (b) causes or permits the falsification, concealment, destruction or disposal of a relevant document.

(2) A relevant document is a document that the person has been required by an order under Part 6 of this Schedule to deliver.

(3) A person does not commit an offence under this paragraph if the person acts—

- (a) with the written permission of the tribunal or an officer of Revenue and Customs, or
- (b) after the document has been delivered.

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*Changes to legislation: There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38. (See end of Document for details)*

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- (4) A person does not commit an offence under this paragraph if the person acts after the end of the period of 2 years beginning with the date on which the order is made, unless before the end of that period an officer of Revenue and Customs has notified the person in writing that the order has not been complied with to the officer's satisfaction.
- (5) A person guilty of an offence under this paragraph is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or to both.”

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**Commencement Information**

**I58** Sch. 38 para. 58 in force at 1.4.2013 by [S.I. 2013/279](#), [art. 2](#)



**Status:**

Point in time view as at 01/01/2023.

**Changes to legislation:**

There are currently no known outstanding effects for the Finance Act 2012, SCHEDULE 38.