

Status: Point in time view as at 10/06/2021.

Changes to legislation: There are currently no known outstanding effects for the Finance Act 2013, SCHEDULE 43C. (See end of Document for details)

SCHEDULES

[^{F1}SCHEDULE 43C U.K.]

PENALTY UNDER SECTION 212A [^{F2}OR 212B]: SUPPLEMENTARY PROVISION

Textual Amendments

- F1** Sch. 43C inserted (15.9.2016) (with effect in accordance with s. 158(15) of the amending Act) by [Finance Act 2016 \(c. 24\), s. 158\(3\)](#)
- F2** Words in Sch. 43C heading inserted (with effect in accordance with s. 124(2) of the amending Act) by [Finance Act 2021 \(c. 26\), Sch. 32 para. 13\(2\)](#)

Value of the counteracted advantage: introduction

- 1 Paragraphs 2 to 4 set out how to calculate the “value of the counteracted advantage” for the purposes of [^{F3}sections 212A and 212B].

Textual Amendments

- F3** Words in [Sch. 43C para. 1](#) substituted (with effect in accordance with s. 124(2) of the amending Act) by [Finance Act 2021 \(c. 26\), Sch. 32 para. 13\(3\)](#)

Value of the counteracted advantage: basic rule

- 2 [^{F4}(1) The “value of the counteracted tax advantage” is—
- (a) for a penalty under section 212A, the additional amount due or payable in respect of tax as a result of the counteraction mentioned in subsection (1) (d) of that section, and
 - (b) for a penalty under section 212B, the additional amount due or payable in respect of tax (by the partner in question) as a result of the counteraction mentioned in subsection (1)(b) of that section.]
- (2) The reference in sub-paragraph (1) to the additional amount due and payable includes a reference to—
- (a) an amount payable to HMRC having erroneously been paid by way of repayment of tax, and
 - (b) an amount which would be repayable by HMRC if the counteraction were not made.
- (3) The following are ignored in calculating the value of the counteracted advantage—
- (a) group relief, and
 - (b) any relief under section 458 of CTA 2010 (relief in respect of repayment etc of loan) which is deferred under subsection (5) of that section.

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- (4) For the purposes of this paragraph consequential adjustments under section 210 are regarded as part of the counteraction in question.
- (5) If the counteraction affects [^{F5}a] person's liability to two or more taxes, the taxes concerned are to be considered together for the purpose of determining the value of the counteracted advantage.
- (6) This paragraph is subject to paragraphs 3 and 4.

Textual Amendments

- F4** Sch. 43C para. 2(1) substituted (with effect in accordance with s. 124(2) of the amending Act) by [Finance Act 2021 \(c. 26\)](#), [Sch. 32 para. 13\(4\)\(a\)](#)
- F5** Word in Sch. 43C para. 2(5) substituted (with effect in accordance with s. 124(2) of the amending Act) by [Finance Act 2021 \(c. 26\)](#), [Sch. 32 para. 13\(4\)\(c\)](#)

Value of counteracted advantage: losses

- 3 (1) To the extent that the tax advantage ^{F6}... resulted in the wrong recording of a loss for the purposes of direct tax and the loss has been wholly used to reduce the amount due or payable in respect of tax, the value of the counteracted advantage is determined in accordance with paragraph 2.
- (2) To the extent that the tax advantage resulted in the wrong recording of a loss for purposes of direct tax and the loss has not been wholly used to reduce the amount due or payable in respect of tax, the value of the counteracted advantage is—
 - (a) the value under paragraph 2 of so much of the tax advantage as results (or would in the absence of the counteraction result) from the part (if any) of the loss which was used to reduce the amount due or payable in respect of tax, plus
 - (b) 10% of the part of the loss not so used.
- (3) Sub-paragraphs (1) and (2) apply both—
 - (a) to a case where no loss would have been recorded but for the tax advantage, and
 - (b) to a case where a loss of a different amount would have been recorded (but in that case sub-paragraphs (1) and (2) apply only to the difference between the amount recorded and the true amount).
- (4) To the extent that the tax advantage creates or increases (or would in the absence of the counteraction create or increase) an aggregate loss recorded for a group of companies—
 - (a) the value of the counteracted advantage is calculated in accordance with this paragraph, and
 - (b) in applying paragraph 2 in accordance with sub-paragraphs (1) and (2), group relief may be taken into account (despite paragraph 2(3)).
- (5) To the extent that the tax advantage results (or would in the absence of the counteraction result) in a loss, the value of it is nil where, because of the nature of the loss or the person's circumstances, there was no reasonable prospect of the loss being used to support a claim to reduce a tax liability (of any person).

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Textual Amendments

- F6** Words in [Sch. 43C para. 3\(1\)](#) omitted (with effect in accordance with s. 124(2) of the amending Act) by virtue of [Finance Act 2021 \(c. 26\)](#), [Sch. 32 para. 13\(5\)](#)

Value of counteracted advantage: deferred tax

- 4 (1) To the extent that the tax advantage mentioned in section 212A [^{F7}or 212B (as the case may be)] is a deferral of tax, the value of the counteracted advantage is—
- (a) 25% of the amount of the deferred tax for each year of the deferral, or
 - (b) a percentage of the amount of the deferred tax, for each separate period of deferral of less than a year, equating to 25% per year,
- or, if less, 100% of the amount of the deferred tax.
- (2) This paragraph does not apply to a case to the extent that paragraph 3 applies.

Textual Amendments

- F7** Words in [Sch. 43C para. 4\(1\)](#) inserted (with effect in accordance with s. 124(2) of the amending Act) by [Finance Act 2021 \(c. 26\)](#), [Sch. 32 para. 13\(6\)](#)

Assessment of penalty

- 5 (1) Where a person is liable for a penalty under section 212A [^{F8}or 212B (as the case may be)], HMRC must assess the penalty.
- (2) Where HMRC assess the penalty, HMRC must—
- [^{F9}(a) notify—
 - (i) where the penalty is under section 212A, the person who is liable for it;
 - (ii) where the penalty is under section 212B, the person who is liable for it and the responsible partner.]
 - (b) state in the notice a tax period in respect of which the penalty is assessed.
- (3) A penalty under this paragraph must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.
- (4) An assessment—
- (a) is to be treated for procedural purposes as if it were an assessment to tax,
 - (b) may be enforced as if it were an assessment to tax, and
 - (c) may be combined with an assessment to tax.
- [^{F10}(5) An assessment of a penalty under this paragraph must be made before the end of the period of 12 months beginning with the date (or the latest of the dates) on which the counteraction mentioned in section 212A(1)(d) [^{F11}or section 212B(1)(b) (as the case may be)] becomes final (within the meaning of section 210(8)).]

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Textual Amendments

- F8** Words in Sch. 43C para. 5(1) inserted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), **Sch. 32 para. 13(7)(a)**
- F9** Sch. 43C para. 5(2)(a) substituted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), **Sch. 32 para. 13(7)(b)**
- F10** Sch. 43C para. 5(5) substituted for Sch. 43C para. 5(5)(6) (with effect in accordance with Sch. 14 paras. 14, 15 of the amending Act) by Finance Act 2020 (c. 14), **Sch. 14 para. 9**
- F11** Words in Sch. 43C para. 5(5) inserted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), **Sch. 32 para. 13(7)(c)**

Modifications etc. (not altering text)

- C1** Sch. 43C para. 5(4)(b) excluded by 2014 c. 7, s. 10A(4) (as inserted (with effect in accordance with s. 157(30) of the amending Act) by Finance Act 2016 (c. 24), **s. 157(17)**)

Alteration of assessment of penalty

- 6 (1) After notification of an assessment has been given to a person under paragraph 5(2), the assessment may not be altered except in accordance with this paragraph or paragraph 7, or on appeal.
- (2) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the value of the counteracted advantage.
- (3) An assessment may be revised as necessary if it operated by reference to an overestimate of the value of the counteracted advantage.

Revision of assessment following consequential relieving adjustment

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

Aggregate penalties

- 8 (1) Sub-paragraph (3) applies where—
- (a) two or more penalties are incurred by the same person and fall to be determined by reference to an amount of tax to which that person is chargeable,
 - (b) one of those penalties is incurred under section 212A ^[F12] or 212B (as the case may be)], and

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- (c) one or more of the other penalties are incurred under a relevant penalty provision.
- (2) But sub-paragraph (3) does not apply if section 212(2) of FA 2014 (follower notices: aggregate penalties) applies in relation to the amount of tax in question.
- (3) The aggregate of the amounts of the penalties mentioned in subsection (1)(b) and (c), so far as determined by reference to that amount of tax, must not exceed—
 - (a) the relevant percentage of that amount, or
 - (b) in a case where at least one of the penalties is under paragraph 5(2)(b) of, or sub-paragraph (3)(b), (4)(b) or (5)(b) of paragraph 6 of, Schedule 55 to FA 2009, £300 (if greater).
- (4) In the application of section 97A of TMA 1970 (multiple penalties) no account shall be taken of a penalty under section 212A ^{F13} or 212B].
- (5) “Relevant penalty provision” means—
 - (a) Schedule 24 to FA 2007 (penalties for errors),
 - (b) Schedule 41 to FA 2008 (penalties: failure to notify etc),
 - (c) Schedule 55 to FA 2009 (penalties for failure to make returns etc), or
 - (d) Part 5 of Schedule 18 to FA 2016 (penalty under serial tax avoidance regime).
- (6) “The relevant percentage” means—
 - (a) 200% in a case where at least one of the penalties is determined by reference to the percentage in—
 - (i) paragraph 4(4)(c) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(4)(a) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(3A)(c) of Schedule 55 to FA 2009,
 - (b) 150% in a case where paragraph (a) does not apply and at least one of the penalties is determined by reference to the percentage in—
 - (i) paragraph 4(3)(c) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(3)(a) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(3A)(b) of Schedule 55 to FA 2009,
 - (c) 140% in a case where neither paragraph (a) nor paragraph (b) applies and at least one of the penalties is determined by reference to the percentage in—
 - (i) paragraph 4(4)(b) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(4)(b) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(4A)(c) of Schedule 55 to FA 2009,
 - (d) 105% in a case where at none of paragraphs (a), (b) and (c) applies and at least one of the penalties is determined by reference to the percentage in—
 - (i) paragraph 4(3)(b) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(3)(b) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(4A)(b) of Schedule 55 to FA 2009, and
 - (e) in any other case, 100%.

Textual Amendments

F12 Words in Sch. 43C para. 8(1)(b) inserted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), Sch. 32 para. 13(8)(a)

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F13 Words in Sch. 43C para. 8(4) inserted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), Sch. 32 para. 13(8)(b)

Modifications etc. (not altering text)

- C2** Sch. 43C para. 8 modified by 2014 c. 7, s. 10A(6) (as inserted (with effect in accordance with s. 157(30) of the amending Act) by Finance Act 2016 (c. 24), s. 157(17))
- C3** Sch. 43C para. 8: power to modify conferred by 2014 c. 7, s. 10A(7) (as inserted (with effect in accordance with s. 157(30) of the amending Act) by Finance Act 2016 (c. 24), s. 157(17))

Appeal against penalty

- 9 (1) A person may appeal against—
- (a) the imposition of a penalty under section 212A [^{F14}or 212B], or
 - (b) the amount assessed under paragraph 5.
- [Where the penalty is under section 212B, an appeal against it must be brought by ^{F15}(1A) the responsible partner.]
- (2) An appeal under sub-paragraph (1)(a) may only be made on the grounds that the arrangements were not abusive or there was no tax advantage to be counteracted.
 - (3) An appeal under sub-paragraph (1)(b) may only be made on the grounds that the assessment was based on an overestimate of the value of the counteracted advantage (whether because the estimate was made by reference to adjustments which were not just and reasonable or for any other reason).
 - (4) An appeal under this paragraph must be made within the period of 30 days beginning with the day on which notification of the penalty is given under paragraph 5(2).
 - (5) An appeal under this paragraph is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC's review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
 - (6) Sub-paragraph (5) does not apply—
 - (a) so as to require a person to pay a penalty before an appeal against the assessment of the penalty is determined, or
 - (b) in respect of any other matter expressly provided for by this Part.
 - (7) On an appeal against the penalty the tribunal may affirm or cancel HMRC's decision.
 - (8) On an appeal against the amount of the penalty the tribunal may—
 - (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC has power to make.
 - (9) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of sub-paragraph (5)).

Textual Amendments

F14 Words in Sch. 43C para. 9(1)(a) inserted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), Sch. 32 para. 13(9)(a)

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F15 Sch. 43C para. 9(1A) inserted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), Sch. 32 para. 13(9)(b)

Modifications etc. (not altering text)

C4 Sch. 43C para. 9(5) modified by 2014 c. 7, s. 10A(5) (as inserted (with effect in accordance with s. 157(30) of the amending Act) by Finance Act 2016 (c. 24), s. 157(17))

Mitigation of penalties

- 10 (1) The Commissioners may in their discretion mitigate a penalty under section 212A [F16 or 212B], or stay or compound any proceedings for such a penalty.
- (2) They may also, after judgment, further mitigate or entirely remit the penalty.

Textual Amendments

F16 Words in Sch. 43C para. 10(1) inserted (with effect in accordance with s. 124(2) of the amending Act) by Finance Act 2021 (c. 26), Sch. 32 para. 13(10)

Interpretation

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

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- (f) “tax period” means a tax year, accounting period or other period in respect of which tax is charged;
- (g) a reference to giving a document to HMRC includes a reference to communicating information to HMRC in any form and by any method (whether by post, fax, email, telephone or otherwise),
- (h) a reference to giving a document to HMRC includes a reference to making a statement or declaration in a document.]

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