

FINANCE ACT 2015

EXPLANATORY NOTES

INTRODUCTION

Section 120 and Schedule 20: Penalties in Connection With Offshore Matters and Offshore Transfers

Summary

1. This section and Schedule amend the existing penalty regime that applies to non-compliance involving an offshore matter. They extend its scope by applying it to inheritance tax, and to where the proceeds of non-compliances are hidden offshore. The territory classification system is also updated to reflect advances in international tax transparency through the implementation of the Common Reporting Standard (CRS). It is anticipated that the provisions will commence in April 2016.

Details of the Section

2. Subsection (1) introduces Schedule 20 which amends the offshore penalty provisions relating to errors in returns, failure to notify liability, failure to make returns in Schedule 24 to Finance Act (FA) 2007 (Schedule 24), Schedule 41 to FA 2008 (Schedule 41) and FA 2009 (Schedule 55).
3. Subsections (2) to (4) provide that the Schedule comes into force on a day specified by a Statutory Instrument made by the Treasury: different times may be specified in respect of different provisions or for certain purposes.

Details of the Schedule

Penalties for errors

4. Paragraph 1 provides for Schedule 24 to be amended. Schedule 24 imposes penalties for inaccuracies in a return or other document submitted to HM Revenue & Customs (HMRC). Penalties for inaccuracies currently fall into any one of 3 categories for the purposes of determining the level of penalty applicable. Penalties arising from a “domestic matter” in relation to income tax and capital gains tax and for all inaccuracies relating to other taxes subject to the penalty regime in Schedule 24, currently attract the lowest level of penalty set by category 1.
5. Inaccuracies involving an offshore matter in relation to income tax and capital gains tax may be liable for a higher penalty than for a domestic matter relating to those taxes depending upon the extent of any information sharing arrangements between the territory concerned and the UK.
6. Paragraph 2 amends paragraph 4 of Schedule 24 by inserting subparagraph (1A) and amending subparagraphs (2) and (5) so as to increase the levels of penalty in respect of a category 1 inaccuracy as a result of the lowest level of penalty now being attached to the new category 0 described below. No change is made to current levels of penalty in relation to inaccuracies falling within categories 2 and 3. A consequential

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amendment is made so that paragraph 4(5) of Schedule 24 refers to 4 categories of inaccuracy (0, 1, 2 and 3).

7. Paragraph 3 amends paragraph 4A of Schedule 24 by:
 - inserting the new category of inaccuracy (category 0) which carries the lowest level of penalty as described above (equivalent to those currently in category 1) (see newly inserted subparagraph (A1) (which creates category 0) and consequential amendment to subparagraph (7));
 - determining the penalty for an inheritance tax inaccuracy by reference to whether the inaccuracy involves a domestic matter, an offshore matter or an offshore transfer in the same way as for income tax and capital gains tax. It also provides rules (see newly inserted subparagraph (4A)) determining where assets are treated as held or situated for inheritance tax related penalties as well as making consequential amendments to subparagraphs (2)(c) and (3)(c); and
 - inserting, in categories (0, 1, 2 and 3), the concept of an “offshore transfer” (see the definition in newly inserted subparagraph (4B) and consequential amendments made to subparagraphs (2)(a), (3)(a), (5) and (6)(a)) which is separate from the existing concept of “offshore matter”.
8. The new subparagraph (4A) requires that where the tax at stake is inheritance tax, the territory where assets are situated or held is determined by reference to where they are situated or held immediately after the transfer of value giving rise to the inheritance tax charge.
9. The new subparagraph (4B) provides that an inaccuracy only involves an “offshore transfer” if it does not involve an “offshore matter”; is deliberate (whether or not concealed); results in a potential loss of income tax, capital gains tax or inheritance tax; and the “applicable condition” in the new paragraph 4AA is satisfied.
10. Paragraph 4 inserts paragraph 4AA into Schedule 24. It sets out the “applicable condition” referred to by newly inserted paragraph 4A(4B). The applicable condition will be satisfied if, by the date when the document containing the inaccuracy is given to HMRC (“filing date” as defined in paragraph 4AA(7)):
 - income (or any part of it) chargeable to income tax is received in, or transferred to, a territory outside the UK;
 - the proceeds (or any part of them) of a disposal giving rise to a charge to capital gains tax are received in, or transferred to, a territory outside the UK; or
 - the disposition giving rise to transfer of value by reason of which inheritance tax is chargeable is a transfer of assets and after the disposition the assets (or part of them) are transferred to a territory outside the UK.
11. Paragraph 4AA(5) extends the applicable condition by providing that references to income, proceeds or assets transferred must be read as including any assets derived from or representing the income, proceeds or assets.
12. Paragraph 4AA(6) ensures that where more than one category of territory is involved in an “offshore transfer”, the level of penalty for the inaccuracy will be determined by reference to the highest category of territory involved.
13. Paragraph 4AA(8) provides that references to income or the proceeds of a disposal or transfer of value must be read as including references to any assets (as defined in section 21(1) of the Taxation of Capital Gains Act 1992) derived from or representing the income or proceeds.
14. Paragraph 5 amends the Table in paragraph 10 of Schedule 24 which specifies the minimum percentages to which a penalty in paragraph 4 may be reduced on account

of disclosures made by a taxpayer who is liable to a penalty. The amendment to the table is made in consequence of the new level of penalties applying to a category 1 inaccuracy so as to specify the minimum percentages to which those penalties may be reduced depending upon whether or not the taxpayer made a prompted or unprompted disclosure.

15. Paragraph 6 makes consequential amendments to paragraph 12 of Schedule 24 so that where penalties are imposed under paragraphs 1 and 1A of that Schedule in respect of the same inaccuracy, the aggregate amount of the penalties must not exceed 100% of the potential lost revenue in respect of a category 0 inaccuracy and 125% in respect of a category 1 inaccuracy.
16. Paragraph 7 makes consequential amendments to paragraph 21A of Schedule 24 which determines the category in which a territory falls for the purposes of offshore matters. A new subparagraph (A1) is inserted and subparagraph (2) is substituted so that a territory will fall as a category 2 territory unless designated by Treasury order as a category 0, 1 or 3 territory. Subparagraph (7) is substituted so that the first Treasury order specifying territories in category 0 must be made using the affirmative resolution procedure.
17. Paragraph 8 amends paragraph 21B of Schedule 24. Subparagraph (1A) is inserted so that the Treasury may make regulations determining for the purposes of paragraph 4AA where income or proceeds of a disposal are received or transferred or where assets are transferred. Subparagraph (2) is amended so that the Treasury may make different provisions for income tax, capital gains tax and inheritance tax when making regulations for determining where an income source is located, asset is situated or held, or activities carried on.

Penalties for failure to notify

18. Paragraphs 9 to 13 make amendments to Schedule 41 in relation to the new category 0 and an offshore transfer that correspond to the amendments made to Schedule 24 by the provisions described in paragraphs 6 to 15 and 17 of this Explanatory Note. Since Schedule 41 does not apply to inheritance tax, there are no amendments in relation to that tax.

Penalties for failure to make returns etc

19. Paragraphs 14 to 19 make amendments to Schedule 55 in relation to the new category 0, an offshore transfer and inheritance tax that correspond to the amendments made to Schedule 24 by the provisions described in paragraphs 6 to 15 and 17 of this Explanatory Note.

Background Note

20. HMRC may charge penalties in cases where income, gains etc. are not declared or notified to HMRC either deliberately or through a failure to take reasonable care. Schedules 24, 41 and 55 of FA 2007 (errors in tax returns etc.), FA 2008 (failure to notify liability) and FA 2009 (returns not filed on time) respectively (“the penalty Schedules”) set out the minimum and maximum penalties that may be charged.
21. In each case the penalty is a percentage of the amount of revenue potentially lost or, in relation to a penalty under Schedule 55 FA 2009, which would have been shown in the return in question. Schedule 10 to FA 2010 amended the penalty Schedules to categorise conduct giving rise to a penalty in relation to income tax or capital gains tax by reference to whether the conduct involved an offshore matter. Maximum penalties are higher for penalties relating to territories falling within categories 2 and 3 than in relation to territories falling within category 1 (which also includes penalties in relation to a “domestic matter”). The legislation provides that a territory falls within category 2 unless designated as category 1 or 3 by Treasury order. Designation of a territory is made by reference to the level of information exchange arrangements (if any) between the UK and the territory. Territories within category 1 (which include EU member States) have entered into arrangements for automatic exchange of information with the

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UK broadly comparable with information provided automatically to HMRC within the UK. The higher penalties corresponding to categories 2 and 3 reflect the fact that, owing to the inferior level of information exchange arrangements, HMRC is less likely to detect non-compliance and that the choice of such territories by those failing to report accurately their tax obligations may well have been influenced by that factor.

22. This measure makes the tax system fairer, by strengthening civil sanctions for the small minority who evade tax by hiding taxable income, gains and assets offshore, and contributes to building the deterrent effect. This Schedule builds on the increased penalties for offshore non-compliance introduced in FA 2010 in three ways.
23. First, a new category 0 is introduced, having the same penalty levels as the current category 1. The intention is that only overseas territories making arrangements with the UK that meet the new Common Reporting Standard will fall into category 0. The penalty levels in new category 1 are raised slightly, those in categories 2 and 3 will stay the same. It is envisaged that most or all territories currently in category 1 will, over time, make arrangements so as to fall within category 0. Regulations to classify territories will be made in 2016.
24. Second, penalties relating to inheritance tax are brought within the scope of the scheme already existing for income tax and capital gains tax so that penalties involving assets in category 1-3 territories will be higher than those for failures in relation to assets in the UK or category 0 territories.
25. Third, the provisions will cover not only income and gains arising offshore, but also non-compliance in the UK where the payment is made overseas or received in the UK and then moved offshore.