

SCHEDULES

SCHEDULE 13

Section 91

PENALTIES FOR FACILITATING AVOIDANCE SCHEMES INVOLVING NON-RESIDENT PROMOTERS

Liability to penalty

- 1 (1) Sub-paragraph (2) applies in relation to a person (“A”) if the person is liable to pay—
- (a) a penalty within sub-paragraph (3), or
 - (b) one or more penalties within sub-paragraph (4), provided that the total amount that is payable under that penalty or those penalties is at least £100,000.

In this Schedule penalties by virtue of which sub-paragraph (2) applies in relation to a person are called “the original penalties”.

- (2) A is liable to a further penalty if—
- (a) the original penalties were incurred in respect of activities (the “original activities”) which A carried out as a member of the same promotion structure as a non-resident promoter (“P”), and
 - (b) the original activities related to a relevant proposal or relevant arrangements in relation to which P was a promoter (the “facilitated proposal or arrangements”).
- (3) Penalties are within this paragraph if they are incurred under—
- (a) the entry relating to section 236B(1) of FA 2014 (effect of stop notices) in the table at paragraph 2(1) of Schedule 35 to that Act (promoters of tax avoidance schemes: penalties);
 - (b) Schedule 16 to F(No.2)A 2017 (penalties for enablers of defeated tax avoidance).
- (4) Penalties are within this paragraph if they are incurred under any of the following—
- (a) section 98C of TMA 1970 (disclosure of tax avoidance schemes);
 - (b) Part 5 of FA 2014 (promoters of tax avoidance schemes) (other than the provision mentioned in sub-paragraph (3)(a)), and Schedule 36 to FA 2008 (information and inspection powers) as it has effect in relation to that Part (see section of 272A of FA 2014);
 - (c) Schedule 36 to FA 2008 as it has effect in relation to Schedule 16 to F(No.2)A 2017 (see Part 9 of Schedule 16 to F(No.2)A 2017);
 - (d) Schedule 17 to F(No.2)A 2017 (disclosure of tax avoidance schemes: VAT and other indirect taxes).
- (5) For the purposes of this paragraph, a person is liable to pay a penalty within sub-paragraph (3) or (4) from the time at which—
- (a) notice of the penalty is given, in a case where the penalty is to be imposed by HMRC, or

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- (b) the penalty is determined, in a case where the penalty is to be determined by the First-tier Tribunal,
 regardless of any outstanding appeal relating to the original penalty.
- (6) In this paragraph, a “non-resident promoter” is a person who carries on a business as a promoter and is resident outside the United Kingdom.

Amount of penalty

- 2 (1) The further penalty payable under paragraph 1(2) is—
 - (a) an amount that is equal to the total value of all consideration received by all persons who, at the time of the original activities, were members of the promotion structure mentioned in paragraph 1(2)(a) in connection with—
 - (i) the facilitated proposal or arrangements, and
 - (ii) any other proposals or arrangements that are substantially the same as the facilitated proposal or arrangements, or
 - (b) such lower amount as the person assessing the penalty considers just and reasonable.
- (2) For the purposes of this Schedule—
 - (a) references to consideration—
 - (i) include fees, remuneration and any other kind of consideration, however received,
 - (ii) are to such fees, remuneration or other consideration as determined to the best of the information and belief of the person assessing them, and
 - (iii) do not include any amount charged in respect of value added tax;
 - (b) where consideration is, under arrangements with any member of the promotion structure mentioned in sub-paragraph (1)(a) (“the member”), paid to a person who is not a member of that promotion structure, it is to be taken to be received by the member;
 - (c) consideration attributable to two or more transactions is to be apportioned on a just and reasonable basis;
 - (d) consideration given for what is in substance one bargain is to be treated as attributable to all elements of the bargain, even though—
 - (i) separate consideration is, or purports to be, given for different elements of the bargain, or
 - (ii) there are, or purport to be, separate transactions in respect of different elements of the bargain.

Procedure for assessing penalty etc

- 3 (1) Where a person is liable for a penalty under paragraph 1(2), an authorised officer of HMRC may assess the penalty.
- (2) Where an authorised officer assesses the penalty the authorised officer must notify the person who is liable for the penalty.
- (3) A penalty 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 of a penalty—

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- (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.
- (5) An authorised officer may make a supplementary assessment in respect of a penalty where—
 - (a) consideration is received after the penalty was first assessed by any person who, at the time of the original activities, was a member of the promotion structure mentioned in paragraph 1(2)(a), or
 - (b) the officer considers it just and reasonable to make a supplementary assessment on the basis of information received after the penalty was first assessed.
- (6) Sub-paragraph (7) applies if a penalty is assessed on the basis of an assessment of consideration received by a person that HMRC subsequently find to have been excessive.
- (7) HMRC may amend the assessment so that it is based upon the correct amount.
- (8) An amendment under sub-paragraph (7)—
 - (a) does not affect when the penalty must be paid, and
 - (b) may be made after the last day on which the assessment in question could have been made under sub-paragraph (9).
- (9) An assessment of a person as liable to pay an amount in respect of a penalty under paragraph 1(2) may not take place more than 2 years after information sufficient to enable the assessment first came to the attention of HMRC.

Appeals

- 4
- (1) A person may appeal against—
 - (a) a decision of an authorised officer to impose a penalty under paragraph 1(2) on the person, or
 - (b) a decision of an authorised officer as to the amount of the penalty.
 - (2) An appeal under sub-paragraph (1) must be made within the period of 30 days beginning with the day on which notification of the penalty is given under paragraph 3(2).
 - (3) An appeal under sub-paragraph (1) is to be treated in the same way as an appeal against an assessment to the tax to which the facilitated proposal or arrangements 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).
 - (4) Sub-paragraph (3) does not apply—
 - (a) so as to require the person bringing the appeal to pay a penalty before an appeal against the assessment of the penalty is determined;
 - (b) in respect of any other matter expressly provided for by this Schedule.
 - (5) On an appeal under sub-paragraph (1)(a) that is notified to the tribunal, the tribunal may affirm or cancel the authorised officer's decision.

- (6) On an appeal under sub-paragraph (1)(b) that is notified to the tribunal, the tribunal may—
- (a) affirm the authorised officer’s decision, or
 - (b) substitute for that decision another decision that the authorised officer had power to make.

Application of provisions of TMA 1970

- 5 Subject to the provisions of this Schedule, the following provisions of TMA 1970 apply for the purposes of this Part 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);
 - (c) section 115 (delivery and service of documents).

Application of information and inspection powers

- 6 (1) Schedule 36 to FA 2008 (information and inspection powers) applies for the purpose of checking a relevant person’s position as regards liability for a penalty under paragraph 1(2) as it applies for checking a person’s tax position, subject to the modifications set out in this paragraph.
- (2) In this paragraph, “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(2) (including if the person would or may be so liable if found liable to pay one or more penalties within paragraph 1(3) or (4)).
- (3) In its application for the purpose mentioned in sub-paragraph (1), Schedule 36 to FA 2008 has effect as if—
- (a) any provisions which can have no application for that purpose were omitted;
 - (b) references to “the (or a) taxpayer” were to “the (or 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(2);
 - (d) references to “business documents” included any documents (or copies of documents) in connection with any relevant proposal or relevant arrangements;
 - (e) references to prejudice to the assessment or collection of tax included a reference to prejudice to the investigation of a relevant person’s position as regards liability for a penalty under paragraph 1(2);
 - (f) references to a pending appeal relating to tax were to a pending appeal by a relevant person under this Schedule;
 - (g) in paragraph 10A (power to inspect business premises of involved third parties) the reference in sub-paragraph (1) to the position of any person or class of persons as regards a relevant tax were a reference to the position of a relevant person as regards liability to a penalty under paragraph 1(2);
 - (h) paragraphs 21 to 21B (certain taxpayer notices) were omitted;
 - (i) paragraph 25 (tax advisers) were omitted;
 - (j) paragraphs 50 and 51 (tax-related penalty) were omitted.

Application

- 7 A is liable to a further penalty under paragraph 1(2) only where the original penalties imposed on A relate only to activities carried out after this Schedule comes into force.

Interpretation

- 8 (1) Expressions used in Part 5 of FA 2014 have the same meaning in this Schedule as in that Part, unless the contrary intention appears (and, in particular, see sections 234 and 235 of FA 2014 for the meanings of “relevant proposal”, “relevant arrangements”, “promoter” and “as a promoter” and Schedule 33A to that Act for the meaning of “promotion structure”).
- (2) In this Schedule, references to an “authorised officer” are to an officer of Revenue and Customs who is, or is a member of a class of officers who are, authorised by the Commissioners to exercise functions conferred by this Schedule.
- (3) In this Schedule—
- “facilitated proposal or arrangements” has the meaning given by paragraph 1(2)(b);
 - “the original penalties” has the meaning given by paragraph 1(1);
 - “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate in light of paragraph 4(3)).