

EXPLANATORY MEMORANDUM TO
THE ASSET-BASED PENALTY FOR OFFSHORE INACCURACIES AND
FAILURES (REDUCTIONS FOR DISCLOSURE AND CO-OPERATION)
REGULATIONS 2017

2017 No. 334

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) on behalf of Her Majesty's Treasury and is laid before the House of Commons by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument sets out the maximum amount by which the standard amount of an asset-based penalty under Schedule 22 to the Finance Act 2016 (c. 24) may be reduced in cases where prompted or unprompted disclosure is made to HMRC of conduct giving rise to certain penalties under paragraph 1 of Schedule 24 to the Finance Act 2007 (c. 11), paragraph 1 of Schedule 41 to the Finance Act 2008 (c. 9) and paragraph 6 Schedule 55 to the Finance Act 2009 (c. 10). In a case involving only unprompted disclosure, the maximum amount of reduction permitted is 50% of the standard amount of the asset-based penalty. Where disclosure is prompted, the maximum amount of reduction permitted is 20% of the standard amount of the asset-based penalty.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 These Regulations exercise the powers contained in paragraph 8(3) and (4) of Schedule 22 to the Finance Act 2016 (c. 24) ("Schedule 22") for the first time. By virtue of the Finance Act 2016, Schedule 22 (Appointed Days) Regulations (S.I. 2017/277 (C. 25)) ("the Appointed Days Regulations"), paragraph 8 of Schedule 22 came into force on 8th March 2017 for the purposes of exercising any of the powers afforded by that paragraph to make the regulations described in paragraph 8(3).
- 4.2 In paragraphs 4.3 to 4.9, references to a paragraph are to the relevant paragraph in Schedule 22 (except where stated otherwise).
- 4.3 Paragraph 1 provides for an asset-based penalty to be payable where a person has incurred one or more standard offshore tax penalties in relation to a tax year and the potential lost revenue threshold is met in relation to that tax year.

- 4.4 Paragraph 2 sets out the meaning of “standard offshore tax penalty”. These are penalties under paragraph 1 of Schedule 24 to the Finance Act 2007 (c. 11), paragraph 1 of Schedule 41 to the Finance Act 2008 (c. 9) and paragraph 6 Schedule 55 to the Finance Act 2009 (c. 10) for deliberate failures where the tax at stake is asset-based income tax (defined in paragraph 2(7)), capital gains tax or inheritance tax and involve an offshore matter or an offshore transfer. (By virtue of paragraph 19(2), “offshore matter” and “offshore transfer” have the same meaning as they do in relation to the standard offshore tax penalty in question).
- 4.5 Paragraphs 10-14 set out how an asset is identified as relating to a standard offshore tax penalty and how it should be valued for the purposes of the asset-based penalty.
- 4.6 Paragraph 3 sets out how the tax year to which a standard offshore tax penalty relates is determined.
- 4.7 Paragraphs 4 and 5 set out how to determine whether the potential lost revenue threshold is met in relation to the tax year in question.
- 4.8 Paragraph 7 provides that the “standard amount of the asset-based penalty” is the lower of 10% of the value of the asset in question and 10 times the amount of offshore potential lost revenue in question (determined in accordance with paragraph 5).
- 4.9 Paragraph 8 requires HMRC to reduce the standard amount of the asset-based penalty where the taxpayer makes disclosure in relation to the standard offshore tax penalty in question and provides certain information. Paragraph 8(3) requires the Treasury to make regulations setting out the maximum amount by which the standard amount of the asset-based penalty may be reduced. Paragraph 8(4), provides that the maximum amount of the reduction may differ according to whether the case involves only unprompted disclosures or involves prompted disclosures (as defined in paragraph 8(5) and (6)).
- 4.10 These Regulations provide that the maximum reduction of the standard amount of the asset-based penalty permitted in a case involving only unprompted disclosures is 50% of the standard amount of the asset-based penalty and 20% in a case where disclosure is prompted.
- 4.11 In relation to inheritance tax, no standard offshore tax penalty relevant for the asset-based penalty can be incurred before 1st April 2017 because the Appointed Days Regulations provide that Schedule 22 only has effect in relation to transfers of value (as defined by section 3 of the Inheritance Tax 1984 (c. 51)) made on or after that day (the same day that Schedule 22 comes into force generally). In relation to income tax and capital gains tax, although the Appointed Days Regulations provide that Schedule 22 has effect in relation to tax years commencing on or after 6th April 2016, no standard offshore tax penalty relevant for the purposes of the asset-based penalty can be incurred before 6th April 2017 (i.e. after the end of the tax year commencing on 6th April 2016).

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 HMRC may charge non-compliant taxpayers a tax geared penalty where income, gains and chargeable transfers of assets etc. are not declared or notified to HMRC. Schedule 22 introduced a new penalty that could be charged in addition to these tax geared penalties in certain cases of deliberate failures to declare tax relating to an offshore matter or an offshore transfer if the tax loss was more than £25,000 in a tax year and related to an asset.
- 7.2 The standard amount of the asset based penalty is the lower of
- a) 10% of the value of the asset or
 - b) 10 times the potential lost offshore revenue (offshore PLR)
- 7.3 The asset-based penalty has been introduced to provide a strong deterrent against failures to declare offshore tax matters and offshore transfers and to introduce tougher sanctions for those who continue to use territories outside the UK in their failure to comply with their UK tax responsibilities.
- 7.4 The asset based penalty must be reduced from the standard amount to reflect the quality of the taxpayer's disclosure and co-operation with HMRC. This Statutory Instrument sets the maximum amount of reduction of the asset-based penalty that can be allowed for cases of unprompted and prompted disclosure.
- 7.5 To encourage unprompted disclosures to HMRC, the standard amount of the asset-based penalty may be reduced by up to 50% where the requirements are met.
- 7.6 For prompted disclosures to HMRC, the standard amount of the asset-based penalty may be reduced by up to 20%.
- 7.7 The extent of the reduction from the standard amount of the penalty will depend on the quality, timing, extent and nature of the disclosure and co-operation.

Consolidation

- 7.8 This instrument is not amending another instrument so consolidation is not necessary.

8. Consultation outcome

- 8.1 The consultation ran from 16 July 2015 until 8 October 2015. Nine groups of stakeholders provided their views at face to face meetings, and 18 stakeholders sent in written responses. The respondents included The Law Society, the "Big 4" accountancy firms, Scottish Courts and Tribunal Service, Society of Trust and Estate Practitioners, Oxfam GB and other representative bodies for accountants.
- 8.2 Responses to the proposed asset-based penalty were mixed, with around 60% of respondents in favour. Respondents noted the strong deterrent effect a penalty related to asset value could create due to the emotional attachment evaders may have to assets such as property. The use of similar penalties in other jurisdictions was also considered to be a useful precedent.

- 8.3 The full consultation summary of responses was published in December 2015 as “Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders” and can be accessed on Gov.UK:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483368/Strengthening_civil_deterrents_for_offshore_evaders_-_summary_of_responses_M7009.pdf.

9. Guidance

- 9.1 HMRC’s Compliance Handbook, which is available to the public on WWW.GOV.UK, is being updated so that the new measure and how it works in practice will be clear to HMRC operational staff, taxpayers, advisors and other stakeholders. This will include guidance on what constitutes a full or partial co-operation.

10. Impact

- 10.1 There is no impact on compliant business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 A Tax Information and Impact Note covering this instrument was published on 9th December 2015 on the website at <https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins>.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses.

12. Monitoring & review

- 12.1 This measure will be monitored through information collected during compliance work to ensure the legislation operates as intended.

13. Contact

- 13.1 Bruce Marsh at the Centre for Offshore Evasion Strategy Telephone: 03000 542484 or email: bruce.marsh@hmrc.gsi.gov.uk can answer any queries regarding the instrument.