



HM Revenue
& Customs

Tackling marketed tax avoidance

Consultation document

Publication date: January 24 2014

Closing date for comments: February 24 2014

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| Subject of this consultation: | Proposals to require individuals and companies to pay the tax in dispute during an enquiry or appeal relating to tax avoidance. |
| Scope of this consultation: | The Government announced the first stage of proposals in December 2013. This consultation document seeks views on extending those proposals to a wider group of taxpayers. |
| Who should read this: | This change will affect individuals and companies who have entered into or are considering entering into tax avoidance schemes. It will also affect promoters of tax avoidance schemes, and firms and individuals who provide tax advice. |
| Duration: | The consultation runs from 24 January 2014 to 24 February 2014. |
| Lead official: | HMRC. Julie Elsey. |
| How to respond or enquire about this consultation: | HM Revenue and Customs, Counter Avoidance Group, 3C/04, 100 Parliament Street, London SW1A 2BQ aag.consultation@hmrc.gsi.gov.uk |
| | Please note that the mailbox will not accept e-mails larger than 10mb. |
| Additional ways to be involved: | HMRC welcomes meetings with interested parties to discuss these proposals. |
| After the consultation: | The response document will be published at Budget 2014, and any legislation will be taken forward as part of the 2014 Finance Bill. |
| Getting to this stage: | This proposal was newly announced in the Chancellor's Autumn Statement on 5 December 2013. |

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Foreword

Aggressive tax avoidance is unacceptable. The majority of hardworking people in this country pay the right amount of tax and they quite rightly expect everyone else to do the same. But the behaviour of a small minority – both those who seek to avoid and those who devise and promote tax avoidance schemes – undermines the honesty of the majority.

As a key part of our long term economic plan, this government has taken significant strides to make the UK's tax system one of the most modern and competitive in the world. To maintain the integrity of this tax system, it must apply fairly and consistently to everyone.

We have made good progress. We have introduced a General Anti-Abuse Rule, and where there is a specific problem we have taken assertive action. We legislated to reduce Stamp Duty Land Tax avoidance, for example, and already new SDLT avoidance schemes have dropped off. We protected over £150m of SDLT by our action in 2013, and many billions of pounds by our action on avoidance across the piece.

This consultation sets out our next steps to tackle another specific problem in the system that we inherited: disputed tax.

Around 65,000 people and businesses have used marketed tax avoidance schemes that need to be investigated and litigated. But when an avoidance scheme is challenged in court, the tax system currently allows taxpayers to hold on to the disputed tax, no matter how tenuous their scheme and how unlikely they are to succeed. The taxpayers and scheme promoters are incentivised to sit back and delay as long as possible – despite evidence that in the vast majority of cases, when the dispute is resolved, tax is due.

Our proposals to tackle 'High Risk Promoters' were one step in addressing these behaviours. At Autumn Statement 2013, the Chancellor announced another: new measures to require taxpayers to pay the tax they owe if they have used the same avoidance scheme (or a similar scheme) as one which a court or tribunal has already ruled against. If they continue the dispute in the face of the evidence they risk a penalty.

This is a start, but there is more to do. This consultation puts forward possible ways to extend the accelerated payment proposals. The measures we propose would change the economics of engaging in tactical tax avoidance promoted by some advisors.

We are sending a clear message: that if you try to avoid paying the tax you owe, we will pursue it. The vast majority of people work hard and pay their fair share in tax. It is not right that a small minority think they can avoid doing the same.



David Gauke
Exchequer Secretary to the Treasury

1. Executive Summary

- 1.1 This consultation is part of the Government's action to tackle tax avoidance by changing the economics of devising and entering into tax avoidance schemes. The existence of around 65,000 open cases involving marketed tax avoidance schemes illustrates how the current position can lead to a build-up of avoidance schemes that HMRC needs to tackle through investigation and litigation, which can take several years to complete. Over 85 per cent of these cases date back to 2009-10 or earlier.
- 1.2 Our consultations 'Lifting the Lid on Tax Avoidance'¹ and 'Raising the Stakes on Tax Avoidance'² set out the issues around how these schemes are developed and marketed, and how promoters and taxpayers can, as things stand, prolong disputes for several years, during which time the taxpayer can hold onto the cash in most (but not all) cases. The evidence of avoidance decisions in the courts and tribunals is that in the vast majority of cases the tax will ultimately be due.
- 1.3 There is no inherent presumption that the tax should remain with the taxpayer during a dispute, and in certain circumstances HMRC can ensure that the Exchequer holds the tax during a dispute. The proposals in this consultation set out how those circumstances can be expanded as part of accelerating payment and, as a result, accelerating resolution of tax avoidance cases.
- 1.4 This document sets out what HMRC is doing to accelerate resolution of these cases, along with the Government's legislative proposals to support further acceleration. The Government announced at Autumn Statement 2013 that it would take forward its proposals regarding High Risk Promoters and 'Follower Notices', that it would introduce an accelerated payments measure linked to the issue of a 'follower notice', and that it would consult on taking further steps to widen the criteria for seeking accelerated payment during avoidance disputes.
- 1.5 **Chapter 2** sets out the picture of the current stock of open avoidance cases, and the steps that HMRC and the Government are taking to address them.
- 1.6 **Chapter 3** sets out the proposals and draft legislation for the first stage of the Accelerated Payment measure.
- 1.7 **Chapter 4** sets out further proposals to extend the coverage of the Accelerated Payment measure.
- 1.8 The responses document for the High Risk Promoters and Follower Notices measures is also published today, along with draft legislation to implement those proposals.

¹ 'Lifting the Lid on Tax Avoidance', published 23 July 2012,

² 'Raising the Stakes on Tax Avoidance', published 12 August 2013.

<https://www.gov.uk/government/consultations/raising-the-stakes-on-tax-avoidance>

2. Marketed tax avoidance schemes

- 2.1 HMRC's anti-avoidance strategy has three core elements:
- **Prevention** – minimising the opportunities for avoidance by designing robust legislation, and by promoting the risks and costs of engaging in avoidance;
 - **Detection** – early identification of avoidance where it persists;
 - **Counteraction** – countering avoidance risk effectively through legislative change, investigation and litigation.
- 2.2 HMRC has made good progress in preventing new forms of avoidance: disclosures of tax avoidance schemes have halved in the last 2 years from 116 to 59, and marketed Stamp Duty Land Tax (SDLT) schemes have almost disappeared from the market. Most recently, the opportunities for avoidance have been reduced by the Government's introduction of a General Anti-Abuse Rule and retrospective legislation to close down SDLT avoidance schemes. HMRC has supported these initiatives with more effective use of anti-avoidance communications, such as 'Tempted by tax avoidance?'³ which spells out the risks of engaging in avoidance; and 'Spotlights'⁴, which warns taxpayers about certain tax avoidance schemes which HMRC think they should be wary of.
- 2.3 HMRC also has a successful track record in challenging and counteracting marketed avoidance: over 80% of avoidance cases heard in the courts and tribunals were won by HMRC in the last financial year. In addition, piloting of behavioural change work has resulted in hundreds of users approaching HMRC to withdraw from avoidance arrangements, some as early as the start of HMRC's investigation.
- 2.4 *Lifting the Lid on Tax Avoidance* reported that whilst more robust legislation has led to a reduction in the quantity of marketed avoidance schemes it has also led to a reduction in their likelihood of success. Increasingly the schemes that HMRC sees have little or no prospect of achieving their aim of avoiding tax. HMRC nonetheless has to challenge these schemes through investigation and litigation.
- 2.5 However, the tax system currently allows taxpayers to hold onto the disputed tax until the matter is resolved, creating little incentive for the taxpayer or promoter in question to progress or resolve the dispute.

³ <http://www.hmrc.gov.uk/avoidance/tempted.htm>

⁴ <http://www.hmrc.gov.uk/avoidance/spotlights.htm>

- 2.6 These factors have inhibited HMRC's ability to leverage its success and progress at a greater pace, and have contributed to a large stock of marketed avoidance cases: HMRC is currently investigating around 65,000 individuals and small businesses that have used marketed avoidance schemes. Around 85% of the avoidance took place more than 4 years ago, reflecting a market for avoidance products which was very active in earlier years.
- 2.7 These 65,000 taxpayers have used a wide range of avoidance schemes to reduce their liability to SDLT, Capital Gains Tax, Corporation Tax, Income Tax and National Insurance Contributions (NICs). However the largest areas of legacy avoidance include:

| | Users under investigation |
|--|----------------------------------|
| Employee Benefit Trusts (EBTs) Diverting remuneration via a trust to avoid Pay As You Earn (PAYE) and NICs | 6,300 |
| Contractor avoidance Contractors using offshore intermediaries and EBTs who make loans in place of remuneration to avoid Income Tax and NICs | 16,000 |
| Partnership losses Individuals borrow money to invest in a partnership and claim a tax loss on the whole investment | 12,000 |
| Stamp Duty Land Tax Avoiding SDLT by exploiting rules designed to avoid a double charge | 8,500 |

- 2.8 Some of these users have used the same scheme more than once whilst others have used more than one scheme.
- 2.9 HMRC is strengthening its strategic approach to enable it to accelerate resolution of the stock of cases. In 2013 HMRC created a new directorate - Counter-Avoidance - bringing together all aspects of marketed avoidance work into a single line of business. The new directorate will build on HMRC's past success whilst developing more effective and efficient ways to reduce the avoidance stock and deter further avoidance. Its approach will be to:
- **Change the economics:** using the new powers detailed in this Consultation Document and in the Responses Document also published today, to drive more cases towards resolution more quickly, and take action against those who persist in promoting and marketing these schemes. Also through developing new policy responses and fully integrating operational insights to ensure we design the most effective counter avoidance proposals.

- **Make greater use of behavioural insights** to influence more taxpayers to resolve their dispute before litigation or, where that fails, earlier in the litigation process. HMRC's piloting of this approach has proved its effectiveness and HMRC will continue to exploit leverage opportunities, such as wider publicity and court successes, to issue targeted communications to those HMRC believes should settle.
- **Prioritising resource to the greatest avoidance risks** together with strong strategic planning and governance, and using resources more flexibly to accelerate more of the avoidance stock to resolution.
- **Strengthening litigation capability** by developing a taskforce approach to accelerate a greater number of users of an avoidance scheme to litigation in a more efficient way. HMRC's approach will increasingly focus on industrialised processes and building expertise. As well as increasing the risk of litigation for those engaged in avoidance, this approach will maximise our potential for success amongst permutations of an avoidance scheme.
- **Prosecuting cases of avoidance which involve criminal behaviour.** Where fraudulent activity is suspected, HMRC's Criminal Investigation Policy sets out the circumstances in which a criminal, as opposed to civil, investigation will be undertaken. Where HMRC suspects that professionals are involved in fraudulent activity HMRC is more likely to commence a criminal investigation. In all cases, HMRC's communications strategy aims to maximise the deterrent effect.

2.9 As part of this strengthened approach, this consultation document proposes new policy measures to counter avoidance.

3. Accelerated Payment for ‘follower cases’

- 3.1 In his Autumn Statement on 5th December 2013, the Chancellor announced that legislation would be introduced in the 2014 Finance Bill to:
- Establish the criteria for a promoter to be designated a ‘High Risk Promoter’ and the consequences that flow from that designation;
 - Put in place a requirement for taxpayers to settle their dispute on receipt of a notice (a ‘follower notice’) that their case is on the same or substantially the same grounds as a case already decided in the tribunal or court; and
 - Require payment of the tax in dispute where a taxpayer who has received a ‘follower notice’ chooses not to settle the dispute on receipt of the notice.
- 3.2 More detail about the first two measures, along with draft legislation, can be found in the Responses Document to “Raising the Stakes on Tax Avoidance”, also published today.
- 3.3 The draft legislation for the third measure is in Annex A to this document.
- 3.4 Avoidance schemes take a long time to investigate and bring to resolution, and that process is often deliberately slowed down by scheme promoters. HMRC is successful in challenging the vast majority of the avoidance schemes that they litigate and the Government does not consider it right that the users of these schemes should be able to retain the disputed tax during the period of the dispute.
- 3.5 There is no inherent presumption that tax under dispute should sit with the taxpayer rather than the Exchequer. Under current law, there are a number of circumstances where the tax sits with the Exchequer while the liability is finalised. Currently:
- HMRC is able to deny claims for tax repayments pending final resolution;
 - HMRC can enforce tax payment when there are claims for other years that might reduce or eliminate that tax;
 - Tax is payable following a court or tribunal decision, despite a continuing appeal; and
 - There are general circumstances where tax is withheld and repaid (eg: PAYE, tax on interest),
- but**
- HMRC cannot normally intervene in a taxpayer’s self assessment, even when the taxpayer deducts amounts claimed as a result of attempted tax avoidance.
- 3.6 These proposals do not therefore introduce a new principle, but rather they extend the range of circumstances where the tax sits with the Exchequer while

the final liability is determined.

Overview of the accelerated payment proposals

- 3.7 The starting point is the issue of a 'follower notice' under the related measure, details of which are set out in the Responses Document to 'Raising the Stakes on Tax Avoidance'. The draft legislation in Annex A covers both that measure and the accelerated payment measure.
- 3.8 The 'follower notice' proposals involve the issue of a notice to taxpayers involved in avoidance schemes where there has been a final judicial decision in another taxpayer's case on the same or similar arrangements. The notice requires the taxpayer to amend their tax return (if the return is still under enquiry) or agree to settle the dispute (where a closure notice or tax assessment or determination has been made and is under appeal).
- 3.9 At the heart of this notice is the proposition that the likelihood of the taxpayer's scheme succeeding is remote, given that a tribunal or court has made a decision on the same or similar arrangements. In HMRC's experience, it is extremely rare for a taxpayer to even proceed to their own litigation in the face of such a decision, but while the vast majority do eventually concede they prolong the dispute for as long as they are able, often agreeing to settle only as the date of litigation approaches. In the Government's view, the delivery of a related judicial decision fundamentally changes the presumption of where the tax should sit during this period.

The taxes covered by this policy

- 3.10 The Government intends that this policy should cover all the taxes and charges which are also covered by the 'follower notice' measure.
- 3.11 The Government also recognises that some avoidance schemes involve National Insurance Contributions (NICs) and plans to extend these measures to NICs. This will require separate legislation when a suitable vehicle becomes available.

Timing of notices and response

- 3.12 A Payment Notice will be issued alongside the 'follower notice'. The 'follower notice' has a 90 day response time, and it is proposed that the 'accelerated payment' would become due on the expiry of that time limit, or the extended period where the taxpayer asks for a review of the 'follower notice'.
- 3.13 If the taxpayer agrees to settle the dispute, the Payment Notice will be discharged once the settlement has been concluded and the tax paid. Otherwise, the Payment Notice will become due for payment and will be pursued by HMRC in the usual way.
- 3.14 Where a taxpayer has amounts potentially due for more than one year, separate Payment Notices will be issued for each tax year involved, although they may be issued simultaneously.

Q1: Do you agree with the proposals for the timing and issue of payment notices?

Establishing the payable amount

- 3.15 Taxpayers receiving a ‘follower notice’ are required to tell HMRC the amount of the tax advantage being sought. However, this figure may not be available until the taxpayer agrees to resolve the dispute in response to the notice – and will not be provided by the taxpayer at all in cases where the taxpayer chooses not to resolve the dispute.
- 3.16 It is proposed, therefore, that HMRC will issue a Payment Notice to the best of their judgement. In the majority of cases HMRC would expect to have a reasonable indication of the amount in dispute as the matter will have been under enquiry, or HMRC will have issued an assessment or determination.
- 3.17 The amount of tax to be paid under the Payment Notice is the amount of additional tax that would otherwise have been paid if the arrangements had not been entered into. This is meant to be a simple recalculation of the additional tax due on the return (or similar document) having removed the effects of the avoidance scheme, less any relevant amounts already paid. It is not a calculation whereby the taxpayer can say that in the absence of these arrangements another structure would have been employed instead.
- 3.18 The amount to be paid will be the amount remaining after any part of the tax in dispute that is already subject to a withheld repayment.
- 3.19 It is important to note that this will simply be a form of payment on account and not a payment that determines the amount of the final liability. If the amount paid is less than the final amount due, the taxpayer will still be liable to pay any remaining balance when the dispute is finally resolved. Equally, if the taxpayer continues to pursue their claim and is successful then they will get their money back with interest.
- 3.20 The taxpayer will be able to ask HMRC to reconsider the amount of the payment and will have the opportunity to provide evidence in support of that request. This must be done within the time window set out above.
- 3.21 Any taxpayer considering entering into a tax avoidance scheme in future should be aware that they are attempting to reduce their tax bill in ways that aim to exploit the law and that there is a risk they will not succeed – they should therefore make proper provision to pay the tax liability given the significant risk that the outcome will go against them.
- 3.22 For the existing stock of cases, HMRC will use its full range of tools, including appropriately structured time to pay arrangements, to assist taxpayers in paying the required amounts.

Q2: Do you agree with this proposed method for establishing the payment amount?

Objecting to the payment notice

3.23 This measure is not intended to simply move the time at which there is a dispute about the substantive point at issue. HMRC will have issued a 'follower notice' on the grounds that, in HMRC's opinion, the tribunal or court has decided the substantive issue and the taxpayer should now concede.

3.24 A taxpayer will therefore be able to challenge the Payment Notice only on limited grounds that HMRC has erred in process – for example, has sent the notice to the wrong person.

Q3: Do you agree with these grounds for objection to an accelerated payment notice?

Q4: Should there be any additional grounds for objection to an accelerated payment notice?

Cases under Appeal

3.25 The proposals set out above will apply to open Self Assessment enquiries. Where a Self Assessment closure notice, or a tax assessment, or a PAYE determination has been issued and is under appeal, the tax is due and payable – section 55(2) of TMA 1970. However, section 55 also provides for the taxpayer to make a postponement application – section 55(3).

3.26 HMRC may agree the amount to be postponed or the matter may be referred to the Tribunal – section 55(3). HMRC may subsequently apply to change the postponed amount if there is a change in circumstances – section 55(4).

3.27 The Government proposes that the issue of a 'follower notice' will constitute an additional criterion for HMRC to amend the amount postponed under section 55 of TMA.

Q5: Do you agree that accelerated payments for cases under appeal should be handled by way of adapting the existing rules for postponed tax in TMA 1970?

Who has to pay the tax on receipt of a Payment Notice

3.28 HMRC intends to issue the Payment Notice to the person who is subject to the dispute. This could be an individual or an employer, depending on the circumstances.

HMRC Procedures

3.29 The government recognises that these are significant new powers and therefore proposes that payment notices should only be issued by officers specifically authorised for the purpose by the Commissioners for Revenue & Customs.

Interest

- 3.30 When a tax dispute is resolved, interest is due on any unpaid tax, back to the original due date for payment of the tax in relation to the tax year in question.
- 3.31 If a payment is made under these proposed rules, interest will only be due on the amount paid for the period from the original due date up to the point at which a payment is made.
- 3.32 For example, £20,000 tax is in dispute, due to have been paid on 31 January 2010. A payment notice is issued on 1 September 2014 and the 90 day period expires on 30 November 2014. If the taxpayer pays £20,000 on 30 November 2014 then, when the liability is finally agreed and paid, interest will only be charged on the payment of £20,000 for the period 31 January 2010 to 30 November 2014.
- 3.33 If, when the final amount of tax due is determined, the taxpayer has paid more than the finally agreed liability, any overpaid balance will be repaid to the taxpayer, with interest on the overpaid amount calculated to the date of the original payment. Again, taking the above example, if the final liability is £15,000 an amount of £5,000 would be repaid, with interest calculated back to 30 November 2014.

Q6: Do you agree with this proposed approach to interest on unpaid and repaid amounts in relation to accelerated payments?

Late Payment Penalty

- 3.34 The Government proposes to introduce a late payment penalty provision, modelled on Schedule 56 to FA 2009. The penalty level, based on the amount unpaid, would be:
- 5% when the due date of payment has passed (the 'penalty day')
 - A further 5% of any amount unpaid 5 months after the penalty day
 - A further 5% of any amount unpaid 11 months after the penalty day
- 3.35 Where a time to pay agreement has been reached before the penalty date the taxpayer is not regarded as being in default for this purpose, provided the terms of the agreement are met.

Q7: Do you agree that the accelerated payment should be subject to a late payment penalty and that the proposed amounts are reasonable and proportionate?

Payment of tax following litigation

- 3.36 Section 56 of TMA 1970 requires payment of tax by a litigant who has been defeated in litigation, or repayment of tax by HMRC where the taxpayer succeeds,

even where there is a continuing appeal.

3.37 The Government does not propose to change the requirement to pay or repay tax in line with the judicial decision. Where accelerated payments have been demanded and paid, HMRC will repay if the taxpayer succeeds in litigation and HMRC pursues an appeal, subject to an additional rule that will enable HMRC to withhold a repayment on the grounds that HMRC has reasonable grounds for believing that the tax may be at risk.

Q8: *Do you agree to this treatment for payment of tax for cases in litigation?*

Q9: *Do you have any further comments on the principles or application of the proposal to issue accelerated payment notices in cases where a 'follower notice' is issued?*

4. Proposed extensions of the accelerated payments measure

Overview of proposals

- 4.1 The application of accelerated payment to ‘follower notice’ cases, where the underlying legal principle has been addressed by the court or tribunal, goes some way towards rebalancing the economics of entering into avoidance schemes by requiring some users to pay up front, but it does not go far enough. Therefore, as announced at Autumn Statement, the Government wants to consult on widening the criteria by which taxpayers are required to pay disputed tax earlier in the process.
- 4.2 This chapter sets out two further proposals to extend accelerated payment in avoidance cases. These are to extend the measure to:
- cases involving schemes disclosed under the Disclosure of Tax Avoidance Schemes rules (DOTAS); and
 - cases being challenged under the General Anti-Abuse Rule (GAAR).
- 4.3 The Government recognises that whilst a measure based on these criteria should have an impact on a significant proportion of avoidance schemes, there are others that will not be affected. The Government therefore plans to keep the criteria under review to determine whether any further broadening may be appropriate and what that might involve.

Proposal 1 – a link to the Disclosure of Tax Avoidance Scheme Rules (DOTAS)

- 4.4 The DOTAS rules require promoters of tax avoidance schemes to notify HMRC about the scheme, and to provide a list of the individuals who have used that scheme. DOTAS gives HMRC valuable early warning of planned avoidance. The information obtained informs HMRC’s response, which may be to advise the Government to introduce corrective legislation, or it may involve opening enquiries into the tax returns of the scheme users.
- 4.5 In response to the disclosure, HMRC issues a Scheme Reference Number (SRN) that provides a unique identifier for the scheme. A taxpayer who has entered into that scheme is required to enter the SRN on their tax return.
- 4.6 The proposal is that payment of the disputed tax may be required from:
- Anyone who has entered a DOTAS SRN on their tax return or otherwise notified HMRC of the SRN; or
 - Whose details feature on a DOTAS ‘client list’; or
 - Who should have entered a SRN, or should have appeared on a ‘client list’ but have not done so – either because the scheme was not disclosed as it should

have been, or the taxpayer has not entered the SRN when they should have done so.

- 4.7 This will apply in relation both to existing cases which have not yet been settled and to new cases. The same principle is relevant to both old and new cases: at present, users of avoidance schemes can delay their tax bills no matter how tenuous the likelihood of their ultimate success. It is this economic enticement to use avoidance schemes that the Government wants to remove.
- 4.8 Linking the Payment Notice to users of DOTAS arrangements appears to the Government to be the right step because:
- a. Most structures that are notified under DOTAS have characteristics or 'hallmarks' of avoidance; and
 - b. DOTAS provides a clear and objective criterion for this policy which can be readily operated by taxpayers and their advisers.
- 4.9 A Payment Notice cannot be issued unless there is an enquiry or appeal, so where the 'enquiry window' is still open but an enquiry has not yet been opened, a Payment Notice cannot be issued until such time as an enquiry is opened.
- 4.10 As with the proposals in Chapter 3, these additional proposals would come into effect from Royal Assent to Finance Bill 2014 and would permit HMRC to begin issuing notices immediately after that date. The majority of the details set out in Chapter 3 will also be relevant to this proposal, but with some additional considerations and safeguards.
- 4.11 Some arrangements disclosed under DOTAS may involve arrangements where a Payment Notice would not be appropriate, because no additional tax liability arises. In such cases, for both existing and future DOTAS disclosures, HMRC would want to provide early certainty to taxpayers for schemes where a Payment Notice will be issued.
- 4.12 For existing disclosures (ie: those made before Royal Assent 2014), HMRC will review all disclosed schemes in order to identify any where HMRC is satisfied that no additional liability is due. HMRC will then issue, in time for Royal Assent, a list of DOTAS schemes where a Payment Notice will be issued.
- 4.13 For new disclosures, HMRC will aim within a reasonable time after disclosure to provide information about disclosed schemes where a Payment Notice will be issued.
- 4.14 However, the government does not intend that the provision of early information to assist taxpayers should provide opportunities for scheme promoters to use HMRC as a test-bed in the design of new avoidance schemes. HMRC would therefore welcome comments on how the objective of providing adequate early certainty for taxpayers can best be balanced with not facilitating the design of new schemes.

Q10: Do you have any comments about how information may be provided in such a way as to provide a reasonable balance between providing early certainty for taxpayers and not opening up a route to assist the development of future avoidance schemes?

How long taxpayers should have to make the payment

4.15 Unlike the criterion linked to the 'follower notice' measure, set out in Chapter 3, this proposed extension of the criteria to DOTAS schemes does not have a link to the time limits for another measure, and will therefore need its own time limits for requiring payment to be made. There are two options:

- Adopt the same time limits as the initial proposal (ie: 90 days from issue of the Payment Notice, with a possible 30 day extension to request reconsideration). This has the benefit that all payment notices will operate to the same timescales.
- Set a separate time limit on the grounds that there is no inherent need to maintain a link, and those who have used a DOTAS scheme will have a clear indication that they are affected by the policy and should expect to receive a payment notice.

4.16 On balance, the Government prefers the first option as that reduces potential complexity. It is also possible that a scheme may attract a Payment Notice under both the 'follower' and the DOTAS criteria. Common payment timescales will help to remove unnecessary disputes about which criterion has been applied.

Q11: Do you agree that the proposed time limit for payment of an accelerated payment as a result of a DOTAS scheme should be the same as for accelerated payments linked to a 'follower' notice?

Q12: Do you have any further comments about the proposed extension of this measure to cases involving schemes disclosed under DOTAS?

Proposal 2 – extension to cases to which the General Anti-Abuse Rule (GAAR) may apply

- 4.17 The GAAR took effect for tax for arrangements entered into on or after 17 July 2013. It is being extended to NICs by way of the NICs Bill currently before Parliament. The GAAR aims to counteract the most abusive tax avoidance schemes. It therefore seems appropriate to the Government that cases where the GAAR can apply should be cases where early payment is sought as these are the least deserving cases for taxpayers to retain the tax.
- 4.18 HMRC would propose to issue a Payment Notice where the GAAR was not the only challenge to an avoidance scheme. The fact that another piece of legislation might apply is not the relevant point – it is that the scheme is sufficiently abusive to fit the GAAR criteria and therefore merits the issue of a Payment Notice.
- 4.19 The proposed timescale is that HMRC would issue the Payment Notice at the point when HMRC decides to proceed to counteraction after receiving a GAAR Advisory Panel opinion on the arrangements.
- 4.20 The processes regarding time limits for objections and how the amount is determined would be the same as those proposed for the DOTAS criterion. It is likely that some cases will involve both DOTAS and the GAAR. In such cases the DOTAS criterion would take precedence as it would apply from an earlier date.

Q13: *Do you agree that the scheme being challenged under the GAAR should be a criterion for issuing an accelerated payment notice?*

Q14: *Do you agree with the timing proposal for the issue of an accelerated payment notice in a case being challenged by the GAAR?*

Q15: *Do you have any further comments about the application of the policy to schemes that are challenged under the GAAR?*

5. Assessment of Impacts

Summary of Impacts

| Exchequer impact (£m) | 2014-15 | 2015-16 | 2016-17 | 2017-18 | 2018-19 |
|---|---|---------|---------|---------|---------|
| | The final costing will be subject to scrutiny by the Office for Budget Responsibility, and will be set out at Budget 2014 | | | | |
| Economic impact | The measure is not expected to have any significant economic impacts | | | | |
| Impact on individuals and households | There will only be an impact on those individuals who engage in tax avoidance. We expect most of these to be higher or additional rate taxpayers. | | | | |
| Equalities impacts | This measure will impact those on above average incomes. It will therefore have greater effect on those protected equality groups who are overrepresented in more affluent populations. | | | | |
| Impact on businesses and Civil Society Organisations | <p>The measure is expected to have a negligible impact on businesses and civil society organisations. There will only be an impact on businesses if they participate in mass avoidance schemes.</p> <p>This measure will have no impact on businesses and civil society organisations undertaking normal commercial transactions.</p> | | | | |
| Impact on HMRC or other public sector delivery organisations | HMRC will incur additional costs to issue and process payment notices and to collect the amounts due. | | | | |
| Other impacts | Other impacts have been considered and none have been identified. | | | | |

6. Summary of Consultation Questions

- Q1: Do you agree with the proposals for the timing and issue of payment notices?
- Q2: Do you agree with this proposed method for establishing the payment amount?
- Q3: Do you agree with these grounds for objection to an accelerated payment notice?
- Q4: Should there be any additional grounds for objection to an accelerated payment notice?
- Q5: Do you agree that accelerated payments for cases under appeal should be handled by way of adapting the existing rules for postponed tax in TMA 1970?
- Q6: Do you agree with this proposed approach to interest on unpaid and repaid amounts in relation to accelerated payments?
- Q7: Do you agree that the accelerated payment should be subject to a late payment penalty and that the proposed amounts are reasonable and proportionate?
- Q8: Do you agree to this treatment for payment of tax for cases in litigation?
- Q9: Do you have any further comments on the principles or application of the proposal to issue accelerated payment notices in cases where a 'follower notice' is issued?
- Q10: Do you have any comments about how information may be provided in such a way as to provide a reasonable balance between providing early certainty for taxpayers and not opening up a route to assist the development of future avoidance schemes?
- Q11: Do you agree that the proposed time limit for payment of an accelerated payment as a result of a DOTAS scheme should be the same as for accelerated payments linked to a 'follower' notice?
- Q12: Do you have any further comments about the proposed extension of this measure to cases involving schemes disclosed under DOTAS?
- Q13: Do you agree that the scheme being challenged under the GAAR should be a criterion for issuing an accelerated payment notice?
- Q14: Do you agree with the timing proposal for the issue of an accelerated payment notice in a case being challenged by the GAAR?
- Q15: Do you have any further comments about the application of the policy to schemes that are challenged under the GAAR?

7. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation is taking place at stages 2 and 3 of the process. Where draft legislation is provided, the consultation seeks views in order to confirm, as far as possible, that it will achieve the intended policy effect with no unintended effects (stage 3). Other aspects of the consultation seek views on the detailed design and implementation of specific proposals to extend the policy (stage 2).

How to respond

A summary of the questions in this consultation is included at chapter 6.

Responses should be sent by 24 February 2014, by e-mail to

aag.consultation@hmrc.gsi.gov.uk - please note that the mailbox will not accept e-mails larger than 10mb.

Responses can also be sent by post to:

Slavica Owen
HM Revenue and Customs
Room 3C/04
100 Parliament Street
London
SW1A 2BQ

Telephone enquiries: 03000 579 417

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from [HMRC Inside Government](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website:

<http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments or complaints about the consultation process please contact:

Paul Miller, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.

Annex A: Draft legislation

1 Amendment of return to take account of relevant judicial ruling

Schedule 1 contains provision about the consequences of failing to take account of relevant judicial rulings relating to tax.

SCHEDULE 1

Section 1

CONSEQUENCES OF FAILING TO TAKE ACCOUNT OF RELEVANT JUDICIAL RULINGS

PART 1

CONSEQUENCES OF FAILING TO TAKE ACCOUNT OF RELEVANT JUDICIAL RULINGS

Cases where a failure notice can be given

- 1 (1) HMRC may give a notice (a “failure notice”) to a person (“P”) if Conditions A to D are met.
 - (2) Condition A is that—
 - (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
 - (b) P has made a tax appeal but that appeal has not yet been determined by the tribunal or court to which it is addressed, or abandoned or otherwise disposed of.
 - (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular tax arrangements (“the applied arrangements”).
 - (4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the applied arrangements.
 - (5) Condition D is that no previous failure notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements and judicial ruling.
 - (6) A failure notice may not be given after the end of the period of 12 months beginning with the later of—
 - (a) the day on which the judicial ruling mentioned in Condition C is made, and
 - (b) the day the return or claim to which sub-paragraph (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which sub-paragraph (2)(b) refers was made.
 - (7) See paragraph 5 for further provision about failure notices.

“Relevant tax”, “tax advantage” and “tax arrangements”

- 2 (1) This paragraph applies for the purposes of this Part of this Schedule.
 - (2) “Relevant tax” means—
 - (a) income tax,
 - (b) capital gains tax,
 - (c) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,
 - (d) inheritance tax,

- (e) stamp duty land tax, and
 - (f) annual tax on enveloped dwellings.
- (3) “Tax advantage” includes –
- (a) relief or increased relief from tax,
 - (b) repayment or increased repayment of tax,
 - (c) avoidance or reduction of a charge to tax or an assessment to tax,
 - (d) avoidance of a possible assessment to tax,
 - (e) deferral of a payment of tax or advancement of a repayment of tax, and
 - (f) avoidance of an obligation to deduct or account for tax.
- (4) Arrangements are “tax arrangements” if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.
- (5) “Arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

Tax enquiries, returns and tax appeals

- 3 (1) This paragraph applies for the purposes of this Part of this Schedule.
- (2) “Tax enquiry” means –
- (a) an enquiry under section 9A or 12AC of TMA 1970 (enquiries into self-assessment returns for income tax and capital gains tax), including an enquiry by virtue of notice being deemed to be given under section 9A of that Act by virtue of section 12AC(6) of that Act,
 - (b) an enquiry under paragraph 5 of Schedule 1A to that Act (enquiry into claims made otherwise than by being included in a return),
 - (c) an enquiry under paragraph 24 of Schedule 18 to FA 1998 (enquiry into company tax return for corporation tax etc), including an enquiry by virtue of notice being deemed to be given under that paragraph by virtue of section 12AC(6) of TMA 1970,
 - (d) an enquiry under paragraph 12 of Schedule 10 to FA 2003 (enquiries into SDLT returns), or
 - (e) an enquiry under paragraph 8 of Schedule 33 to FA 2013 (enquiries into the annual tax for enveloped dwellings returns).
- (3) The period during which an enquiry is in progress is the period –
- (a) beginning with the day on which notice of enquiry is given, and
 - (b) ending with the day on which the enquiry is completed.
- (4) Sub-paragraphs (2) and (3) are subject to sub-paragraph (6).
- (5) In the case of inheritance tax, each of the following is to be treated as a return –
- (a) an account delivered by a person under section 216 or 217 of IHTA 1984 (including an account delivered in accordance with regulations under section 256 of that Act);
 - (b) a statement or declaration which amends or is otherwise connected with such an account produced by the person who delivered the account;

- (c) information or a document provided by a person in accordance with regulations under section 256 of that Act;
and such a return is to be treated as made by the person in question.
- (6) There is a tax enquiry in progress in relation to a return to which subparagraph (5) applies from the time the account is delivered or (as the case may be) statement, declaration, information or document is produced until such time as the person has been issued with a certificate of discharge under section 239 of that Act in respect of the return (at which point the enquiry is to be treated as completed).
- (7) “Tax appeal” means –
- (a) an appeal under section 31 of TMA 1970 (income tax: appeals against amendments of self-assessment, amendments made by closure notices under section 28A or 28B of that Act, etc), including any appeal under that section by virtue of regulations under Part 11 of ITEPA 2003 (PAYE),
 - (b) an appeal under paragraph 9 of Schedule 1A to TMA 1970 (income tax: appeals against amendments made by closure notices under paragraph 7(2) of that Act, etc),
 - (c) an appeal under paragraph 34(3) or 48 of Schedule 18 to FA 1998 (corporation tax: appeals against amendment of a company’s return made by closure notice, assessments other than self-assessments, etc),
 - (d) an appeal under paragraph 35 of Schedule 10 to FA 2003 (stamp duty land tax: appeals against amendment of self-assessment, discovery assessments, etc),
 - (e) an appeal under paragraph 35 of Schedule 33 to FA 2013 (annual tax on enveloped dwellings: appeals against amendment of self-assessment, discovery assessments, etc), or
 - (f) a further appeal against any determination of an appeal within paragraphs (a) to (e) or any further appeal within this paragraph.

“Judicial ruling” and circumstances in which it is “relevant”

- 4 (1) This paragraph applies for the purposes of this Part of this Schedule.
- (2) “Judicial ruling” means a ruling of a court or tribunal on one or more issues.
- (3) A judicial ruling is “relevant” to the applied arrangements if –
- (a) it relates to tax arrangements,
 - (b) the principles laid down in the ruling would, if applied to the applied arrangements, deny the asserted advantage, or a part of that advantage, and
 - (c) it is a final ruling.
- (4) A judicial ruling is a “final ruling” if it is –
- (a) a ruling of the Supreme Court, or
 - (b) a ruling of any other court or tribunal in circumstances where –
 - (i) no appeal may be made against the ruling,
 - (ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

- (iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or
 - (iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.
- (5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of sub-paragraph (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied.

Content of failure notices

- 5 (1) A failure notice must –
- (a) identify the judicial ruling in respect of which Condition C in paragraph 1 is met,
 - (b) explain why HMRC considers that the ruling meets the requirements of paragraph 4(3), and
 - (c) set out the requirements, and explain the effect, of paragraphs 6 to 9 and 13.
- (2) A failure notice given by virtue of paragraph 1(2)(a) (notice given during an enquiry) must also –
- (a) specify the amount of the accelerated payment for the purposes of paragraph 20 (accelerated payment of disputed tax), and
 - (b) set out the requirements, and explain the effect of, paragraphs 19 to 21.
- (3) “The accelerated payment” means such amount as a designated HMRC officer may determine, to the best of that officer’s information and belief, as the additional amount that would become due and payable in respect of tax on the assumption that –
- (a) the explanation given under sub-paragraph (1)(b) is correct, and
 - (b) the necessary corrective action is taken under paragraph 6(2)(a) in respect of what that officer so determines as the denied advantage.
- (4) A failure notice given by virtue of paragraph 1(2)(b) (notice given pending determination of an appeal), in the case of an initial appeal (rather than a further appeal), must also specify the amount of any charge to tax arising in consequence of –
- (a) the amendment or assessment appealed against, or
 - (b) where the appeal is against a conclusion stated by a closure notice, that conclusion,
- which, in the opinion of HMRC, is required to ensure the counteraction of the denied advantage.
- (5) In this Part of this Schedule “the denied advantage” means the asserted advantage (see paragraph 1(3)), or the part of that advantage, denied by the application of the principles laid down in the relevant judicial ruling.

Effect of giving a failure notice

- 6 (1) This paragraph applies where P has been given a failure notice and that notice has not been withdrawn.

- (2) P must—
- (a) take the necessary corrective action in respect of the denied advantage, and
 - (b) give HMRC a notice which—
 - (i) states that P accepts that the judicial ruling is relevant and has taken the necessary corrective action, and
 - (ii) specifies the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the necessary corrective action being taken.
- (3) But if P makes representations to HMRC in accordance with paragraph 7, sub-paragraph (2) ceases to apply until HMRC notifies P that the failure notice has been confirmed (with or without amendment) under that paragraph.
- (4) For the purposes of sub-paragraph (2), P takes the necessary corrective action in respect of the denied advantage if (and only if)—
- (a) in the case of a failure notice given by virtue of paragraph 1(2)(a), P amends a return or claim before the end of the tax enquiry to counteract the denied advantage;
 - (b) in the case of a failure notice given by virtue of paragraph 1(2)(b), P takes all necessary steps to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.
- (5) For the purposes of determining the additional amount which has or will become due and payable in respect of tax for the purposes of sub-paragraph (2)(b)(ii), in a case where P takes all those necessary steps it is to be assumed the agreement is entered into.
- (6) No enactment which limits the time during which amendments may be made to returns or claims operates to prevent an amendment of a return or claim being made in accordance with this paragraph.
- (7) See paragraph 22 (appeals against final rulings made out of time) for circumstances in which the duty in sub-paragraph (2) is suspended.
- (8) No appeal may be brought, by virtue of a provision mentioned in sub-paragraph (9), against an amendment made by a closure notice in respect of a tax enquiry to the extent that the amendment takes into account an amendment made by P to a return or claim in accordance with this paragraph.
- (9) The provisions are—
- (a) section 31(1)(b) or (c) of TMA 1970,
 - (b) paragraph 9 of Schedule 1A to TMA 1970,
 - (c) paragraph 30(3) or 34(3) of Schedule 18 to FA 1998,
 - (d) paragraph 35(1)(b) of Schedule 10 to FA 2003, and
 - (e) paragraph 35(1)(b) of Schedule 33 to FA 2013.

Request for reconsideration by HMRC of a failure notice

- 7 (1) Where a failure notice is given, P has 90 days beginning with the day the notice is given to send representations to HMRC objecting to the notice on the grounds that—

- (a) Condition A, B or D in paragraph 1 was not met, or
 - (b) the judicial ruling specified in the notice is not one which is relevant to the applied arrangements.
- (2) HMRC must consider any representations made in accordance with sub-paragraph (1).
- (3) Having considered the representations, HMRC must –
- (a) confirm the failure notice (with or without amendment), or
 - (b) withdraw the failure notice,
- and notify P.

Penalty for failure to take the necessary corrective action

- 8 (1) This section applies where a failure notice has been given and not withdrawn.
- (2) P is liable to pay a penalty in the following cases.
- (3) The first case is where –
- (a) no representations objecting to the failure notice are made by P in accordance with paragraph 7 during the 90 day post-notice period, and
 - (b) P fails to comply with paragraph 6(2) before the end of that period.
- (4) The second case is where –
- (a) P makes representations in accordance with paragraph 7 objecting to the failure notice,
 - (b) the notice is confirmed under that paragraph (with or without amendment), and
 - (c) P fails to comply with paragraph 6(2) before the later of –
 - (i) the end of the 90 day post-notice period, and
 - (ii) the end of the 30 day post-representations period.
- (5) In this Part of this Schedule –
- “the 90 day post-notice period” means the period of 90 days beginning with the day on which the failure notice is given;
- “the 30 day post-representations period” means the period of 30 days beginning with the day on which P is notified of HMRC’s determination under paragraph 7(3).

The amount of the paragraph 8 penalty

- 9 (1) The penalty under paragraph 8 is X% of the value of the denied advantage.
- (2) Where, before the relevant time, P –
- (a) amends a return or claim to counteract part of the denied advantage only, or
 - (b) takes all necessary steps to enter into an agreement with HMRC (in writing) for the purposes of relinquishing part of the denied advantage only,
- in sub-paragraph (1) the reference to the denied advantage is to be read as a reference to the remainder of the denied advantage.
- (3) “The relevant time” means –

- (a) in a case within paragraph 8(3), the end of the 90 day post-notice period, and
 - (b) in a case within paragraph 8(4), the later of –
 - (i) the end of the 90 day post-notice period, and
 - (ii) the end of the 30 day post-representations period.
- (4) See paragraphs 10 to 13 for provision about the value of the denied advantage for the purposes of calculating penalties under this paragraph.

Value of denied advantage: normal rule

- 10 (1) For the purposes of calculating penalties under paragraph 9, the value of the denied advantage is the additional amount due or payable in respect of tax as a result of counteracting the denied advantage.
- (2) The reference in sub-paragraph (1) to the additional amount due or 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 denied advantage were not counteracted.
- (3) The following are ignored in calculating the value of the denied 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.
- (4) This paragraph is subject to paragraphs 11 and 12.

Value of denied advantage: losses

- 11 (1) To the extent that the denied advantage has the result that a loss is wrongly recorded for 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 denied advantage is determined in accordance with paragraph 10.
- (2) To the extent that the denied advantage has the result that a loss is wrongly recorded 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 denied advantage is –
- (a) the value under paragraph 10 of so much of the denied advantage as results from the part (if any) of the loss which is 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 denied 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 a denied advantage creates or increases an aggregate loss recorded for a group of companies –

- (a) the value of the denied advantage is calculated in accordance with this paragraph, and
 - (b) in applying paragraph 10 in accordance with sub-paragraphs (1) and (2), group relief may be taken into account (despite paragraph 10(3)).
- (5) To the extent that the denied advantage results in a loss, the value of it is nil where, because of the nature of the loss or P's circumstances, there is no reasonable prospect of the loss being used to support a claim to reduce a tax liability (of any person).

Value of denied advantage: delayed tax

- 12 (1) To the extent that the denied advantage is a deferral of tax, the value of that 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 11 applies.

Reduction of paragraph 8 penalty for co-operation

- 13 (1) Where –
- (a) P is liable to pay a penalty under paragraph 8 of the amount specified in paragraph 9(1),
 - (b) the penalty has not yet been assessed, and
 - (c) P has co-operated with HMRC,
- HMRC may reduce the amount of that penalty to reflect the quality of that co-operation.
- (2) In relation to co-operation, “quality” includes timing, nature and extent.
- (3) In sub-paragraph (1), the reference to P having co-operated with HMRC is to P having done one or more of the following –
- (a) counteracted the denied advantage;
 - (b) provided HMRC with information enabling corrective action to be taken by HMRC;
 - (c) provided with information enabling HMRC to enter an agreement with P for the purposes of paragraph 6(4);
 - (d) provided reasonable assistance to HMRC in quantifying the tax advantage;
 - (e) allowed HMRC to access tax records for the purpose of ensuring that the denied advantage is fully counteracted.
- (4) But nothing in this paragraph permits HMRC to reduce a penalty to less than Y% of the value of the denied advantage.

Assessment of penalties

- 14 (1) Where a person is liable for a penalty under paragraph 8, HMRC may assess the penalty.
- (2) Where HMRC assess the penalty, HMRC must –

- (a) notify the person who is liable for the penalty, and
 - (b) state in the notice a tax period in respect of which the penalty is assessed.
- (3) A penalty under paragraph 8 must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under sub-paragraph (2).
- (4) An assessment –
- (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),
 - (b) may be enforced as if it were an assessment to tax, and
 - (c) may be combined with an assessment to tax.
- (5) No penalty under paragraph 8 may be notified under sub-paragraph (2) later than –
- (a) in the case of a failure notice given by virtue of paragraph 1(2)(a) (tax enquiry in progress), the end of the period of 90 days beginning with the day the tax enquiry is completed, and
 - (b) in the case of a failure notice given by virtue of paragraph 1(2)(b) (tax appeal pending), the end of the period of 90 days beginning with the earliest of –
 - (i) the day on which P takes the necessary corrective action in accordance with paragraph 6(2),
 - (ii) the day on which a ruling is made on the appeal, or any further appeal, which is a final ruling (see paragraph 4(4)), and
 - (iii) the day on which the appeal, or any further appeal, is abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed.
- (6) In this paragraph –
- (a) “tax period” means a tax year, accounting period or other period in respect of which tax is charged, and
 - (b) a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

Aggregate penalties

- 15 (1) This paragraph 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 with which that person is chargeable,
 - (b) one of those penalties is incurred under paragraph 8, and
 - (c) the remaining penalties are incurred under a relevant penalty provision.
- (2) The aggregate of the amounts of those penalties, 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) or 6(3)(b), (4)(b) or (5)(b) of Schedule 55 to FA 2009, £300 (if greater).

- (3) In the application of section 97A of TMA 1970 (multiple penalties) no account is to be taken of a penalty under paragraph 8.
- (4) “Relevant penalty provision” means –
 - (a) Schedule 24 to FA 2007,
 - (b) Schedule 41 to FA 2008, or
 - (c) Schedule 55 to FA 2009.
- (5) “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,
 - (iii) paragraph 6(4A)(c) of Schedule 55 to FA 2009,
 - (d) 105% in a case where 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,
 - (iii) paragraph 6(4A)(b) of Schedule 55 to FA 2009, and
 - (e) in any other case, 100%.
- (6) When determining the relevant percentage under sub-paragraph (5), any reduction of a penalty by HMRC is to be ignored.

Alteration of assessment

- 16 (1) After the notification of an assessment has been given to a person under paragraph 14(2), the assessment may not be altered except in accordance with this paragraph 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 denied advantage.
- (3) An assessment or supplementary assessment may be revised as necessary if it operated by reference to an overestimate of the denied advantage; and, where more than the resulting assessed penalty has already been paid by the person to HMRC, the excess must be repaid.

Appeals against a penalty under paragraph 8

- 17 (1) P may appeal against a decision of HMRC that a penalty is payable by P under paragraph 8.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under paragraph 8.
- (3) 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 14(2).
- (4) 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).
- (5) Sub-paragraph (4) 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 Schedule.
- (6) In this paragraph a reference to an assessment to tax, in relation to inheritance tax, is to a determination.
- 18 (1) On an appeal under paragraph 17(1), the tribunal may affirm or cancel HMRC’s decision.
- (2) On an appeal under paragraph 17(2), the tribunal may –
- (a) affirm HMRC’s decision, or
 - (b) substitute for HMRC’s decision another decision that HMRC had power to make.
- (3) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 17(4)).

Representations about HMRC’s determination of the amount of disputed tax

- 19 (1) This paragraph applies where a failure notice has been given and not withdrawn.
- (2) P has 90 days, beginning with the day the notice is given, to send representations to HMRC objecting to the amount specified in the notice under paragraph 5(2)(a) or (4).
- (3) HMRC must consider any representations made in accordance with sub-paragraph (2).
- (4) Having considered the representations, HMRC must –
- (a) confirm the amount specified in the notice, or
 - (b) determine that a different amount ought to have been specified and amend the notice accordingly,
- and notify P.

Accelerated payment on account where failure notice given and tax unpaid

- 20 (1) This paragraph applies where a failure notice –
- (a) has been given by virtue of paragraph 1(2)(a) (notice given during an enquiry), and
 - (b) has not been withdrawn,
- (and applies whether or not P is liable to a penalty under paragraph 8).
- (2) P must pay to HMRC the accelerated payment specified in the failure notice under paragraph 5(2)(a).
- (3) The accelerated payment is to be treated as a payment on account of the additional amount of tax which would become due and payable by P on the assumption that –
- (a) the explanation given in the failure notice under paragraph 5(1)(b) is correct, and
 - (b) the necessary corrective action is taken under paragraph 6(2)(a).
- (4) The accelerated payment must be made before –
- (a) the end of the payment period, or
 - (b) if later, the date on which that additional amount in respect of tax would become due and payable.
- (5) “The payment period” means –
- (a) if P made no representations under paragraph 19, the 90 day post-notice period, and
 - (b) if P made such representations, whichever of the following periods ends later –
 - (i) the 90 day post-notice period;
 - (ii) the period of 30 days beginning with the day on which P is notified under paragraph 19 of HMRC’s determination.
- (6) See paragraph 22 (appeals against final rulings made out of time) for circumstances in which the duty in sub-paragraph (2) is suspended.

Penalty for failure to make accelerated payment on time

- 21 (1) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.
- (2) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
- (3) If any amount of the accelerated payment is unpaid after the end of the period of 11 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.
- (4) “The penalty day” means the day immediately following the end of the payment period.
- (5) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this paragraph in relation a failure by P to pay the accelerated payment as they

apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax.

Appeals against final judicial rulings out of time

- 22 (1) This paragraph applies where a final judicial ruling is the subject of an appeal by reason of a court or tribunal granting leave to appeal out of time.
- (2) If a failure notice has been given identifying the judicial ruling under paragraph 5(1)(a), the notice is suspended until such time as HMRC notify P that—
- (a) the appeal has resulted in a judicial ruling which is a final ruling, or
 - (b) the appeal has been abandoned or otherwise disposed of (before it was determined).
- (3) Accordingly the period during which the notice is suspended does not count towards the periods mentioned in paragraph 8(5) or 20(5)(b)(ii).
- (4) When a failure notice is suspended under sub-paragraph (2), HMRC must notify P as soon as reasonably practicable.
- (5) If the final ruling resulting from the appeal is not a judicial ruling which is relevant to the applied arrangements (see paragraph 4(3)), the failure notice ceases to have effect at the end of the period of suspension.
- (6) In any other case, the failure notice continues after the suspension and, in a case within sub-paragraph (2)(a), is treated as if it were in respect of the final ruling resulting from the appeal.
- (7) The notice given under sub-paragraph (2) must—
- (a) state whether sub-paragraph (5) or (6) applies, and
 - (b) where sub-paragraph (6) applies in a case within sub-paragraph (2)(a), make any amendments to the failure notice required to reflect the new final ruling.
- (8) No new failure notice may be given in respect of the judicial ruling which is the subject of the appeal, unless the appeal has been abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed.
- (9) Nothing in this paragraph prevents a failure notice being given in respect of a new final ruling resulting from the appeal.
- (10) Where the appeal is abandoned or otherwise disposed of as mentioned in sub-paragraph (8), for the purposes of the ruling mentioned in sub-paragraph (1) the period beginning when leave to appeal out of time was granted and ending when the appeal is disposed of does not count towards the period of 12 months mentioned in paragraph 5(1).

Partnership: introduction

- 23 (1) Paragraphs 24 to 29 make special provision about partners and partnerships.
- (2) In those paragraphs and this paragraph—
- “partnership failure notice” means a failure notice given by reason of—
 - (a) a tax enquiry being in progress into a partnership return, or

- (b) an appeal having been made in relation to an amendment of a partnership return or against a conclusion stated by a closure notice in relation to a tax enquiry into a partnership return;

“partnership return” means a return in pursuance of a notice under section 12AA(2) or (3) of TMA 1970;

“the representative partner”, in relation to a partnership return, means the person who was required by a notice served under or for the purposes of section 12AA(2) or (3) of TMA 1970 to deliver the return;

“relevant partner”, in relation to a partnership return, means a person who was a partner in the partnership to which the return relates at any time during the period in respect of which the return was required;

and references to a “successor”, in relation to the representative partner are to be construed in accordance with section 12AA(11) of TMA 1970.

Giving of failure notices in relation to partnership returns

- 24 (1) If the representative partner in relation to a partnership return is no longer available, for the purposes of paragraph 1 the return, or an appeal in respect of the return, is to be regarded as made by the person who is for the time being the successor of that partner (if that would not otherwise be the case).
- (2) Where, at any time after a partnership failure notice is given to P, P is no longer available, any reference in this Part of this Schedule (other than paragraph 1 and this sub-paragraph) to P is to be read as a reference to the person who is, for the time being, the successor of the representative partner.
- (3) For the purposes of paragraph 1(3) a partnership return, or appeal in respect of a partnership return, is made on the basis that a particular tax advantage results from particular tax arrangements if –
- (a) it is made on the basis that an increase or reduction in one or more of the amounts mentioned in section 12AB(1) of TMA 1970 (amounts in the partnership statement in a partnership return) results from those tax arrangements, and
 - (b) that increase or reduction results in that tax advantage for one or more of the relevant partners.
- (4) For the purposes of Condition D in paragraph 1(5) –
- (a) a notice given to a person in the person’s capacity as the representative partner of a partnership, or a successor of that partner, and a notice given to that person otherwise than in that capacity are not to be treated as given to the same person, and
 - (b) all notices given to the representative partner and successors of that partner, in that capacity, are to be treated as given to the same person.
- (5) In this paragraph references to a person being “no longer available” have the same meaning as in section 12AA(11) of TMA 1970.

Accelerated payments and partnership failure notices

- 25 (1) Where HMRC give a partnership failure notice, paragraphs 5(2) to (4) and 19 to 21 (which make provision for accelerated payments by P) do not apply in relation to the notice.

- (2) But see paragraph 28 and 29 for provision about partner payment notices and accelerated partner payments in such cases.

Effect of a partnership failure notice

- 26 In the application of paragraph 6 in relation to a partnership failure notice –
- (a) references to the denied advantage are to be read as references to the increase or reduction in an amount in the partnership statement mentioned in paragraph 24(2), and
 - (b) in sub-paragraph (2)(b)(ii) the words from “and (where different)” to the end are to be ignored.

Penalty for failure to take the necessary corrective action: partnership failure notice

- 27 (1) This paragraph applies in relation to a partnership failure notice.
- (2) Paragraph 8(2) applies as if the reference to P were to each relevant partner.
- (3) Paragraph 9 applies subject to the following modifications –
- (a) the total amount of the penalties under paragraph 8 for which the relevant partners are liable is Z% of the value of the denied advantage,
 - (b) the amount of the penalty for which each relevant partner is liable is that partner’s appropriate share of that total amount, and
 - (c) the value of the denied advantage for the purposes of calculating the total amount of the penalties is –
 - (i) in the case of a notice given under paragraph 1(2)(a), the net amount of the amendments required to be made to the partnership return to counteract the denied advantage, and
 - (ii) in the case of a notice given under paragraph 1(2)(b), the net amount of the amendments that have been made to the partnership return to counteract the denied advantage,
 (and, accordingly, paragraphs 10 to 12 do not apply).
- (4) For the purposes of sub-paragraph (3) a relevant partner’s appropriate share is –
- (a) the same share as the share in which any profits or loss for the period to which the return relates would be apportioned to that partner in accordance with the firm’s profit-sharing arrangements, or
 - (b) if HMRC do not have sufficient information from P to establish that share, such share as is determined for the purposes of this paragraph by an officer of HMRC.
- (5) Where –
- (a) the relevant partners are liable to pay a penalty under paragraph 8 (as modified by this paragraph),
 - (b) the penalties have not yet been assessed, and
 - (c) P has co-operated with HMRC,
- paragraph 13(1) does not apply, but HMRC may reduce the total amount of the penalties determined in accordance with sub-paragraph (3)(a) to reflect the quality of that co-operation.
- Paragraph 13(2) and (3) apply for the purposes of this sub-paragraph.

- (6) Nothing in sub-paragraph (5) permits HMRC to reduce the total amount of the penalties to less than Y% of the value of the denied advantage (as determined in accordance with sub-paragraph (3)(c)).
- (7) For the purposes of paragraph 15, a penalty imposed on a relevant partner by virtue of sub-paragraph (2) is to be treated as if it were determined by reference to such additional amount of tax as is due and payable by the relevant partner as a result of the counteraction of the denied advantage.
- (8) The right of appeal under paragraph 17 extends to—
 - (a) a decision that penalties are payable by the relevant partners by virtue of this paragraph, and
 - (b) a decision as to the total amount of those penalties payable by those partners,but not to a decision as to the appropriate share of, or the amount of a penalty payable by, a relevant partner.
- (9) Paragraph 18(1) applies to an appeal by virtue of sub-paragraph (8)(a), and paragraph 18(2) to an appeal by virtue of sub-paragraph (8)(b).
- (10) An appeal by virtue of sub-paragraph (8) may be brought only by the representative partner or, if that partner is no longer available, the person who is for the time being the successor of that partner.

Partner payment notices

- 28 (1) Where HMRC give a partnership failure notice, HMRC must, at the same time, give each relevant partner (other than an excluded partner) a notice (a “partner payment notice”).
- (2) The partner payment notice given to a relevant partner must—
 - (a) specify the amount of the accelerated partner payment for the purposes of paragraph 29, and
 - (b) set out the requirements, and explain the effect of, this paragraph and paragraph 29.
- (3) “The accelerated partner payment”, in relation to a relevant partner, means such amount as a designated HMRC officer may determine, to the best of the officer’s information and belief, as the additional amount that would become due and payable by that partner in respect of tax on the assumption that—
 - (a) the explanation given in the partnership failure notice under paragraph 5(1)(b) is correct, and
 - (b) what that officer may so determine as the denied advantage is counteracted to the extent that it is reflected in a return or claim of the partner.
- (4) A partner is “excluded” if the amount of the accelerated partner payment in respect of the partner is nil.
- (5) Paragraph 19 (representations about HMRC’s determination of the amount of disputed tax) applies in relation to an partner payment notice given to a relevant partner as it applies in relation to a failure notice given to P.

Payment of accelerated partner payments

- 29 (1) This paragraph applies where an partner payment notice has been given to a relevant partner and not withdrawn.
- (2) The relevant partner must pay to HMRC the accelerated partner payment specified in the notice under paragraph 28(2)(a).
- (3) The accelerated partner payment is to be treated as a payment on account of the additional amount of tax which would become due and payable by the relevant partner on the assumptions mentioned in paragraph 28(3).
- (4) The accelerated partner payment must be made before –
- (a) the end of the payment period, or
 - (b) if later, the date on which that additional amount in respect of tax would become due and payable.
- (5) “The payment period” means –
- (a) if the relevant partner made no representations under paragraph 19 (as applied by paragraph 28(5)), the period of 90 days beginning with the day on which the partner payment notice is given;
 - (b) if the relevant partner made such representations –
 - (i) the period mentioned in paragraph (a), or
 - (ii) the period of 30 days beginning with the day on which the relevant partner is notified under paragraph 19 of HMRC’s determination,
 whichever ends later.
- (6) Paragraph 21 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if –
- (a) references in that paragraph to the accelerated payment were to the accelerated partner payment,
 - (b) references to P were to the relevant partner, and
 - (c) “the payment period” had the meaning given in sub-paragraph (5).
- (7) Where a partnership failure notice is suspended under paragraph 22 (appeals against final rulings made out of time) –
- (a) any partner payment notice given in relation to that notice is also suspended and, accordingly, the period during which the notice is suspended does not count towards the periods mentioned in sub-paragraph (5)(a) or (b)(ii), and
 - (b) HMRC must give a copy of any notice given under paragraph 22 to each relevant partner who has been given a partner payment notice.

Interpretation of Part 1

- 30 In this Part of this Schedule –
- “the applied arrangements” has the meaning given in paragraph 1(3);
 - “arrangements” is defined in paragraph 2(5);
 - “the asserted advantage” has the meaning given in paragraph 1(3);
 - “the denied advantage” is defined in paragraph 5(5);
 - “designated HMRC officer” means an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of this Part of this Schedule;

- “failure notice” has the meaning given in paragraph 1(1);
- “HMRC” means Her Majesty’s Revenue and Customs;
- “judicial ruling” and “relevant”, in relation to a judicial ruling, are defined in paragraph 4;
- “relevant tax” is defined in paragraph 2(2);
- “tax advantage” is defined in paragraph 2(3);
- “tax appeal” is defined in paragraph 3(7);
- “tax arrangements” is defined in paragraph 2(4);
- “tax enquiry” is defined in paragraph 3(2) (but see also paragraph 3(6));
- “P” has the meaning given in paragraph 1(1);
- “the 30 day post-representations period” has the meaning given in paragraph 8(5);
- “the 90 day post-notice period” has the meaning given in paragraph 8(5).

PART 2

EXTENSION OF PART 1 TO OTHER TAXES

- 31 (1) The Treasury may by order amend the definition of “relevant tax” in paragraph 1 so as to extend the application of Part 1 of this Schedule to any other tax.
- (2) An order under this paragraph may include—
- (a) consequential and supplemental provision (including amendments of Part 1 of this Schedule or any other enactment whenever passed or made), and
 - (b) transitional and transitory provision and savings.
- (3) The power to make orders under this paragraph is exercisable by statutory instrument.
- (4) An order under this paragraph may only be made if a draft of the instrument containing the order has been laid before and approved by a resolution of the House of Commons.
- (5) In this paragraph “tax” includes duty.

PART 3

CONSEQUENTIAL AMENDMENTS

Taxes Management Act 1970

- 32 TMA 1970 is amended as follows.
- 33 In section 9B (amendment of return by relevant person during enquiry), in subsection (1), after “relevant person” insert “, or Part 1 of Schedule 1 to the Finance Act 2014 (amendment of return following failure notice),”.
- 34 In section 55 (recovery of tax not postponed), after subsection (8A) insert—
- “(8B) Subsections (8C) and (8D) apply where a person has been given a failure notice under Part 1 of Schedule 1 to FA 2014 (consequences of

failing to take account of relevant judicial rulings) and that notice has not been withdrawn.

- (8C) Nothing in this section enables the postponement of the payment of—
- (a) an amount due under paragraph 20 of that Schedule by reason of the failure notice (accelerated payment on account where failure notice given and tax unpaid), or
 - (b) an amount of tax identified in the failure notice in accordance with paragraph 5(4) of that Schedule or, where that notice has been amended under paragraph 19 of that Schedule, the amended notice.
- (8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section, immediately before the failure notice is given, it ceases to be so postponed with effect from the time the failure notice is given, and the tax is due and payable—
- (a) if no representations were made under paragraph 19 of that Schedule in respect of the failure notice, no later than the end of the 90 day post-notice period (within the meaning of Part 1 of that Schedule), and
 - (b) if representations were so made, no later than the end of whichever of the following periods ends later—
 - (i) the 90 day post-notice period;
 - (ii) the period of 30 days beginning with the day on which HMRC’s determination in respect of those representations is notified under paragraph 19 of that Schedule.”

35 In section 56 (payment of tax where there is a further appeal), after subsection (3) insert—

- “(3A) Subsection (3B) applies where—
- (a) a failure notice has been given to a party to the appeal under Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and not withdrawn, and
 - (b) the assessment has effect, or partly has effect, to counteract the whole or part of the asserted advantage (within the meaning of paragraph 1(3) of that Schedule) by reason of which the notice was given.
- (3B) If, on the application of HMRC, the relevant court or tribunal considers it necessary for the protection of the revenue, it may direct that subsection (2) does not apply so far as the tax relates to the counteraction of the asserted advantage, and—
- (a) give permission to withhold all or part of any payment or repayment, or
 - (b) require the provision of adequate security before a payment or repayment is made.
- (3C) “Relevant court or tribunal” means the tribunal or court from which permission or leave to appeal is sought.”

Finance Act 2003

- 36 (1) Schedule 10 to FA 2003 (SDLT: returns, enquiries, assessments and appeals) is amended as follows.
- (2) In paragraph 39 (direction by the tribunal to postpone payment) after sub-paragraph (8) insert—
- “(9) Sub-paragraphs (10) and (11) apply where a person has been given a failure notice under Part 1 of Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and that notice has not been withdrawn.
- (10) Nothing in this paragraph enables the postponement of the payment of—
- (a) an amount due under paragraph 20 of that Schedule by reason of the failure notice (accelerated payment on account where failure notice given and tax unpaid), or
- (b) an amount of tax identified in the failure notice in accordance with paragraph 5(4) of that Schedule or, where that notice has been amended under paragraph 19 of that Schedule, the amended notice.
- (11) Accordingly, if the payment of an amount of tax within sub-paragraph (10)(b) is postponed by virtue of this paragraph, immediately before the failure notice is given, it ceases to be so postponed with effect from the time the failure notice is given, and the tax is due and payable—
- (a) if no representations were made under paragraph 19 of that Schedule in respect of the failure notice, no later than the end of the 90 day post-notice period (within the meaning of Part 1 of that Schedule), and
- (b) if representations were so made, no later than the end of whichever of the following periods ends later—
- (i) the 90 day post-notice period;
- (ii) the period of 30 days beginning with the day on which HMRC’s determination in respect of those representations is notified under paragraph 19 of that Schedule.”
- (3) In paragraph 40 (agreement to postpone payment of tax), after sub-paragraph (3) insert—
- “(4) Paragraph 39(9) and (10) applies for the purposes of this paragraph as it applies for the purposes of paragraph 39.”
- (4) In paragraph 43 (payment of stamp duty land tax where there is a further appeal), after sub-paragraph (2) insert—
- “(3) Sub-paragraph (4) applies where—
- (a) a failure notice has been given to a party to the appeal under Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and not withdrawn, and
- (b) the assessment to which the appeal relates has effect, or partly has effect, to counteract the whole or part of the

asserted advantage (within the meaning of paragraph 1(3) of that Schedule) by reason of which the notice was given.

- (3) If, on the application of HMRC, the relevant court or tribunal considers it necessary for the protection of the revenue, it may direct that sub-paragraph (1) does not apply so far as the stamp duty land tax relates to the counteraction of the asserted advantage, and –
- (a) give permission to withhold all or part of any payment or repayment, or
 - (b) require the provision of adequate security before payment or repayment is made.
- (4) “Relevant court or tribunal” means the tribunal or court from which permission or leave to appeal is sought.”

Finance Act 2007

- 37 In paragraph 12 of Schedule 24 to FA 2007 (penalties for errors: interaction with other penalties), after sub-paragraph (2) insert –
- “(2A) In sub-paragraph (2) “any other penalty” does not include a penalty under Schedule 1 to FA 2014 (penalty for failure to comply with failure notice).”

Finance Act 2008

- 38 In paragraph 15 of Schedule 41 to FA 2008 (penalties: failure to notify: interaction with other penalties), after sub-paragraph (1) insert –
- “(1A) In sub-paragraph (2) “any other penalty” does not include a penalty under Schedule 1 to FA 2014 (penalty for failure to comply with failure notice).”

Finance Act 2009

- 39 In paragraph 17 of Schedule 55 to FA 2009 (penalty for failure to make returns etc: interaction with other penalties), in sub-paragraph (2), after paragraph (b) insert “, or
- (c) a penalty under Schedule 1 to FA 2014 (penalty for failure to comply with failure notice).”

Finance Act 2013

- 40 (1) Schedule 33 to FA 2013 (annual tax on enveloped dwellings: returns, enquiries, assessments and appeals is amended as follows).
- (2) In paragraph 48 (application for payment of tax to be postponed) after sub-paragraph (8) insert –
- “(8A) Sub-paragraphs (10) and (11) apply where a person has been given a failure notice under Part 1 of Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and that notice has not been withdrawn.
- (8B) Nothing in this paragraph enables the postponement of the payment of –

- (a) an amount due under paragraph 20 of that Schedule by reason of the failure notice (accelerated payment on account where failure notice given and tax unpaid), or
 - (b) an amount of tax identified in the failure notice in accordance with paragraph 5(4) of that Schedule or, where that notice has been amended under paragraph 19 of that Schedule, the amended notice.
- (8C) Accordingly, if the payment of an amount of tax within sub-paragraph (8B)(b) is postponed by virtue of this paragraph, immediately before the failure notice is given, it ceases to be so postponed with effect from the time the failure notice is given, and the tax is due and payable –
 - (a) if no representations were made under paragraph 19 of that Schedule in respect of the failure notice, no later than the end of the 90 day post-notice period (within the meaning of Part 1 of that Schedule), and
 - (b) if representations were so made, no later than the end of whichever of the following periods ends later –
 - (i) the 90 day post-notice period;
 - (ii) the period of 30 days beginning with the day on which HMRC’s determination in respect of those representations is notified under paragraph 19 of that Schedule.”
- (3) In paragraph 49 (agreement to postpone payment of tax), after sub-paragraph (3) insert –
 - “(4) Paragraph 39(9) applies for the purposes of this paragraph as it applies for the purposes of paragraph 39.”
- (4) In paragraph 53 (payment of tax where there is a further appeal), after sub-paragraph (2) insert –
 - “(3) Sub-paragraph (4) applies where –
 - (a) a failure notice has been given to a party to the appeal under Schedule 1 to FA 2014 (consequences of failing to take account of relevant judicial rulings) and not withdrawn, and
 - (b) the assessment to which the appeal relates has effect, or partly has effect, to counteract the whole or part of the asserted advantage (within the meaning of paragraph 1(3) of that Schedule) by reason of which the notice was given.
 - (3) If, on the application of HMRC, the relevant court or tribunal considers it necessary for the protection of the revenue, it may direct that sub-paragraph (1) does not apply so far as the tax relates to the counteraction of the asserted advantage, and –
 - (a) give permission to withhold all or part of any payment or repayment, or
 - (b) require the provision of adequate security before payment or repayment is made.
 - (4) “Relevant court or tribunal” means the tribunal or court from which permission or leave to appeal is sought.”

PART 4

COMMENCEMENT AND TRANSITIONAL PROVISION

- 41 (1) The amendments made by Part 1 of this Schedule have effect in relation to judicial rulings whenever made.
- (2) But, in the case of judicial rulings made before the day on which this Act is passed, Part 1 of this Schedule has effect as if for paragraph 1(6) there were substituted –
- “(5) A failure notice may not be given after –
- (a) the end of the period of 24 months beginning with the day on which this Act is passed, or
- (b) the end of the period of 12 months beginning with the day the return or claim to which sub-paragraph (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which sub-paragraph (2)(b) refers was made, whichever is later.”
- (3) Accordingly, the reference in paragraph 22(10) to the period of 12 months includes a reference to the period of 24 months mentioned in the version of paragraph 1(6) set out in sub-paragraph (2) above.

EXPLANATORY NOTE

CLAUSE 1 SCHEDULE 1: CONSEQUENCES OF FAILING TO TAKE ACCOUNT OF RELEVANT JUDICIAL RULINGS

SUMMARY

1. Clause 1 and Schedule 1 introduce a new requirement for users of certain tax arrangements to amend their returns to relinquish the asserted tax advantage obtained by applying those arrangements when notified to do so by HM Revenue & Customs (HMRC). HMRC may issue such a notification when those tax arrangements have been shown in a relevant judicial ruling not to give the asserted tax advantage if applied to those tax arrangements. The measure provides for a penalty to be charged on those taxpayers who fail to make the required amendment or to satisfy HMRC that no such amendment is necessary. Taxpayers have a right of appeal against the penalty.

Taxpayers in receipt of a notice to amend their returns will also be notified of a requirement to pay the amount of the tax advantage to HMRC. This amount will only be payable if the taxpayer fails to amend the relevant return and pay the additional tax liability.

The measure applies to Income Tax (IT); Capital Gains Tax (CGT); Corporation Tax (CT); Inheritance Tax (IHT); Stamp Duty Land Tax (SDLT); and the Annual Tax on Enveloped Dwellings (ATED). The clause provides for further taxes to be added to the measure by Treasury Order.

DETAILS OF THE SCHEDULE

2. Paragraph 1 defines the conditions which must apply for HMRC to issue a failure notice to a person.
3. Paragraph 1(2) provides the first condition that there is an open tax enquiry into that person's return, or the person has made a tax appeal.
4. Paragraph 1(3) provides the second condition that the return or claim subject to the enquiry or to the appeal is made on the basis that the person obtains a tax advantage from the use of tax arrangements.
5. Paragraph 1(4) provides the third condition that there has been a judicial ruling relevant to the person's return, claim or appeal.
6. Paragraph 1(5) provides the fourth condition, that no previous failure notice has been given to the person in respect of the same tax arrangements and tax advantage, unless it was withdrawn.

Tax Advantage and Tax Arrangements

7. Paragraph 2(3) defines a tax advantage to include relief from or repayment of tax, avoidance or reduction of a charge or assessment to tax or a tax obligation, and a deferral of payment or an advance of repayment of tax.

Tax Returns and Enquiries

8. Paragraph 3(5) provides that certain defined statements, accounts and documents are to be treated as returns for the purposes of Inheritance Tax (IHT).

9. Paragraph 3(6) states that an IHT tax enquiry is deemed to be in progress from the time an account is delivered or other document produced, until the person is issued with a certificate of discharge.

Relevant Judicial Ruling

10. Paragraph 4(3) provides that a judicial ruling in another party's litigation is relevant to a person if the ruling relates to tax arrangements, the ruling lays down principles which, if applied to those arrangements, deny that advantage or part of it, and it is a final ruling.

11. Paragraph 4(4) defines a ruling as final if it is made by the Supreme Court, or if made by a lower court or tribunal, no appeal is made against it, permission to appeal is refused or if an appeal is made but is abandoned or otherwise disposed of before it was determined.

Failure Notices

12. Paragraph 5(1) provides that a failure notice must identify the judicial ruling on which it is based, explain why HMRC consider it is relevant to the person's tax arrangements, and set out what the person is required to do as a result of the notice.

13. Paragraph 5(2) provides that a failure notice will also notify the taxpayer of the amount of the "accelerated payment" which is due under paragraph 20, and explain the payment due date and the consequences of not making the payment.

14. Paragraph 5(3) provides that the amount of the accelerated payment will be that amount which is properly due, on the assumption that there is a relevant judicial ruling and the taxpayer takes the required corrective action (e.g. in amending the return). In effect it is the amount of additional tax HMRC maintains is due for the return now that the asserted tax advantage has been shown not to accrue as a result of the relevant judicial ruling. This sub-paragraph also provides that only a "designated" officer is authorised to determine the amount payable.

15. Paragraph 6(2)(a) provides that a person who is issued with a failure notice must take the required action to correct the tax position.

16. Paragraph 6(2)(b) provides that the person must notify HMRC when he has taken the corrective action and that he accepts the judicial ruling is relevant, and that he must notify HMRC of the amount of the asserted tax advantage and the tax that has now become payable.

17. Paragraph 6(4) defines the action required by the person as amending his return or claim to counteract the tax advantage claimed if the failure notice is in respect of an open tax enquiry, or taking all necessary steps to reach agreement with HMRC to relinquish the denied advantage if the failure notice is issued in respect of a tax appeal.

18. Paragraph 6(6) provides that any time limit applied to prevent a taxpayer amending his return or claim is disregarded for the purposes of this measure.

19. Paragraphs 6(8) and (9) provides that a taxpayer may not appeal against a notice closing an enquiry into his return or claim where that notice gives effect to any amendment made by the taxpayer in response to a failure notice.

Request for Reconsideration by HMRC of a Failure Notice

20. Paragraph 7 provides that a person may make representations to HMRC within 90 days of a failure notice being issued. The person may object to a failure notice either because there is no open tax enquiry or appeal or no tax advantage was obtained by the return or claim; that he has already been given a failure notice in respect of the tax arrangements or tax advantage; or that the judicial ruling is not relevant to his circumstances. HMRC must consider the representations and notify the person that the failure notice is confirmed or amended, or withdrawn.

Penalties for Failure to Comply with Failure Notices

21. Paragraph 8(3) states that a person becomes liable to a penalty if he fails to comply with a failure notice within 90 days and makes no representations to HMRC.

22. Paragraph 8(4) states that when a person makes representations to HMRC about a failure notice he becomes liable to a penalty if he subsequently fails to comply with a failure notice within 30 days of HMRC amending or confirming it, or if later, within 90 days of the original date of the failure notice.

23. Paragraph 9 provides that if a person becomes liable to a penalty it will be charged at [X%] of the tax advantage claimed, or of that part of it remaining if the person complies in part with the notice before becoming liable to a penalty.

Value of Denied Advantage

24. Paragraph 10(1) defines the value of the denied advantage as the additional amount of tax that would be due or payable if the advantage were counteracted.

25. Paragraph 10(3) excludes group relief and relief in respect of repayment of loans when calculating the denied advantage in respect of Corporation Tax.

26. Paragraph 11(2)(b) provides that 10 per cent of any part of a loss not used to reduce the amount of tax due and payable shall be included in the value of the denied advantage.

27. Paragraph 11(4) amends the calculation of denied advantage for groups of companies (for corporation tax) where the group has an overall loss, to the extent that a denied advantage results in an understatement of profit in one group company, the denied advantage is calculated in accordance with paragraph 10(1) and (2).

28. Paragraph 11(5) says that where the nature of the loss is, or the person's circumstances are, such that there is no reasonable prospect of the loss being used to reduce a tax liability of any person, there will be no penalty.

29. Paragraph 12 provides that where tax arrangements claim to result in tax being deferred, the denied advantage is calculated at 25% of the tax deferred for each year of deferral, or a proportionately reduced percentage if the deferment is less than a year.

Reductions for Co-operation

30. Paragraph 13(1) provides that before the penalty has been charged, HMRC may reduce the penalty if the taxpayer co-operates with HMRC to resolve the matter.

31. Paragraph 13(3) sets out how the taxpayer must act to provide the co-operation required for HMRC to reduce the penalty. The penalty can be reduced if the taxpayer:

- Acts to counteract the tax advantage;
- Provides sufficient information for HMRC to act to counteract the tax advantage or to reach agreement with the taxpayer to relinquish the tax advantage;
- Gives reasonable help to HMRC to quantify the tax advantage; or
- Gives HMRC access to his records to allow them to ensure the advantage is counteracted.

32. Paragraph 13(4) sets the minimum rate of penalty at Y%.

Assessment of Penalties

33. Paragraph 14(2) requires HMRC to notify the taxpayer when a penalty is assessed and that the notice must state the tax period to which the penalty relates.

34. Paragraph 14(5)(a) provides that in the case of a Failure Notice issued in respect of an open tax enquiry, the penalty must be notified no later than 90 days after the enquiry is closed.

35. Paragraph 14(5)(b) provides that in the case of a Failure Notice issued in respect of a pending appeal case, the penalty must be notified no later than 90 days after the taxpayer takes the necessary action to agree his case with HMRC or withdraws his appeal. If the litigation proceeds, the penalty must be issued within 90 days of the final ruling being made.

Aggregate Penalties

36. Paragraph 15(1) sets out that when a taxpayer becomes liable to both a penalty under this regime and also to a penalty calculated by reference to the same tax amount but assessed under different legislation, paragraph 15 will apply.
37. Paragraph 15(2)(a) sets the maximum amount at which penalties may be aggregated.
38. Paragraph 15(2)(b) applies if one of the penalties applying is issued under Schedule 55 to the Finance Act 2009 (Penalty for Failure to Make Returns) because a return is more than 6-months or 12-months outstanding. In such cases the maximum amount of penalties aggregated under this section must not exceed the “relevant percentage”, or £300 if greater.
39. Paragraph 15(5) sets the “relevant percentage” applicable in each case by reference to the penalty provision under which the other penalty is imposed reflecting the seriousness of the default and whether the penalty concerns an offshore matter.

Alteration of Assessment

40. Paragraph 16(2) provides that a supplementary penalty assessment may be issued if the earlier one was based on too low an amount of denied advantage.
41. Paragraph 16(3) provides that penalty assessments and supplementary assessments may be recalculated if they were based on too high an amount of advantage and that HMRC must repay any excess that the taxpayer has already paid.

Appeals

42. Paragraph 17(1) provides that a person may appeal against HMRC’s decision that a penalty is payable.
43. Paragraph 17(2) provides that a person may appeal against the amount of penalty charged.
44. Paragraph 17(5) states that a person is not required to pay a penalty before the appeal against it is determined.
45. Paragraph 18(1) provides that a tribunal may affirm or cancel HMRC’s decision that a penalty is payable.
46. Paragraph 18(2) provides that a tribunal may confirm the amount of the penalty charged, or vary it by changing any decision made by HMRC to any other that HMRC has the power to make.

Representations about HMRC’s determination of the amount of disputed tax

47. Paragraph 19 provides for the taxpayer to make representations about the amount of the accelerated payment or the additional amount of tax due. This includes, for example, circumstances relating to other reliefs and allowances that might affect the final amount of tax due, to the extent that they have not already been taken into account against other liabilities.

Accelerated payment on account

48. Paragraph 20 provides the rules regarding the payment of the accelerated payment.

49. Paragraph 20(3) explains that the accelerated payment is to be treated as a payment on account of the tax liability that will be determined on final resolution of the tax dispute.

50. Paragraph 20(4) ensures that the accelerated payment does not become due and payable before the time that the tax liability on which it is based would ordinarily become due and payable.

51. Paragraph 20(5) links the ‘payment period’ to the time limit for the taxpayer to take the necessary corrective action in response to the ‘failure notice’.

Penalty for failing to make accelerated payment

52. Paragraph 21 provides for a penalty which will be applied to any part of the accelerated payment that is not received by the due date. The amount of the penalty will reflect the degree to which the payment is late, and is based on the amount remaining unpaid.

53. Paragraph 21(6) imports the effect of a number of provisions in Schedule 56 to FA 2009. This includes the rule that where HMRC has agreed a structured ‘time to pay’ agreement, payment will be regarded as satisfied for the purposes of the late payment penalty, provided that agreement is being met.

Out-of-Time Appeals Against Final Rulings

54. Paragraph 22(2) provides for a failure notice to be suspended if an appeal is accepted by a court out of time in respect of a relevant ruling, until HMRC notifies the taxpayer that the appeal has been abandoned or has reached a final ruling.

55. Paragraph 22(3) states that the limits of 90 days, or where appropriate 30 days, for the taxpayer to comply with a failure notice take no account of the period that a notice is suspended. This also applies to the ‘payment period’ for an accelerated payment.

56. Paragraph 22(5) states that if the appeal results in a ruling which no longer applies to the circumstances of the taxpayer in receipt of the failure notice, the notice no longer has effect once the period of suspension is over.

57. Paragraph 22(6) provides that if sub-paragraph 22(5) does not apply, a failure notice continues once HMRC notifies the taxpayer that the suspension is over and if relevant that the new judicial ruling is now the final one for the purposes of the notice.

58. Paragraph 22(7)(b) requires HMRC to include in a notice issued under paragraph 22(2) any changes to the final notice needed to take account of a new final ruling.

59. Paragraph 22(8) prevents the issue of further failure notices being issued to other taxpayers in respect of the matter under appeal, unless that appeal is abandoned or otherwise disposed of before it is determined.

60. Paragraph 22(10) provides that when such an appeal is abandoned, the period between when the person was given leave to appeal and the abandonment of the appeal does not count towards the limit of 12 months from the date of the final ruling for HMRC to issue a failure notice.

Special Provision about Partnership Returns

61. Paragraph 24(3) states that in respect of partnership returns, a tax advantage arises from tax arrangements if the arrangements increase or reduce any of the items required to be included in a partnership return, and result in a tax advantage for at least one of the partners.

62. Paragraph 24(4)(a) provides that any failure notice given to a representative partner or his successor is not treated as a notice given to that person in any other capacity.

63. Paragraph 24(4)(b) provides that a representative partner and his successor are to be treated as the same person in respect of any failure notice given to them in that capacity.

64. Paragraph 25 disapplies certain provisions in the case of partnerships and instead substitutes paragraphs 28 and 29.

65. Paragraph 27(2) provides that a penalty for failing to comply with a failure notice is payable by each relevant partner.

66. Paragraph 27(3)(a) states that the total amount of penalties charged to relevant partners is Z% of the denied advantage.

67. Paragraph 27(3)(b) provides that each partner's share of the total penalty is the appropriate share.

68. Paragraph 27(4) defines the appropriate share as the same as the share of profits or losses apportioned to that partner in the accounting period, but if that information is not available to HMRC, any such share as an officer of HMRC may determine.

69. Paragraph 27(5) provides that any reduction to the penalty for co-operation under paragraph 13 is calculated and applied to the total amount of penalties issued to the partners.

70. Paragraph 27(7) provides that for the purposes of applying the maximum sum of aggregated penalties under paragraph 15, a penalty charged to a relevant partner is to be treated as if it were calculated by reference to the amount of tax due from the partner as a result of counteracting the tax advantage.

71. Paragraph 27(8) states that an appeal may be made against a decision that the partners are liable to penalties or against the sum total of those penalties.

72. Paragraphs 28 and 29 apply the accelerated payment provisions to members of a partnership, with necessary modifications. These provisions apply to the partners individually and not to the partnership as a whole, except to the extent that the partner's tax liability results from matters determined at the partnership level.

73. Paragraph 28(4) provides that an 'excluded partner' is a partner who will have no additional tax liability that warrants an accelerated payment, for example, due to their residence status.

Part 2

Extension to Other Taxes

74. Paragraph 31 provides for the Treasury to make an order to add other taxes to the scope of the measure by statutory instrument.

Part 3

Consequential amendments

75. Paragraph 34 provides that in circumstances where a taxpayer has postponed the tax amount which is the subject of an accelerated payment, or might normally expect to be able to do so, that taxpayer will no longer be able to postpone the tax. Thus the position of taxpayers who are subject to a failure notice will be the same, regardless of where they are in the enquiry process.

76. Paragraph 35 provides that, whilst HMRC will normally repay any disputed tax it has received if the taxpayer is successful in litigation at any stage, they will not be obliged to do so if there is reason to think the revenue may be at risk and the matter is being appealed further.

77. Paragraphs 36 and 40 fulfil the same functions as paragraphs 34 and 35 for the other taxes covered by this legislation.

78. Paragraph 37 disapplies the interaction provision in Schedule 24 to Finance Act 2007, penalties for errors, so that a penalty under that schedule is not reduced by the amount of a penalty charged under this schedule calculated by reference to the same amount of tax..

79. Paragraph 38 _disapplies the interaction provision in Schedule 41 to Finance Act 2008, penalties for failure to notify and certain VAT and excise wrongdoings, so that a penalty under that schedule is not reduced by the amount of a penalty charged under this schedule calculated by reference to the same amount of tax..

80. Paragraph 39 disapplies the interaction provision in Schedule 55 to Finance Act 2009, penalties for failure to make returns, so that a penalty under that schedule is not reduced by the amount of a penalty charged under this schedule calculated by reference to the same amount of tax.

Part 4

Commencement and Transitional Provision

81. Paragraph 41(2) provides that where a judicial ruling was made before the date the Act was passed, a failure notice may be issued no later than a date two years from the day the Act was passed or one year from the day the return or claim was submitted or appeal made, if later.

BACKGROUND NOTE

HMRC sometimes have to deal with a large number of taxpayers' returns that claim a tax advantage from the same or similar tax arrangements, or large numbers of appeals against HMRC's conclusion that the arrangements do not work. This measure has been introduced to encourage users of marketed or widely used avoidance schemes to settle their case with HMRC once a Tribunal or court has concluded in another party's litigation that the scheme does not work as asserted.

At the same time it removes the benefit for users of tax avoidance schemes in terms of the time value of money. Given the existence of a judicial precedent, the balance of the argument that the tax is due and payable tips significantly towards the Exchequer, even though the taxpayer continues to dispute the effectiveness of the tax scheme.

If you have any questions about this change, or comments on the legislation, please contact Pete Woodham on 03000 586533 (email: peter.woodham@hmrc.gsi.gov.uk) or David Edney on 03000 585985 (email: david.edney1@hmrc.gsi.gov.uk) or Brian New on 03000 536935 (email: brian.new@hmrc.gsi.gov.uk)