

## Tax Agents: Dishonest Conduct

---

### Who is likely to be affected?

Tax agents who assist clients with their tax affairs.

### General description of the measure

Legislation will be introduced in Finance Bill 2012 to allow HM Revenue & Customs (HMRC) to issue a tax agent with a conduct notice if it has determined that they have engaged in dishonest conduct. This notice would be subject to appeal.

Subject to prior approval by the first-tier tribunal, HMRC would be able to issue a File Access Notice requiring production of the working papers of tax agents found to have engaged in dishonest conduct. Where working papers are no longer in the power or possession of the tax agent, HMRC would be able to request these from a third party.

There will be a civil penalty for dishonest conduct in an amount of up to £50,000. In cases where full disclosure was not made, HMRC would be able to publish details of the penalised tax agent.

### Policy objective

This measure supports the Government's objective of a fairer tax system. It introduces a modern, effective civil penalty to allow HMRC to take action against the small number of dishonest tax agents, which will apply across all taxes.

The new power to publish details of agents penalised will act as a powerful deterrent to those agents who are prepared to act dishonestly, reassure the public and support honest agents by protecting them from unfair competition. It will also encourage disclosure, making it easier for HMRC to establish the tax loss at the client level as a result of the tax agent's dishonesty.

### Background to the measure

This measure was last announced at Budget 2011. HMRC has consulted three times on this measure:

- a consultation document *Working with Tax Agents* was published in April 2009;
- a consultation document *Working with Tax Agents: the next stage* was published in December 2009 together with draft legislation in February 2010; and
- a discussion document *Working with Tax Agents: Dishonest Conduct* was published on 14 July 2011 together with legislation revised to take account of consultation responses.

A response document: *Working with Tax Agents: Dishonest Conduct – Summary of Responses* was published on 6 December 2011 on the HMRC website.

## Detailed proposal

### Operative date

The measure will be brought into effect by Treasury Order. The measure will have effect for dishonest conduct on and after the date specified in that order. It is intended that the legislation will be effective from 1 April 2013.

## Current law

Section 99 of the Taxes Management Act (TMA) 1970 provides for a civil penalty on any person who assists in or induces an incorrect tax return or other document.

Section 20A of TMA allows HMRC to call for the papers of a tax accountant who had been penalised under section 99 in order to establish the extent of the inaccurate returns and the tax lost as a result.

There are equivalents for other direct taxes, but no similar provisions in respect of VAT and other indirect taxes.

## Proposed revisions

Legislation will be introduced in Finance Bill 2012 to replace current law, principally sections 20A and 99 TMA 1970 and equivalents for other direct taxes.

## Summary of impacts

<b>Exchequer impact (£m)</b>	2011-12	2012-13	2013-14	2014-15	2015-16
	-	-	negligible	negligible	negligible
	This measure is expected to have a negligible impact on the Exchequer. Any impact will be set out at Budget 2012.				
<b>Economic impact</b>	This measure has no significant economic impacts.				
<b>Impact on individuals and households</b>	There is no direct impact on individuals or households because this measure only includes tax agents who assist clients in the course of business. There may be a small indirect beneficial effect on individuals if the change leads to a reduction in the number of dishonest tax agents.				
<b>Equalities impacts</b>	Equality has been considered and it has been concluded that there are no adverse impacts from this change on groups with different protected characteristics.  HMRC do not routinely collect personal data relating to the agent population. However HMRC research found that the agent community is dominated by men (68 per cent) and the middle aged (51 per cent aged 35-54 years). Most are employed full time (85 per cent), but dispersed across different business structures.				
<b>Impact on business including civil society organisations</b>	This measure will target the small minority of tax agents who are dishonest and non-compliant. Some tax agents may incur costs if they need to comply with or appeal against a dishonest conduct notice and any subsequent file access notice.  There may be some costs where third parties have to provide working papers in the small number of cases where the working papers are not in the possession or power of the dishonest tax agent. The third party will have a right of appeal on grounds that it would be onerous for them to comply. It is expected that the impact on third parties will be negligible.				
<b>Operational impact (£m) (HMRC or other)</b>	Changes will need to be made to existing HMRC processes and Information Technology systems to identify cases, record progress and to charge and collect penalties. It is estimated that the costs to make the initial changes and ongoing costs for the first five year life cycle would be in the range of £300,000 to £800,000 depending on the extent to which the process is automated.				

	Civil investigation of tax agents is likely to be restricted to specialist teams. It is estimated that the cost to resource these teams over a five year period will be in the range of £2 million to £3 million.
<b>Other impacts</b>	<p><u>Small firms impact test:</u> HMRC want to deter all tax agents from acting dishonestly. HMRC received almost 50 responses from sole practitioners or small firms with fewer than 20 employees during the last two consultations. These have been considered and HMRC has concluded that excluding individuals working within firms with less than 20 employees would reduce the effectiveness of this measure.</p> <p><u>Competition assessment:</u> HMRC consider that by deterring tax agents from acting dishonestly and penalising those who do, HMRC will help honest businesses to compete against those who seek an unfair advantage.</p> <p><u>Privacy:</u> this measure will give HMRC access to some client information through access to the working papers of dishonest tax agents, subject to Tribunal approval.</p> <p>HMRC will be able to publish details of tax agents who have been charged a penalty for dishonesty once all avenues of appeal are exhausted. When a tax agent complies with a tribunal approved notice and makes full disclosure their details will not be published.</p> <p>Strict procedures will be in place to demonstrate that the interference with privacy is proportional and justified, and thus lawful.</p>

### **Monitoring and evaluation**

The measure will be kept under review through regular communication with those affected.

The Implementation Oversight Forum will consider changes brought about by this measure. The Forum, with a majority of external members, was established to consider the changes brought about by the Review of Powers, Deterrents and Safeguards.

### **Further advice**

If you have any questions about this change, please send an email to [powers.review-of-hmrc@hmrc.gsi.gov.uk](mailto:powers.review-of-hmrc@hmrc.gsi.gov.uk) or contact Maria Richards on 020 7147 3223.

## **1 Tax agents: dishonest conduct**

- (1) Schedule 1 contains provision about tax agents who engage in dishonest conduct.
- (2) That Schedule comes into force on such day as the Treasury may by order appoint.
- (3) An order under subsection (2) –
  - (a) may make different provision for different purposes, and
  - (b) may include transitional provisions and savings.
- (4) The Treasury may by order make any incidental, supplemental, consequential, transitional or saving provision in consequence of Schedule 1.
- (5) An order under subsection (4) may –
  - (a) make different provision for different purposes, and
  - (b) make provision amending, repealing or revoking any provision made by or under an Act (whenever passed or made).
- (6) An order under this section is to be made by statutory instrument.
- (7) A statutory instrument containing an order under subsection (4) is subject to annulment in pursuance of a resolution of the House of Commons.

## SCHEDULE 1

Section 1

### TAX AGENTS: DISHONEST CONDUCT

#### PART 1

#### INTRODUCTION

##### *Overview*

- 1 This Schedule is arranged as follows –
  - (a) this Part explains who is a tax agent and what it means to engage in dishonest conduct,
  - (b) Part 2 sets out the process for establishing whether someone is engaging in or has engaged in dishonest conduct,
  - (c) Part 3 confers power on HMRC to obtain relevant documents,
  - (d) Part 4 sets out sanctions for engaging in dishonest conduct,
  - (e) Part 5 provides for assessment of and appeals against penalties, and
  - (f) Parts 6 and 7 contain miscellaneous provisions and consequential amendments.

##### *Tax agent*

- 2 (1) A “tax agent” is an individual who, in the course of business, assists other persons (“clients”) with their tax affairs.
  - (2) Individuals can be tax agents even if they (or the organisations for which they work) are appointed –
    - (a) indirectly, or
    - (b) at the request of someone other than the client.
  - (3) Assistance with a client’s tax affairs includes –
    - (a) advising a client in relation to tax, and
    - (b) acting or purporting to act as agent on behalf of a client in relation to tax.
  - (4) Assistance with a client’s tax affairs also includes assistance with any document that is likely to be relied on by HMRC to determine a client’s tax position.
  - (5) Assistance given for non-tax purposes counts as assistance with a client’s tax affairs if it is given in the knowledge that it will be, or is likely to be, used by a client in connection with the client’s tax affairs.

##### *Dishonest conduct*

- 3 (1) An individual “engages in dishonest conduct” if, in the course of acting as a tax agent, the individual does something dishonest with a view to bringing about a loss of tax revenue.

- (2) It does not matter whether a loss is actually brought about.
- (3) Nor does it matter whether the individual is acting on the instruction of clients.
- (4) A loss of tax revenue would be brought about for these purposes if clients were to—
  - (a) account for less tax than they are required to account for by law,
  - (b) obtain more tax relief than they are entitled to obtain by law,
  - (c) account for tax later than they are required to account for it by law, or
  - (d) obtain tax relief earlier than they are entitled to obtain it by law.
- (5) “Tax” is defined in Part 6 of this Schedule.
- (6) “Tax relief” includes—
  - (a) any exemption from or deduction or credit against or in respect of tax, and
  - (b) any repayment of tax.
- (7) A reference in this paragraph to doing something dishonest includes—
  - (a) dishonestly omitting to do something, and
  - (b) advising or assisting a client to do something that the individual knows to be dishonest.

## PART 2

### ESTABLISHING DISHONEST CONDUCT

#### *Conduct notice*

- 4 (1) This paragraph applies if HMRC determine that an individual is engaging in or has engaged in dishonest conduct.
- (2) An authorised officer (or an officer of Revenue and Customs with the approval of an authorised officer) may notify the individual of that determination.
- (3) The notice must state the grounds on which the determination was made.
- (4) For the effect of notifying the individual, see paragraphs 7(2) and 29(2).
- (5) A notice under this paragraph is referred to as a “conduct notice”.
- (6) In relation to a conduct notice, a reference to “the determination” is to the determination forming the subject of the notice.

#### *Appeal against determination*

- 5 (1) An individual to whom a conduct notice is given may appeal against the determination.
- (2) Notice of appeal must be given—
  - (a) in writing to the officer who gave the conduct notice, and
  - (b) within the period of 30 days beginning with the day on which the conduct notice was given.
- (3) It must state the grounds of appeal.

- (4) On an appeal that is notified to the tribunal, the tribunal may confirm or set aside the determination.
- (5) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this paragraph as they have effect in relation to an appeal against an assessment to income tax.
- (6) Setting aside a determination does not prevent a further conduct notice being given in respect of the same conduct if further evidence emerges.

*Offence of concealment etc in connection with conduct notice*

- 6 (1) A person (“P”) commits an offence if, after a relevant event has occurred, P—
  - (a) conceals, destroys or otherwise disposes of a material document, or
  - (b) arranges for the concealment, destruction or disposal of a material document.
- (2) A “relevant event” occurs if—
  - (a) a conduct notice is given to an individual, or
  - (b) an individual is informed by an officer of Revenue and Customs that a conduct notice will be or is likely to be given to the individual.
- (3) A “material document” is any document that could be sought under paragraph 8 as a result of the giving of the conduct notice.
- (4) If P acts after the event described in sub-paragraph (2)(a), no offence is committed if P acts—
  - (a) after the determination has been set aside,
  - (b) more than 4 years after the conduct notice was given, or
  - (c) without knowledge of that event.
- (5) If P acts before that event but after the event described in sub-paragraph (2)(b), no offence is committed if P acts—
  - (a) more than 2 years after the individual was, or was last, so informed, or
  - (b) without knowledge of the event described in sub-paragraph (2)(b).
- (6) P acts without knowledge of an event if P—
  - (a) is not the individual with respect to whom the event has occurred, and
  - (b) does not know, and could not reasonably be expected to know, that the event has occurred.
- (7) A person guilty of an offence under this paragraph is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum, and
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or both.

PART 3

POWER TO OBTAIN TAX AGENT’S FILES ETC

*Circumstances in which power is exercisable*

- 7 (1) The power in paragraph 8 is exercisable only in case A or case B and only with the approval of the tribunal.
- (2) Case A is where a conduct notice has been given to an individual and either –
- (a) the time allowed for giving notice of appeal against the determination has expired without any such notice being given, or
  - (b) notice of appeal against the determination was given within that time, but the appeal has been withdrawn or the determination confirmed.
- (3) Case B is where –
- (a) an individual has been convicted of an offence relating to tax that involves fraud or dishonesty,
  - (b) the offence was committed after the individual became a tax agent (whether or not the individual was still a tax agent when it was committed and regardless of the capacity in which it was committed),
  - (c) either –
    - (i) the time allowed for appealing against the conviction has expired without any such appeal being brought, or
    - (ii) an appeal against the conviction was brought within that time, but the appeal has been withdrawn or the conviction upheld, and
  - (d) no more than 12 months have elapsed since the date on which paragraph (c) was satisfied.
- (4) For the purposes of this paragraph, a determination or conviction that is appealed is not considered to have been confirmed or upheld until –
- (a) the time allowed for bringing any further appeal has expired, or
  - (b) if a further appeal is brought within that time, that further appeal has been withdrawn or determined.
- (5) In this Schedule, a reference to “the tax agent” is –
- (a) in a case falling within case A, a reference to the individual mentioned in sub-paragraph (2), and
  - (b) in a case falling within case B, a reference to the individual mentioned in sub-paragraph (3).
- (6) It does not matter whether the individual is still a tax agent when the power in paragraph 8 is to be exercised.

*File access notice*

- 8 (1) Subject to paragraph 7, an officer of Revenue and Customs may by notice in writing require any person mentioned in sub-paragraph (2) to provide relevant documents.
- (2) The persons are –



- (a) the tax agent, and
  - (b) any other person the officer believes may hold relevant documents.
- (3) “Relevant documents” is defined in paragraph 9.
- (4) A notice under this paragraph is referred to as a “file access notice”.
- (5) The person to whom a file access notice is given is referred to as “the document-holder”.

#### *Relevant documents*

- 9 (1) “Relevant documents” means the tax agent’s working papers (whenever acting as a tax agent) and any other documents received, created, prepared or used by the tax agent for the purposes of or in the course of assisting clients with their tax affairs.
- (2) It does not matter who owns the papers or other documents.
- (3) The reference in sub-paragraph (1) to clients –
- (a) includes former clients, and
  - (b) is not limited to the clients with respect to whom the tax agent is engaging in or has engaged in dishonest conduct.

#### *Content of notice*

- 10 (1) A file access notice may require the provision of –
- (a) particular relevant documents specified in the notice, or
  - (b) all relevant documents in the document-holder’s possession or power.
- (2) A file access notice does not need to identify the clients of the tax agent.
- (3) A file access notice addressed to anyone other than the tax agent must name the tax agent.

#### *Compliance*

- 11 A file access notice may require documents to be provided –
- (a) within such period,
  - (b) by such means and in such form, and
  - (c) to such person and at such place,
- as is reasonably specified in the notice or in a document referred to in the notice.
- 12 Unless otherwise specified in the notice, a file access notice may be complied with by providing copies of the relevant documents.

#### *Approval by tribunal*

- 13 (1) The tribunal may not approve the giving of a file access notice unless –
- (a) the application for approval is made by or with the agreement of an authorised officer,
  - (b) the tribunal is satisfied that the case falls within case A or case B (see paragraph 7),

- (c) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,
  - (d) the document-holder and (where different) the tax agent have been told that relevant documents are to be required and given a reasonable opportunity to make representations to an officer of Revenue and Customs, and
  - (e) the tribunal has been given a summary of any representations so made.
- (2) Nothing in sub-paragraph (1) requires the tribunal to determine whether an individual is engaging in or has engaged in dishonest conduct.
- (3) A decision by the tribunal under this paragraph is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).

*Documents not in person’s possession or power*

- 14 A file access notice only requires the document-holder to provide a document if it is in the document-holder’s possession or power.

*Types of information*

- 15 (1) A file access notice does not require the document-holder to provide—
- (a) parts of a document that contain information relating to the conduct of a pending appeal relating to tax, or
  - (b) journalistic material (as defined in section 13 of the Police and Criminal Evidence Act 1984).
- (2) A file access notice does not require the document-holder to provide personal records (as defined in section 12 of the Police and Criminal Evidence Act 1984).
- (3) But a file access notice may require the document-holder to provide documents that are personal records, omitting any information whose inclusion (whether alone or with other information) makes the original documents personal records.

*Old documents*

- 16 (1) A file access notice does not require the document-holder to provide a relevant document if—
- (a) the whole of the document originated before the back-stop day, and
  - (b) no part of it has a bearing on tax periods ending on or after that day.
- (2) “The back-stop day” is the first day of the period of 20 years ending with the day on which the file access notice is given.

*Privileged communications between professional legal advisers and clients*

- 17 (1) A file access notice does not require the document-holder to provide any part of a document that is privileged.
- (2) For the purposes of this paragraph a document is privileged if it is a document in respect of which a claim to legal professional privilege, or (in

Scotland) to confidentiality of communications between client and professional legal adviser, could be maintained in legal proceedings.

- (3) Regulations under paragraph 23 of Schedule 36 to FA 2008 (information powers: privileged communications) apply (with any necessary modifications) to disputes under this paragraph as to whether a document is privileged.

*Power to copy documents*

- 18 If a document is provided pursuant to a file access notice, an officer of Revenue and Customs may take copies of or make extracts from the document.

*Power to retain documents*

- 19 (1) If a document is provided pursuant to a file access notice, HMRC may retain the document for a reasonable period if an officer of Revenue and Customs thinks it necessary to do so.
- (2) While a document is retained –
  - (a) the document-holder may, if the document is reasonably required for any purpose, request a copy of it, and
  - (b) an officer of Revenue and Customs must comply with such a request without charge.
- (3) The retention of a document under this paragraph is not to be regarded as breaking any lien claimed on the document.
- (4) If a document retained under this paragraph is lost or damaged, the Commissioners are liable to compensate the owner of the document for any expenses reasonably incurred in replacing or repairing the document.

*Appeal against file access notice*

- 20 (1) If the document-holder is a person other than the tax agent, the document-holder may appeal against the file access notice, or any requirement in it, on the ground that it would be unduly onerous to comply with the notice or requirement.
- (2) Notice of appeal must be given –
  - (a) in writing to the officer by whom the file access notice was given, and
  - (b) within the period of 30 days beginning with the day on which the file access notice was given.
- (3) It must state the grounds of appeal.
- (4) On an appeal that is notified to the tribunal, the tribunal may confirm, vary or set aside the file access notice or a requirement in it.
- (5) If the tribunal confirms or varies the notice or a requirement in it, the document-holder must comply with the notice or requirement –
  - (a) within such period as is specified by the tribunal, or
  - (b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal’s decision.

- (6) A decision by the tribunal under this paragraph is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).
- (7) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this paragraph as they have effect in relation to an appeal against an assessment to income tax.

*Offence of concealment etc in connection with file access notice*

- 21 (1) A person (“P”) commits an offence if P—
- (a) conceals, destroys or otherwise disposes of a required document, or
  - (b) arranges for the concealment, destruction or disposal of a required document.
- (2) A “required document” is a document within sub-paragraph (3) or sub-paragraph (4).
- (3) A document is within this sub-paragraph if at the time when P acts—
- (a) P is required to provide the document by a file access notice, and
  - (b) either—
    - (i) the notice has not been complied with, or
    - (ii) it has been complied with, but P has been notified in writing by an officer of Revenue and Customs that P must continue to preserve the document (and the notification has not been withdrawn).
- (4) A document is within this sub-paragraph if at the time when P acts—
- (a) P is not required to provide the document by a file access notice,
  - (b) P has been informed by an officer of Revenue and Customs that P will be or is likely to be so required, and
  - (c) no more than 6 months have elapsed since P was, or was last, so informed.
- (5) A person guilty of an offence under this paragraph is liable—
- (a) on summary conviction to a fine not exceeding the statutory maximum, and
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or both.

*Penalty for failure to comply*

- 22 (1) A person who fails to comply with a file access notice is liable to a penalty of £300.
- (2) Failing to comply with a file access notice also includes—
- (a) concealing, destroying or otherwise disposing of a required document, or
  - (b) arranging for any such concealment, destruction or disposal.
- (3) “Required document” has the same meaning as in paragraph 21.

*Daily penalty for failure to comply*

- 23 If the failure continues after notification of a penalty under paragraph 22 has been issued, the person is liable to a further penalty, for each subsequent day on which the failure continues, of an amount not exceeding £60 for each such day.

*Failure to comply with time limit*

- 24 A failure to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 22 or 23 if the thing was done within such further time (if any) as an officer of Revenue and Customs may have allowed.

*Reasonable excuse*

- 25 (1) Liability to a penalty under paragraph 22 or 23 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of this paragraph—
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person’s control,
  - (b) if the person relies on another person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure,
  - (c) if the person had a reasonable excuse for the failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

PART 4

SANCTIONS FOR DISHONEST CONDUCT

*Penalty for dishonest conduct*

- 26 (1) An individual who engages in dishonest conduct is liable to a penalty.
- (2) Subject to paragraph 27, the penalty to which the individual is liable is to be—
- (a) no less than £5,000, and
  - (b) no more than £50,000.
- (3) In assessing the amount of the penalty, regard must be had to—
- (a) whether the individual disclosed the dishonest conduct,
  - (b) whether that disclosure was prompted or unprompted,
  - (c) the quality of that disclosure, and
  - (d) the quality of the individual’s compliance with any file access notice in connection with the dishonest conduct.
- (4) An individual “discloses” dishonest conduct by—
- (a) telling HMRC about it,

- (b) giving HMRC reasonable help in identifying the client or clients concerned and in quantifying the loss of tax revenue (if any) brought about by it, and
  - (c) allowing HMRC access to records for the purpose of ensuring that any such loss is recovered or otherwise properly accounted for.
- (5) A disclosure is “unprompted” if it is made at a time when the individual has no reason to believe that HMRC have discovered or are about to discover the dishonest conduct.
- (6) Otherwise, a disclosure is “prompted”.
- (7) In relation to disclosure or compliance, “quality” includes timing, nature and extent.

#### *Special reduction*

- 27 (1) This paragraph applies if HMRC propose to assess an individual to a penalty under paragraph 26 of £5,000.
- (2) If they think it right because of special circumstances, HMRC may take one or more of the following steps –
- (a) reduce the penalty to an amount below £5,000 (which may be nil),
  - (b) stay the penalty, or
  - (c) agree a compromise in relation to proceedings for the penalty.
- (3) “Special circumstances” does not include –
- (a) ability to pay, or
  - (b) the fact that a loss of tax revenue from a client is balanced by an over-payment by another person (whether or not a client).

#### *Power to publish details*

- 28 (1) The Commissioners may publish information about an individual if the individual incurs a penalty under paragraph 26.
- (2) The information that may be published is –
- (a) the individual’s name (including any trading name, previous name or pseudonym),
  - (b) the individual’s address,
  - (c) the nature of any business carried on by the individual,
  - (d) the amount of the penalty,
  - (e) the periods or times to which the dishonest conduct relates,
  - (f) any other information the Commissioners consider it appropriate to publish in order to make clear the individual’s identity, and
  - (g) the link (if there is one) between the dishonest conduct and any inaccuracy, failure or action as a result of which information is published under section 94 of FA 2009 (which relates to deliberate tax defaulters).
- (3) No information may be published under this paragraph if the penalty incurred by the individual is £5,000 or less.
- (4) Subsections (5) to (9) and (11) of section 94 of FA 2009 apply to publishing information about an individual under this paragraph as they apply to publishing information about a person under that section.

- (5) If, in acting as a tax agent, the individual works or worked for an organisation, sub-paragraph (2)(f) includes power to publish such information about that organisation as the Commissioners consider appropriate in order to make clear the individual's identity.

## PART 5

### PENALTIES UNDER THIS SCHEDULE: ASSESSMENT ETC

#### *Assessment of penalties*

- 29 (1) If a person becomes liable to a penalty under Part 3 or 4 of this Schedule, HMRC may assess the penalty.
- (2) But, in the case of a penalty under Part 4, they may only do so if a conduct notice has been given to the person and either –
- (a) the time allowed for giving notice of appeal against the determination has expired without notice of appeal being given, or
  - (b) notice of appeal against the determination was given within the time allowed, but the appeal has been withdrawn or the determination confirmed.
- (3) Paragraph 7(4) applies for the purposes of sub-paragraph (2)(b).
- (4) If HMRC assess a penalty, they must notify the person.
- 30 (1) HMRC may not assess a penalty under this Schedule after the applicable deadline.
- (2) For a penalty under Part 3, the applicable deadline is the end of the period of 12 months beginning with the day on which the person became liable to the penalty.
- (3) For a penalty under Part 4, the applicable deadline is the end of the period of 12 months beginning with the later of –
- (a) the first day on which HMRC may assess the penalty (see paragraph 29(2)) and
  - (b) day X.
- (4) If a loss of tax revenue is brought about by the dishonest conduct, day X is –
- (a) the day immediately following the end of the appeal period for the assessment or determination of the tax revenue lost (or, if more than one client is involved, the end of the last such period), or
  - (b) if there is no such assessment or determination, the day on which the amount of tax revenue lost is ascertained.
- (5) Otherwise, day X is the day on which HMRC ascertain that no loss of tax revenue has been brought about by the dishonest conduct.
- (6) In sub-paragraph (4), “appeal period” means the period during which –
- (a) an appeal could be brought, or
  - (b) an appeal that has been brought has not been withdrawn or determined.

#### *Appeal against penalty*

- 31 (1) A person may appeal against a decision of HMRC –

- (a) that a penalty is payable under Part 3 of this Schedule, or
  - (b) as to the amount of a penalty payable under Part 3 or 4 of this Schedule.
- (2) Notice of appeal must be given –
  - (a) in writing to HMRC, and
  - (b) before the end of the period of 30 days beginning with the day on which notification of the penalty was issued.
- (3) It must state the grounds of appeal.
- (4) On an appeal under sub-paragraph (1)(a) that is notified to the tribunal, the tribunal may confirm or cancel the decision.
- (5) On an appeal under sub-paragraph (1)(b) that is notified to the tribunal, the tribunal may –
  - (a) confirm the decision, or
  - (b) substitute for the decision another decision that HMRC had power to make.
- (6) If, in the case of an appeal against a penalty under Part 4, the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 27 (special reduction) –
  - (a) to the same extent as HMRC (which may mean applying the same reduction as HMRC to a different starting point), or
  - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of that paragraph was flawed (when considered in the light of the principles applicable in proceedings for judicial review).
- (7) Subject to this paragraph and paragraph 32, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this paragraph as they have effect in relation to an appeal against an assessment to income tax.

#### *Enforcement of penalty*

- 32 (1) A penalty under this Schedule must be paid –
  - (a) before the end of the period of 30 days beginning with the day on which notification of the penalty was issued, or
  - (b) if a notice of appeal under paragraph 31 is given, before the end of the period of 30 days beginning with the day on which the appeal is withdrawn or determined.
- (2) A penalty under this Schedule may be enforced as if it were income tax charged in an assessment and due and payable.

#### *Double jeopardy*

- 33 A person is not liable to a penalty under this Schedule in respect of anything in respect of which the person has been convicted of an offence.
- 34 (1) A person is not liable to a penalty under this Schedule in respect of anything in respect of which the person is personally liable to a penalty under –
  - (a) Schedule 24 to FA 2007 (penalties for errors),
  - (b) Schedule 41 to FA 2008 (penalties for failure to notify etc), or



- (c) Schedule 55 to FA 2009 (penalties for failure to make a return etc).
- (2) Sub-paragraph (1) applies where, for example, the person is personally liable by virtue of section 48(3) of VATA 1994 (VAT representatives).

*Power to change amount of penalties*

- 35 (1) If it appears to the Treasury that there has been a change in the value of money since the last relevant day, they may by regulations substitute for the sums for the time being specified in paragraphs 22(1), 23, 26(2), 27(1) and (2)(a) and 28(3) such other sums as appear to them to be justified by the change.
- (2) “Relevant day”, in relation to a specified sum, means –
- (a) the day on which this Act is passed, and
  - (b) each day on which the power conferred by sub-paragraph (1) has been exercised in relation to that sum.
- (3) Regulations under this paragraph do not apply to a failure or conduct that began before the day on which they come into force.
- (4) The power to make regulations under this paragraph is exercisable by statutory instrument.
- (5) A statutory instrument containing regulations under this paragraph is subject to annulment in pursuance of a resolution of the House of Commons.

PART 6

MISCELLANEOUS PROVISION AND INTERPRETATION

*Application of provisions of TMA 1970*

- 36 Subject to the provisions of this Schedule, the following provisions of TMA 1970 apply for the purposes of this Schedule as they apply for the purposes of the Taxes Acts –
- (a) section 108 (responsibility of company officers),
  - (b) section 114 (want of form), and
  - (c) section 115 (delivery and service of documents).

*Tax*

- 37 (1) “Tax” means –
- (a) income tax,
  - (b) capital gains tax,
  - (c) corporation tax,
  - (d) construction industry deductions,
  - (e) VAT,
  - (f) insurance premium tax,
  - (g) inheritance tax,
  - (h) stamp duty land tax,
  - (i) stamp duty reserve tax,
  - (j) petroleum revenue tax,
  - (k) aggregates levy,

- (l) climate change levy,
  - (m) landfill tax, and
  - (n) any duty of excise other than vehicle excise duty.
- (2) “Construction industry deductions” means construction industry deductions under Chapter 3 of Part 3 of FA 2004.
- (3) “Corporation tax” includes an amount assessable or chargeable as if it were corporation tax.
- (4) “VAT” means –
- (a) value added tax charged in accordance with VATA 1994,
  - (b) amounts recoverable under paragraph 5(2) of Schedule 11 to that Act (amounts shown on invoices as VAT), and
  - (c) amounts treated as VAT by virtue of regulations under section 54 of that Act (farmers etc).

*General interpretation*

- 38 In this Schedule –
- “appointed” includes engaged;
  - “client” (except in paragraph 17) –
    - (a) has the meaning given in paragraph 2(1), and
    - (b) in relation to a particular tax agent, means a client of that tax agent;
  - “the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs;
  - “conduct notice” has the meaning given in paragraph 4;
  - “the document-holder” has the meaning given in paragraph 8;
  - “document” includes a copy of a document (see also section 114 of FA 2008);
  - “file access notice” has the meaning given in paragraph 8;
  - “HMRC” means Her Majesty’s Revenue and Customs;
  - “organisation” includes any person or firm carrying on a business;
  - “specify” includes describe;
  - “tax period” means a tax year, accounting period or other period in respect of which tax is charged;
  - “the tribunal” means the First-tier Tribunal or, where determined by or under the Tribunal Procedure Rules, the Upper Tribunal.
- 39 (1) A reference in this Schedule to clients of a tax agent (or to a tax agent’s clients) is a reference to the persons whom the agent assists with their tax affairs.
- (2) Sub-paragraph (1) applies even if –
- (a) the agent works for an organisation, and
  - (b) it is the organisation that is appointed to give the assistance.
- 40 A loss of tax revenue is taken for the purposes of this Schedule to be (or to be capable of being) brought about by dishonest conduct despite the fact that the loss can be recovered or properly accounted for (following discovery of the conduct or otherwise).

- 41 A reference in this Schedule to working for an organisation includes being a partner or member of an organisation.
- 42 A reference in a provision of this Schedule to an authorised officer is to an officer of Revenue and Customs who is, or is a member of a class of officers who are, authorised by the Commissioners for the purposes of that provision.

*Relationship with other enactments*

- 43 Nothing in this Schedule limits –
- (a) any liability a person may have under any other enactment in respect of conduct in respect of which a person is liable to a penalty under this Schedule, or
  - (b) any power a person may have under any other enactment to obtain relevant documents.

PART 7

CONSEQUENTIAL PROVISIONS

*TMA 1970*

- 44 TMA 1970 is amended as follows.
- 45 Omit –
- (a) section 20A (power to call for papers of tax accountant),
  - (b) section 20B (restrictions on powers under section 20A), and
  - (c) section 99 (assisting in preparation of incorrect return etc).
- 46 (1) Section 20BB (falsification etc of documents) is amended as follows.
- (2) In subsection (1) –
    - (a) for “subsections (2) to (4)” substitute “subsections (2) and (3)”,
    - (b) in paragraph (a), omit “a notice under section 20A above or”,
    - (c) at the end of that paragraph, omit “or”, and
    - (d) omit paragraph (b).
  - (3) In subsection (2) –
    - (a) in paragraph (a), omit “, the inspector”,
    - (b) at the end of that paragraph, insert “or”,
    - (c) at the end of paragraph (b), omit “or”, and
    - (d) omit paragraph (c).
  - (4) In subsection (3), for the words from “the notice is given” to the end substitute “the order is made, unless before the end of that period an officer of Revenue and Customs has notified the person in writing that the order has not been complied with to the officer’s satisfaction”.
  - (5) Omit subsection (4).
- 47 In section 20D (interpretation of sections 20 to 20CC) –
- (a) in subsection (1), for “sections 20A and 20BA” substitute “section 20BA”, and
  - (b) omit subsection (2).

- 48 In section 103 (time limits for penalties) –  
(a) omit subsection (3), and  
(b) in subsection (4), for “neither subsection (1) nor subsection (3) applies” substitute “subsection (1) does not apply”.
- 49 In section 103ZA (disapplication of sections 100 to 103) –  
(a) omit “or” at the end of paragraph (e),  
(b) at the end of paragraph (f) insert “, or  
(g) Schedule 1 to FA 2012 (tax agents: dishonest conduct).”
- 50 In section 118 (interpretation), in the definition of “tax”, omit the words from “except that” to the end.

#### OTA 1975

- 51 In Schedule 2 to OTA 1975 (management and collection of petroleum revenue tax), in the Table in paragraph 1(1), omit the entry relating to section 99 of TMA 1970.

#### IHTA 1984

- 52 In section 247 of IHTA 1984 (provision of incorrect information), omit subsection (4).

#### FA 2003

- 53 (1) FA 2003 is amended as follows.
- (2) In section 93 (information powers) –  
(a) in subsection (2), omit the entries relating to Parts 3 and 4 of Schedule 13, and  
(b) omit subsections (3) to (6).
- (3) Omit section 96 (penalty for assisting in preparation of incorrect return etc).
- (4) In Schedule 13 (stamp duty land tax: information powers) –  
(a) omit Parts 3 and 4, and  
(b) for paragraph 53 substitute –  
“53 (1) A person commits an offence if the person intentionally –  
(a) falsifies, conceals, destroys or otherwise disposes of a relevant document, or  
(b) causes or permits the falsification, concealment, destruction or disposal of a relevant document.  
(2) A relevant document is a document that the person has been required by an order under Part 6 of this Schedule to deliver.  
(3) A person does not commit an offence under this paragraph if the person acts –  
(a) with the written permission of the tribunal or an officer of Revenue and Customs, or  
(b) after the document has been delivered.”

- (4) A person does not commit an offence under this paragraph if the person acts after the end of the period of 2 years beginning with the date on which the order is made, unless before the end of that period an officer of Revenue and Customs has notified the person in writing that the order has not been complied with to the officer's satisfaction.
- (5) A person guilty of an offence under this paragraph is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum;
  - (b) on conviction on indictment, to imprisonment for a term of years not exceeding 2 years or a fine or to both.”

**EXPLANATORY NOTE**

**TAX AGENTS: DISHONEST CONDUCT**

**SUMMARY**

1. This clause and Schedule make provision about powers to obtain working papers from tax agents who engage in dishonest conduct; impose penalties on them and allow the Commissioners of HM Revenue and Customs (HMRC) to publish their details. The Schedule will come into force by means of a Treasury order, made by statutory instrument.

**DETAILS OF THE CLAUSE**

2. Subsection (3) provides that an order to bring the Schedule into force may make different provision for different purposes, and may include transitional provisions and savings.
3. Subsections (4)-(6) cover other orders that may be used to make incidental, supplemental, consequential, transitional and saving provisions but only if they are consequential on the draft Schedule.
4. Subsection (7) provides that a statutory instrument, which contains an order under subsection (4), is subject to the negative procedure.

**DETAILS OF THE SCHEDULE**

*Part 1: Introduction*

5. Paragraph 1 provides an overview of the Schedule.
6. Paragraph 2 defines a “tax agent” as an individual who assists others with their tax affairs. The assistance must be in the course of business, so that, for example, general advice by friends, family or volunteer advisers, or broadcasts and lectures is not caught.
7. Under sub-paragraph (2) an individual can be a tax agent even if appointed indirectly.
8. Under sub-paragraph (3) assistance includes providing advice to or acting for a client in relation to tax. Sub-paragraphs (4) to (5) further clarify the meaning of assistance.

9. Sub-paragraph (1) of paragraph 3 defines engaging in “dishonest conduct” as doing something dishonest with a view to bringing about a loss of tax revenue and sub-paragraph (7) provides more detail.
10. Sub-paragraphs (2) and (3) provide that it does not matter whether or not there is an actual loss of tax revenue, or whether the agent was acting on a client’s instructions.
11. Sub-paragraph (4) together with sub-paragraph (6) defines a loss of tax revenue.
12. Sub-paragraph (5) cross refers to Part 6 for the definition of the taxes covered by the Schedule.

*Part 2: Establishing dishonest conduct*

13. Paragraph 4 applies if HMRC determine that a person has engaged in dishonest conduct.
14. Sub-paragraph (2) and (3) provide that an authorised HMRC officer may notify the person of that determination, stating the grounds (a conduct notice).
15. Sub-paragraph (4) sets out the implications of a conduct notice by reference to later paragraphs of the Schedule (tribunal authorisation of a file access notice and a penalty for dishonest conduct).
16. Paragraph 5 provides a right of appeal for the tax agent against HMRC’s determination of dishonest conduct, setting out the procedure and what the tribunal may do.
17. Paragraph 6 provides for a criminal offence if a person disposes of a material document which could otherwise be sought under a file access notice.

*Part 3: Power to obtain tax agent’s files etc*

18. Paragraph 7 sets out two cases in which relevant documents may be required by a file access notice. Case A is where a conduct notice has been given without an appeal being made or once the appeal has been resolved. Case B is where an individual has been convicted of a tax related offence of dishonesty but only if it occurred after they became a tax agent. The capacity in which the offence was committed does not matter. In both Cases A and B the tribunal must approve the file access notice.
19. Paragraph 8 allows an officer to require relevant documents by a file access notice to the agent or anyone else who holds the documents.

20. Paragraph 9 describes “relevant documents”. These are any documents used by a tax agent in assisting clients with their tax affairs and can be required even if the agent does not own them.
21. Paragraph 10 describes the documents which can be required under a file access notice.
22. Paragraphs 11 and 12 describe how a tax agent may comply with the contents of a file access notice.
23. Sub-paragraph (1) of paragraph 13 sets out the conditions for approval by the tribunal of the file access notice.
24. Sub-paragraphs (1)(b) and (c) set out that before approving the file access notice the tribunal must be satisfied that there has been dishonest conduct or a relevant conviction, and that the notice is justified in the circumstances.
25. Sub-paragraphs (1)(d) and (e) put conditions on HMRC (in addition to any other requirements deriving from tribunal rules).
26. Sub-paragraph (3) provides that the tribunal’s decision is final. But there is a further right of appeal for a document-holder who is not the tax agent under paragraph 20 below.
27. Paragraphs 14 and 15 set out restrictions on documents that can be required by a file access notice: documents not in the document-holder’s possession or power, material that relates to a pending tax appeal, or which is journalistic or personal.
28. Paragraph 16 provides that a file access notice cannot require production of documents which are more than 20 years old unless the document is of continuing relevance to tax.
29. Paragraph 17 concerns privileged material. Under sub-paragraph (1), a document-holder is not required to provide such material. Sub-paragraph (2) defines privileged material, and sub-paragraph (3) applies regulations made under Schedule 36 to the Finance Act (FA) 2008, covering disputes about whether a document is privileged.
30. Paragraphs 18 and 19 allow HMRC to copy and retain the documents provided and describe the conditions that apply to retention.
31. Paragraph 20 provides a right of appeal against the file access notice on the grounds of onerousness for a document-holder (a third party) who is not the tax agent. It sets out the procedure and the tribunal’s powers.
32. Paragraph 21 provides for a criminal offence where a person disposes of a document required by a file access notice (a required document).



33. Paragraph 22 provides for a civil penalty for failure to comply with a file access notice.
34. Paragraph 23 provides for a daily civil penalty for a continuing failure to comply with a file access notice. This does not apply if a person cannot comply with the notice because the document in question has been destroyed, since it is no longer in the person's possession or power.
35. Paragraph 24 says that where an officer of HMRC allows extra time for a requirement to be complied with, which is then met, there is no liability to a penalty.
36. Paragraph 25 provides that if a person has a reasonable excuse there is no liability to a penalty. Sub-paragraph (2) sets out circumstances which do not count as a reasonable excuse.

*Part 4: Sanctions for dishonest conduct*

37. Paragraph 26 says that a tax agent who engages in dishonest conduct is liable to a penalty.
38. Sub-paragraph (2) sets out the minimum and maximum amount of this penalty.
39. Sub-paragraphs (3)-(7) set out the factors to be taken into account in assessing the penalty, including whether the dishonest conduct was disclosed and the quality of that disclosure.
40. Paragraph 27 provides that where HMRC propose to assess the minimum penalty for dishonest conduct, and there are special circumstances, HMRC may reduce a penalty, stay (desist from) proceedings, or agree a compromise in those proceedings.
41. Sub-paragraph (3) explains what does not constitute special circumstances.
42. Sub-paragraph (1) of paragraph 28 provides that HMRC may publish information about a tax agent who has incurred a penalty for dishonest conduct.
43. Sub-paragraph (2) sets out what information may be published.
44. Sub-paragraph (3) provides that no information may be published if a penalty has been reduced to or below the minimum.
45. Sub-paragraph (4) applies certain provisions of section 94 of FA 2009 to publishing information about a tax agent (time limits and the ability to make representations to HMRC).

46. Sub-paragraph (5) provides that information about an organisation (including a firm or business) may be published in order to make clear the identity of a tax agent who works for that organisation.

*Part 5: Penalties under this Schedule: Assessment etc*

47. Paragraphs 29 and 30 provide machinery provisions for HMRC to assess penalties due under this Schedule.
48. Paragraph 31 provides a right of appeal against a decision to impose a penalty or against the amount of any penalty and describes the procedures for appealing.
49. Paragraph 32 describes the means by which collection of a penalty charged under this Schedule may be enforced.
50. Paragraphs 33 and 34 provide that a person is not liable to a penalty under this Schedule for anything in respect of which they have either been convicted of an offence, or are liable to a penalty under specified penalty enactments.
51. Paragraph 35 provides for penalty amounts in this Schedule to be re-valourised by means of a Treasury order if there has been a change in the value of money.

*Part 6: Miscellaneous provision and interpretation*

52. Paragraph 36 specifies parts of the Taxes Management Act 1970 (TMA) which apply to this Schedule.
53. Paragraph 37 sets out which taxes are covered by this Schedule.
54. Paragraphs 38, 39, 41 and 42 cover how certain terms should be interpreted for the purposes of this Schedule.
55. Paragraph 40 provides that a loss of tax is taken to have been brought about even if subsequently recovered or properly accounted for.
56. Paragraph 43 describes the relationship between this Schedule and other enactments.

*Part 7: Consequential provisions*

57. Paragraphs 44 to 53 describe other legislation which is omitted or amended as a consequence of this Schedule.

**BACKGROUND NOTE**

58. Tax agents play a crucial role in the delivery of the UK tax system. HMRC is able to accept the majority of returns without checking their accuracy individually because of the work done by taxpayers and their agents to ensure those returns are correct.
59. But there are a small number of tax agents who are prepared to act dishonestly and whose actions can affect a larger group of taxpayers. HMRC needs to be able to deter and penalise this behaviour. It also needs to identify the scale of the dishonesty in order to be able to put matters right. This requires HMRC to be able to access the working papers of the dishonest agent to check and correct their clients' returns as appropriate.
60. HMRC has existing powers in respect of agents in sections 99 and 20A of TMA, but these apply only to direct tax and do not work as intended. This provision modernises the existing law, extends it to other taxes and duties and allows HMRC to publish details on its website of dishonest tax agents who are penalised and fail to fully disclose their dishonesty.
61. HMRC has consulted three times on how it should engage with tax agents to raise professional standards. *Working with Tax Agents* was published in April 2009. *Working with Tax Agents: the next stage* was published in December 2009 together with draft legislation in February 2010. Revised legislation was published with a discussion document *Working with Tax Agents: Dishonest Conduct* on 14 July 2011.
62. The draft legislation for inclusion in Finance Bill 2012 published today reflects the comments received during those consultations. A response document is also published today.
63. The measure will be brought into effect by Treasury Order, not expected to be before 1 April 2013.
64. If you have any questions about this change, or comments on the legislation, please contact Madeleine O'Brien on 020 7147 2466 or Maria Richards on 020 7147 3223 (email: powers.review-of-hmrc@hmrc.gsi.gov.uk).