



HM Revenue  
& Customs

# Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion

**Summary of Responses**  
December 2015

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# Foreword

Tax evasion is a crime which deprives the Government of much needed funds to run our public services and reduce the deficit, placing a greater burden on the vast majority of people who pay their fair share of tax. Tackling tax evasion is an important part of this Government's long-term economic plan and it will take tough action against evaders and those who help others to evade tax.

For too long it has been too easy for people to hide their money overseas to evade tax. We have changed that. Over the last two years the UK has led the drive in Europe, in the G20 and through its G8 Presidency to revolutionise international tax transparency. We now have agreement, reached with over 90 countries and jurisdictions, to exchange information on financial accounts automatically every year. Starting in 2016, HMRC will receive a wide range of information on offshore accounts held by UK tax residents. This will be an unprecedented step change in HMRC's ability to tackle offshore tax evasion, as for the first time it will reveal the details of billions of pounds worth of assets held offshore.

HMRC is today publishing the responses to four consultations on new tougher sanctions announced at the March 2015 Budget. It is right and fair that we make sure that the penalties evaders face, and the penalties for those who help them, reflect the wider harm caused by their actions and act as an effective deterrent to others.

The Government will legislate for:

- A new criminal offence for corporations that fail to take adequate steps to prevent the facilitation of tax evasion;
- Tougher financial penalties for offshore evaders, including a penalty based on the value of the asset on which tax was evaded as well as wider public naming of offshore evaders;
- A new penalty regime for those who enable tax evasion, based on the amount of tax evaded and public naming of enablers;
- A new criminal offence to make prosecution easier by removing the need to prove intent where a large amount of tax has not been paid on offshore income and gains.

The vast majority of people and businesses in the UK pay the tax they owe on time and do not attempt to dodge their responsibilities. Our message to evaders and enablers is clear and simple – HMRC is closing in on you, so come forward now or face tougher sanctions, both civil and criminal.

**David Gauke**

**Financial Secretary to the Treasury**

# 1. Introduction

- 1.1. This document responds to the consultation paper '*Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion*' published on 16 July 2015.
- 1.2. HMRC is grateful to all those who responded or participated in meetings for taking the time to consider the issues raised by this consultation document.
- 1.3. Responses to the consultations on criminal sanctions for enablers and on civil and criminal sanctions for tax evaders are set out in separate response documents.

## Context for the consultation

- 1.4. Offshore evasion is illegal and has a real impact on honest taxpayers. While most people pay their taxes correctly, a small minority do not. They ignore their tax responsibilities when their money is outside of the UK, or actively take advantage of the challenges that offshore jurisdictions pose to HMRC and use these to evade the tax which is due.
- 1.5. HMRC's strategy for tackling offshore evasion [No Safe Havens](#), sets out five key objectives:
  - There are no jurisdictions where UK taxpayers feel safe to hide their income and assets from HMRC;
  - Would-be offshore evaders realise that the balance of risk is against them;
  - Offshore evaders voluntarily pay the tax due and remain compliant;
  - Those who do not come forward are detected and face vigorously-enforced sanctions; and,
  - There will be no place for the facilitators, or enablers, of offshore evasion.
- 1.6. Very few evaders work alone in their efforts to withhold tax from the Exchequer. The Government wants to address the problem of enablers who help and support taxpayers in hiding income and gains offshore.
- 1.7. The Government's message is clear: if you are knowingly helping others to evade tax, you will be held to account.

## Background to the consultation

- 1.8. The consultation document identified that those who unknowingly enable offshore evasion deserve support and education, not punishment. In terms of those who are deliberate or careless, the Government wants to take a more holistic approach than it has taken in the past, and hence HMRC has reviewed the range of both civil and criminal powers which are available to it, in order to identify gaps.

## Enablers: the civil v criminal response

- 1.9. In terms of a criminal response, the Government identified a gap which it sought to address in the consultation on the '*Corporate criminal offence for failure to prevent the facilitation of evasion*'. However, it is difficult to tackle the problem of enablers using criminal powers alone. In HMRC's approach to tax evaders, a criminal response is reserved for cases where it needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate, since criminal investigations are very resource intensive and may not provide the best value for money to the Exchequer. The Government believes that the same is true for tackling those who enable tax evasion (enablers). The Money Laundering Regulations (MLRs) are an essential tool, but HMRC is one of 27 supervisors so its oversight covers only part of the enabler population. Other current civil powers to tackle enablers are very limited.
- 1.10. Therefore, in addition to criminal powers, the Government has identified the need for civil powers to tackle enablers which complement existing criminal powers. This mirrors HMRC's approach to tax evasion more generally as noted in 1.9 above.
- 1.11. The consultation paper set out the Government's plans to introduce a new civil penalty for those who deliberately enable offshore tax evasion, linked to the amount of tax which the enabler helped the evader to evade. It also proposed the publication of the names of enablers who have been charged the penalty.
- 1.12. This consultation was published alongside three others on tackling offshore tax evasion: strengthening civil deterrents for offshore evaders, a criminal offence for offshore evaders and a new corporate criminal offence of failure to prevent the facilitation of evasion.
- 1.13. Respondents generally supported the aims of the government in tackling offshore evasion, but had a range of views on the particular options presented in the four consultations.

## Structure of the consultation response

1.14. The remainder of the consultation response is divided into 3 sections:

- Chapter 2 sets out a summary of the responses to the consultation and the Government's overarching response.
- Chapter 3 provides more detail on the responses to the specific questions set out in the consultation document.
- Chapter 4 sets out next steps.
- Annex A sets out the list of respondents.
- Annex B sets out the Government's views on what is an enabler
- Annex C sets out the practical issues for publishing details of deliberate enablers
- Annex D sets out draft legislation for comment.

## 2. Summary of responses

### Summary of responses

- 2.1. The Government received 20 formal responses from individual institutions as well as professional and representative bodies. HMRC representatives also met with key interest groups and representative bodies.
- 2.2. The Government is very grateful to all those who responded or participated in consultation meetings between August and October 2015 (see Annex A for full list) for taking the time to consider the issues raised by the consultation paper.
- 2.3. Half of the written responses received, and many of the conversations held with stakeholders in meetings, explicitly expressed agreement with the general policy aim of this consultation, i.e. that it is right for the Government to be focusing on tackling those who help others to evade tax, in addition to dealing with the evaders themselves. One respondent commented:

*“[We are] generally in support of the introduction of measures which are effective in reducing tax evasion, and which form part of an overall coherent policy to effect behavioural change in the long term. We believe in this context it makes sense to have a civil regime which sits alongside the new proposed criminal regime.”*

- 2.4. However, there were very mixed views as to whether civil sanctions are needed to address the problem and others disagreed with the proposals, several very strongly. The main areas of concern raised were:
  - There is already adequate existing law in this area.
  - A number of respondents queried the rationale behind the differences in scope of taxes covered between the civil and criminal enabler consultations. The proposed civil sanctions come into play where UK tax has been evaded using offshore accounts and structures; whereas the corporate criminal offence covers all types of tax evasion.
  - The limited geographical scope of the sanctions were also raised in meetings and written responses.

### Government response

- 2.5. The Government has considered the responses to this consultation carefully. The Government recognises the concerns raised by respondents, but needs to balance these concerns with the real harm that offshore tax evasion brings, and the need to tackle it more effectively.

- 2.6. Therefore, the Government intends to introduce a new civil penalty for those who deliberately enable offshore tax evasion, linked to the amount of tax which the enabler helped the evader to evade as well as naming provisions. It will deter would be enablers and will ensure that people no longer think they can get away with enabling offshore tax evasion.
- 2.7. The Government notes the comments on the interaction between the corporate criminal offence and this consultation. The proposed corporate criminal offence for failure to prevent the criminal facilitation of tax evasion holds a corporation liable where it has failed to prevent its agent from criminally aiding and abetting a natural or legal person to commit tax evasion (under the existing law). The corporation will be liable where it can be proven (to the criminal standard) that an individual has deliberately helped another to commit tax evasion. That individual needs to have been acting as an agent of the corporation. The offence applies to both UK and non-UK corporations in respect of UK taxes, and to UK corporations who fail to prevent their agents from criminally facilitating a tax loss overseas, where there is dual criminality.
- 2.8. In contrast, the civil sanctions for enablers (either legal or natural persons) apply where that person has deliberately helped another to commit tax evasion, in respect of UK taxes. The civil sanction cannot apply to the enabling of an overseas tax loss because there is no predicate civil offence in the UK where there is no UK tax loss, so as such there is no dual criminality. This does not preclude the possibility of the jurisdiction suffering the tax loss taking civil action against a UK based enabler, with the co-operation of the UK and vice versa.
- 2.9. The proposals focus on offshore evasion because this is where the Government has gathered evidence of a problem which could be dealt with using civil methods, although we continue to consider whether the proposals should be extended to enablers of all types of UK tax evasion. If appropriate, this would become the subject of further, separate consultation at a later date.
- 2.10. The Government acknowledges that many of those who enable offshore evasion will be based offshore, beyond HMRC's jurisdiction. HMRC can in certain circumstances pursue and recover civil penalties under mutual assistance with international partners, but this will not be effective in all cases. The Government recognises the difficulties in applying civil sanctions to those enablers who operate offshore, and will continue to work with international partners to find solutions to this problem.



## 3. Responses to questions posed in the consultation document

### What is an enabler?

3.1. The consultation document set out the Government's current thinking on the subject of enablers. The ways in which someone might "enable" evasion were set out at paragraph 3.3 of the document, and are included here in Annex B for reference.

### **Q1. What are your views on the use of the term "enabler" to describe any third party who provides such services, whether or not they are aware that they are doing so?**

3.2. Whilst some respondents agreed it was sensible to use the term "enabler" to describe any third party who provides such services, the majority of respondents were concerned that use of the term was inappropriate in certain circumstances. In particular, some considered the term to have negative connotations. Many felt that the "unaware" should not be categorised as enablers – two respondents noted that infrastructure services like "postman" could potentially be included in such a definition, which is clearly inappropriate. Others felt that the term should be restricted only to those who have knowledge of their involvement and the intention to assist someone to evade.

### Government response

- 3.3. The Government accepts that using the term "enabler" to describe someone who is unaware that they have assisted an evader is not necessarily appropriate and will be mindful of this as its thinking develops. This conclusion does not impact on the proposed scope of the sanction (see Q7).
- 3.4. A number of stakeholders also expressed a view that there is an inconsistency between the Government's use of the words facilitator, enabler and promoter.
- 3.5. The Government notes that while a person may fall into more than one of these descriptions, the terms "promoter", "facilitator" and "enabler" are used to describe different activities. In particular a "promoter" is a statutory term used in tax avoidance legislation, which is not the subject of this consultation.
- 3.6. The Government also notes that the term "enabler" was used to describe those who provide services which support offshore evasion across the full behavioural spectrum – including whether or not there was knowledge of the evasion – with respect to all potential responses, whether civil, criminal, or regulatory.

“Facilitation” was used in the corporate criminal offence consultation to denote those who **criminally facilitate** the evasion, i.e. the individual(s) within the corporate who could be charged under a number of existing offences e.g. aiding and abetting and conspiracy to defraud. The term “facilitation” was used to encompass the acts covered by those existing offences.

**Q2. Does the list [see Annex B of this document] reflect your experience, from dealing with disclosures for example, of the ways in which evaders have been assisted by third parties? If not, how has your experience differed?**

- 3.7. The vast majority of respondents agreed that the list reflected their understanding and experience. The Government would like to reiterate that the use of offshore structures is in many cases legitimate (and hence provision of the services listed is, in many cases, also legitimate).
- 3.8. The use of the term “middleman” when relating to referrals, caused some concern. Many respondents noted that referrals happen very often, in the ordinary course of business, and were concerned as to the level of due diligence both this new sanction and the new corporate criminal offence would require. One respondent suggested that inclusion of such services should be limited to formal introductions by agreement and for a fee; and should be limited only to the services considered by the actual introduction, not any follow-on services that the third party may provide.

**Government response**

- 3.9. The Government notes that this is a complex area. It will legislate the definition of “enabler” and will set out in guidance details of the types of services which fall within the legislation.

**Q3. What are your views on our approach to using behaviours and services [see Annex B of this document] to define an enabler?**

**AND**

**Q4. Do you find this categorisation of behaviours and services clear and comprehensive? Please explain your answer.**

- 3.10. Most respondents broadly agreed that an approach which focuses on the behaviours and services provided by enablers is the right one to take – particularly the decision not to focus on specific/named professions and industries – and that the categorisations were clear.
- 3.11. However, the clear message that the Government received from respondents is that it would not be appropriate to extend the proposed sanctions to “careless” enablers (paragraph 5.6 of the consultation document affirmed that the Government share this view). Some respondents thought there are a number of

grey areas where it would be difficult to distinguish between those who are unaware and those who are careless. They were also of the view that there is much wider coverage of careless behaviour, for example in anti-money laundering legislation and in the reporting requirements under the Common Reporting Standard.

- 3.12. Several responses also noted that it may be appropriate to distinguish between services, on the basis that certain services are far more likely to be associated with tax evasion than others. They felt that guidance on services and how behaviour is determined is essential.
- 3.13. The Government used the phrases “deliberate” and “deliberate enabling” in this consultation as this is in keeping with existing behaviour-based penalty legislation. However some respondents questioned whether “deliberate” was the correct term to use – a small number pointed out that, in the case of an adviser for example, everything the adviser does is deliberate in the sense that they are deliberately performing acts and services on behalf of a client and in order to make a profit. Whether those acts and services are provided dishonestly is, they felt, a separate matter. Respondents felt it needs to be clear that only those with knowledge of the evasion, intent to assist the evader, and who act dishonestly, should be caught by the proposed sanctions.
- 3.14. The examples given in the consultation document were derived from real-life cases, but were necessarily simplified for the purposes of the consultation. Some respondents felt there were inconsistencies between some of the examples, and it was not clear why the enabler in question had been assigned to a particular behavioural category.
- 3.15. The phrase “turning a blind eye” caused some comment, particularly in consultation meetings, with some noting that the Proceeds of Crime Act 2002 draws a distinction between those who are actively involved in the offence of money laundering, and those who know or suspect that someone is involved in money laundering (and fail to meet their reporting obligations in that regard).

### **Government response**

- 3.16. Whilst it is still the Government’s intention to tackle those who deliberately enable offshore tax evasion, the draft legislation does not explicitly use the word “deliberate” but instead uses phrases which make it clear that this is the behaviour under consideration.
- 3.17. The Government acknowledges the comments in relation to the examples in the consultation document and will ensure any published guidance is clear in this regard.

3.18. The Government notes that where it is, or should be, obvious to a person that they have enabled tax evasion, and they consciously and wilfully decide to be blind to what they have done (or its consequences or both), the Government considers the enabler's acts to be deliberate. Those who unreasonably adopt a position of wilful blindness to tax evasion which they have enabled are not merely careless, and should not be able to rely on a pretence of ignorance to avoid penalties for their deliberate enabling act.

### Current civil sanctions available to HMRC – their scope and limitations

3.19. Current enabler penalties were summarised in the following table:

Legislation	Section	Applies To	Does not apply to	Behaviour	Sanctions	Scope and shortcomings
Finance Act 2007	Schedule 24, Paragraph 1A	Natural and legal persons who <i>deliberately</i> provide false information in taxpayer documentation	Those who enable other than by providing information, e.g. service providers, trustees	Deliberate	Up to 100% of lost revenue	<b>Limited scope of behaviours and activities</b>
Finance Act 2012	Schedule 38	Tax advisers who are individuals (see appendix for details)	Corporate bodies and any enabler not providing tax advice	Deliberate (dishonest)	Maximum £50,000 penalty, public naming of offenders	<b>Limited scope of behaviours, activities and sanctions</b>
Money Laundering Regulations 2007	Regulations 7-13, 23, 24 and 42-47	Corporate bodies supervised by HMRC	Focuses on due diligence and reporting. Limited HMRC oversight	Careless	Warning letters, removal of 'fit and proper' person status, unlimited penalties, prosecution	<b>Limited HMRC oversight and scope of behaviours</b>

3.20. The Government's view, as set out in consultation, is that the current legislation does not comprehensively cover all circumstances where an individual or corporation may deliberately enable tax evasion. The Government does, however, consider the Money Laundering Regulations (MLR) to cover adequately the instances where an enabler carelessly enables the offshore tax evasion by ensuring they implement and enforce adequate due diligence policies and procedures.

**Q5. Do you agree that Sch 24 Finance Act 2007, Schedule 38, Finance Act 2012 and Money Laundering Regulations 2007 are the relevant civil sanctions that currently apply to enablers?**

**AND**

**Q6. Do you agree with our conclusions on the scope of existing sanctions? [The paper concluded that existing sanctions do not cover all circumstances where an individual or legal person may deliberately enable tax evasion.] Please state your reasons.**

- 3.21. Over 50% of respondents to this question agreed with our conclusion that current legislation does not comprehensively cover all circumstances where an individual or legal person may deliberately enable tax evasion. The remainder considered that tax evasion is adequately covered by the MLR (discussed in Annex B to the consultation paper), although most respondents acknowledged that HMRC only supervises part of the enabler population, so its MLR oversight is limited.
- 3.22. Four responses noted the potential overlap and interaction between the policy aim and the scope of Sch 38 FA2012 (the dishonest tax agent legislation), with some suggesting this could be amended rather than bringing in new legislation.

### **Government response**

- 3.23. The Government notes that the proposed civil sanctions for enablers address a different kind of non-compliance from MLR, although there can be overlaps. The MLRs are designed to prevent the use of businesses for the purpose of money laundering or terrorist financing. Relevant entities are supervised to ensure they understand and address the risks, and report suspicious activity to the National Crime Agency. In this way possible avenues for money laundering are blocked. This focus on prevention distinguishes the MLR regime from the proposed civil sanctions. The proposed civil sanctions are aimed at preventing offshore tax evasion by reducing the opportunities and incentives to enable evasion. In proposing civil sanctions for enablers, the Government is aiming for consistency and clarity in the sanctioning of those who deliberately enable offshore evasion.
- 3.24. The Government was mindful of the existing Dishonest Tax Agent (DTA) legislation at Sch 38 FA 2012 when designing the proposed penalties. There are a number of reasons why amending and widening Sch 38 FA 2012 is not considered to be appropriate:
- i. the DTA penalty can only be charged on an individual who was acting in the course of business, and it therefore would not cover all of the enablers in this proposed model;

- ii. the DTA penalty has an upper limit of £50,000, which in the Government's view is not high enough to deter or penalise those who deliberately enable offshore tax evasion;
- iii. The Government's intention is that the penalty for deliberate enablers will be linked to the evader's tax liability. The calculation of the DTA penalty takes no account of the amount of tax involved or the penalty incurred by the person who evaded the tax, which the Government feels is the more appropriate method of calculation for these sanctions.

3.25. The Government's view is that new sanctions are still warranted because of these discrepancies in the scope, penalty size and penalty calculation between the Dishonest Tax Agent legislation and the policy aims of the new sanctions proposed.

### Proposed sanctions – a penalty for deliberate enablers

3.26. In Chapter 5 of the consultation document, the Government set out two conditions, both of which would need to be met, for determining whether an enabler who acted deliberately should be liable to a penalty:

**Condition 1:** The enabler must have deliberately enabled a UK taxpayer to evade income tax, capital gains tax and / or inheritance tax by utilising structures in offshore jurisdictions.

**Condition 2:** HMRC must either:

- i. have secured a conviction against the evader; or
- ii. have charged the evader an offshore penalty as set out in Annex A to the consultation document; or
- iii. hold sufficient proof of the evader's culpability to secure either (i) or (ii) above if the appropriate procedures had been pursued.

### Q7. What are your views on these conditions? Should any be removed or changed, or further conditions added, and if so why?

3.27. The majority of respondents broadly agreed with these conditions, with some caveats as noted under each of the "condition" headings below.

#### Condition 1:

3.28. The consultation document states an "enabler" would include both natural and legal persons. Concern was raised over how HMRC would prove deliberate behaviour in legal persons, particularly corporates, and to what extent corporates would be responsible for the actions of their agents under the proposed sanctions.

- 3.29. When thinking about the taxpayers themselves, it is possible for a legal person to be penalised for deliberate behaviour if HMRC can demonstrate deliberate behaviour on the part of either:
- a) the controlling mind and will of the legal person; or
  - b) an individual with delegated authority (e.g. as envisaged by s.108 TMA 1970).

### Government response

- 3.30. The proposed corporate criminal offence recognises the difficulties in proving the *mens rea* at the director or equivalent level in a legal person. On a practical level, if HMRC could demonstrate that, for example, the directors of a large multinational corporation had directed and encouraged the agents within their company to knowingly and with intent provide services that enabled tax evasion, it is unlikely that a civil response would be appropriate.
- 3.31. Therefore whilst the civil penalty can apply to natural and legal persons, in practice its applicability to larger enterprises is likely to be limited because of the difficulties in proving *mens rea* at director level. For larger enterprises, either the corporate criminal offence, or a criminal charge on the directors individually, may be the more appropriate response.
- 3.32. Some respondents queried whether the initial burden of proof in terms of charging a penalty would lie with HMRC. The Government confirms that there is no intention to change its current approach to the charging of penalties: to establish culpability, an officer of HMRC must be confident that they have sufficient evidence about the behaviour of the person being charged a penalty to convince a reviewing officer or tribunal that, on the balance of probabilities, the person is liable to a penalty.
- 3.33. A few respondents noted that HMRC should need to demonstrate that the service provided by the enabler actually enabled the evasion. The Government's view is that this is already implicit in Condition 1.

#### **Condition 2(i) [secured a conviction against the evader]:**

- 3.34. Some respondents queried the link between this consultation and the consultation '*Tackling offshore tax evasion: A new criminal offence for offshore evaders*'. They asked whether it would be a crime to aid and abet the new criminal offence even though there is no *mens rea* (i.e. the "guilty mind") for that offence; and by extension, whether new civil sanctions for enabling could be imposed on any deliberate enabler(s) of that offshore evasion.

## Government response

3.35. The Government notes that it is possible in law to aid and abet a strict liability offence. Given the Government's view that the new civil sanctions for enablers should apply where the evader has received an offshore penalty, whether that penalty is for careless or deliberate behaviour on the part of the evader, it is appropriate that a "conviction" in this context should include the new criminal offence for offshore evaders. Therefore, where a HMRC secures a conviction under the new simple criminal offence, it may also consider the position of the enablers in that case and seek to impose a civil penalty on any deliberate enablers, if appropriate.

### **Condition 2(ii) [charged the evader an offshore penalty]:**

3.36. A number of respondents noted that offshore penalties can, in some instances, be levied for failure to take reasonable care on the part of the evader. For the purposes of this sanction, they felt that only deliberate behaviour (with or without concealment) on the part of the evader should be included. However, views were also put forward that in some cases the evader might have failed to take reasonable care, but the enabler has in fact acted deliberately.

3.37. Several respondents also expressed concern over how the proposed enabler penalty would interact with a situation where a penalty for deliberate conduct (with or without concealment) is accepted by the taxpayer on commercial grounds, i.e. it is cheaper to accept the proposed penalty than to fight for a lesser penalty for failure to take reasonable care.

3.38. A question was raised over whether "evader" refers to an individual, or to all types of taxpayer.

## Government response

3.39. In HMRC's experience, it is sometimes the case that the enabler has provided advice or other services which they know are not legitimate, but has persuaded the taxpayer to believe that this advice is sound. The taxpayer may receive no penalty, or a penalty for failure to take reasonable care. However the fact remains that the enabler provided his services deliberately, knowing they are not legitimate, and hence the Government believes that failure to take reasonable care on the part of the evader should remain in scope. We would need to consider the facts and circumstances of each case before deciding whether to pursue an enabler for a penalty.

3.40. The Government confirms that the term 'evader' refers to all types of taxpayer, although in practice the majority of taxpayers receiving an offshore penalty



(whether for deliberate behaviour or failure to take reasonable care) are likely to be individuals.

- 3.41. Respondents assumed that for condition 2(ii) to apply, all appeal routes on the part of the taxpayer would need to have been exhausted. The Government confirms that this is the intention.

**Condition 2(iii) [hold sufficient proof of the evader’s culpability to secure either (i) or (ii) above if the appropriate procedures had been pursued]:**

- 3.42. 50% of respondents and a number of stakeholders in consultation meetings raised concerns over this condition, specifically:

- how in practice would HMRC go about proving the guilt of the taxpayer;
- that HMRC should at least need a Tribunal to agree that the evidence proving the taxpayer’s culpability is of an acceptable standard before pursuing the enabler penalty;
- that the European Convention on Human Rights would prevent this condition from operating in practice with respect to deceased persons; and
- that the condition generally is inappropriate. One stakeholder noted: “...if the reason that the evader has not been pursued is because they have died or are seriously ill and therefore cannot effectively mount a defence it is unfair that an enabler should be pursued as the same argument would apply to them – they cannot mount a defence without the evidence of the putative evader.”

## Government response

- 3.43. The Government notes respondents’ comments and concerns and has decided to remove this condition in draft legislation.

**Q8. What are your views on the standard penalty amount being 100% of the revenue loss to which the enabler contributed? Do you have any alternative suggestions?**

- 3.44. For the avoidance of doubt, the Government’s proposal is a starting point of 100%, with reductions available for various forms of assistance from the enabler in establishing the amount of tax evaded (see Q10 and Q12 below).
- 3.45. Views were mixed. Many agreed with a starting point of 100%, although noted that the penalty might be higher for the evader in offshore cases involving category 2 and 3 jurisdictions. Conversely, the starting point might be lower for an evader who has been penalised for deliberate behaviour without concealment, where the starting point is 70%. The Government notes that the 100% starting point fits with HMRC’s existing levels for “deliberate and concealed” behaviour, with avoidance penalties starting at lower rates. For

example, the penalty under the General Anti-Abuse Rule has a starting point of 60%.

- 3.46. One respondent thought the proposals did not go far enough, and thought a scale of fixed monetary amounts would provide a more significant deterrent.
- 3.47. Another expressed the view that the tax lost is not particularly relevant to establishing the enabler penalty, as the behaviour could be egregious but not lead to significant tax loss. The penalty should instead be calculated relative to the enabler's turnover and actions in order to be proportionate. Others noted a desire for flexibility, and that the nature of the offence, and the size and nature of the organisation concerned, should also be taken into account when calculating the penalty. Only the proportion of lost revenue properly attributable to the actions of the enabler should be the starting point. Another thought that 100% was excessive, in particular where penalties may be imposed on the taxpayer and multiple enablers with respect to the same revenue loss. A lower starting point of 30% was suggested by that respondent, which could be increased in future if appropriate.

### Government response

- 3.48. There was no consensus on a viable alternative for the penalty starting point. The Government remains convinced that 100% is an appropriate starting point for the penalty.

### **Q9. What are your views on the suggested approach [calculate the penalty to be charged against each enabler in their own right rather than apportioning one penalty calculation between them all] where multiple enablers are involved?**

- 3.49. The majority of respondents agreed with the approach suggested in respect of multiple enablers. It was seen as inappropriate and impractical to split one penalty between different enablers, although several respondents also considered it would be inappropriate to charge a penalty as high as 100% of the revenue loss on large numbers of enablers in respect of a single such loss.
- 3.50. Maintaining proportionality was a primary concern for respondents. For example, one respondent noted that multiple penalties could be applied if the evader is a trust with multiple beneficiaries who are now facing a UK tax liability, and considered that only one penalty should be applied to the enabler in this instance.

### Government response

- 3.51. The Government recognises the concerns raised over proportionality but considers that its original proposal is the clearest method of sanctioning multiple enablers. Each enabler would then have the opportunity to gain reductions for

disclosure (see below) depending on their own behaviour in the course of HMRC's investigations into the evader's and enabler's activities.

**Q10. What are your views on a provision to reduce the amount of the penalty to recognise any assistance the enabler gave us to put things right, and the quality of that assistance? Is a 30% lower limit appropriate, and why?**

3.52. There was majority agreement that reductions for assistance would be appropriate, but no consensus on the minimum amount. One respondent thought a 50% minimum might be a more effective deterrent. Some thought that 20% should be the lower limit (in line with "deliberate without concealment" penalties for evaders). Others thought the minimum should be nil in appropriate cases in order to encourage disclosure and cooperation. It was also noted that HMRC should have wide discretion in terms of reductions because of the wide range of potential circumstances involved.

**Government response**

3.53. The Government has not focused on enablers in this way before, nor has it encouraged enablers to come forward and disclose their misdemeanours. This is in contrast to offshore evaders, who have been given opportunities to come forward and disclose and therefore face increasingly tougher sanctions. Accordingly the Government is persuaded of the need to have a lower limit of less than 30% so as not to provide a disincentive to enablers who want to come forward and disclose. However, this needs to be balanced with the fact that anyone charged a penalty under this legislation will have deliberately enabled tax evasion, and deserves to be sanctioned. We therefore propose a minimum 10% penalty (following reductions) for unprompted disclosure, and a minimum 30% penalty for prompted disclosure.

3.54. In addition, the Government believes the enabler should be given credit for any assistance provided in the course of the taxpayer's enquiry. Conversely, reductions would be reduced or withheld if the enabler had been obstructive during the course of the taxpayer's enquiry e.g. by withholding information.

**Q11. What is your view on treating all forms of deliberate enabling as equally serious?**

3.55. The consultation noted that setting a single percentage for the standard amount of penalty, and only providing reductions for disclosure, treats all forms of deliberate enabling as being equally serious. In the Government's view this is the right approach since the amount of revenue lost is not necessarily affected by the nature of the action or inaction of the enabler.

- 3.56. A number of stakeholders agreed with the suggested approach on the basis that:
- if services were categorised according to seriousness, it could be seen to be suggesting that some forms of enabling are less serious than others; and
  - the need to take account of both practical and qualitative considerations could result in subjective decisions when differentiating between levels of seriousness.
- 3.57. Others disagreed, saying that HMRC should consider the facts in each case, so that the penalty is proportionate and reflects the nature and severity of the wrongdoing and culpability. For example, some enablers will employ elaborate methods to facilitate the evasion, whilst others will employ less sophisticated methods. Several respondents thought enabler penalties should be separated into “deliberate” and “deliberate with concealment” as they are for evaders.

### Government response

- 3.58. The Government believes the suggested approach leads to simplicity and clarity in terms of the application of penalties, and accordingly proposes to treat all forms of deliberate enabling as equally serious. Reductions to the penalty will be available as set out below and in draft legislation.

**Q12. [The Government proposes to treat all forms of deliberate enabling as equally serious.] If we were to treat various forms of deliberate enabling differently, what could the relevant criteria be?**

**AND**

**Q14. What other factors [apart from reductions for disclosure] should we take into account in order to determine the amount of any reduction?**

- 3.59. Some noted that, as suggested in the consultation, factors applicable to penalties for evaders should be used to ensure consistency between the regimes. This includes the conduct of the enabler after the wrong-doing occurs, such as the quality of assistance to put things right and information provided on other wrongdoing.
- 3.60. Those who responded to this question also offered the following as potential additional or alternative criteria:
- the amount of tax loss attributable to the enabler’s actions;
  - the nature, seriousness and impact of the enabler’s involvement;
  - nature and size of the organisation;

- duration and frequency (e.g. whether the involvement is a one-off event, periodic, or sustained and continuous);
- extent to which the enabler has assisted or encouraged the taxpayer to voluntarily disclose;
- whether the disclosure is prompted or unprompted;
- enabler's compliance history;
- whether false information or falsified documents had been knowingly provided;
- whether the false information was given in response to specific questions from HMRC;
- any factors that might have inclined the enabler towards believing that his conduct was acceptable.

In categorising seriousness, one respondent suggested:

- providing initial advice, establishing the infrastructure or moving funds to avoid detection would be seen as the most serious;
- maintaining existing infrastructure but not taking steps to further the evasion would be seen as less serious;
- making only referrals and introductions would be seen as the least serious.

## Government response

3.61. The Government considers that whether the disclosure is prompted or unprompted should have a bearing on the amount of penalty charged, as should the extent to which the enabler has assisted in the course of the taxpayer's enquiry (and conversely, the extent to which the enabler prevented or hampered HMRC's enquiries into the taxpayer's non-compliance).

**Q13. [As both the enabler and evader wish to minimise their exposure to penalties for deliberate behaviour, this may lead to a conflict of interest.] To what extent do you think a reduction for disclosure will minimise that conflict of interest?**

3.62. Most respondents agreed that a reduction would minimise conflict, particularly where the enabler is given credit for encouraging the evader to disclose, but it would not solve the issue entirely.

**Q15. [The Government wishes to ensure that all enablers are liable to be charged a penalty of a meaningful amount.] Do you agree that there should be a lower limit to the penalty and is £1,000 an appropriate amount? Please give reasons for your answer.**

- 3.63. There was a little confusion in responses as to what this question meant. To ensure that the penalty provides a credible threat and all enablers are charged a meaningful amount, a lower limit of £1,000 was proposed. If, after reductions, the amount of penalty would otherwise come to less than £1,000, the lower limit would kick in and ensure that the enabler would be charged a penalty of £1,000.
- 3.64. A number of respondents agreed with this lower limit although there was no particularly strong feeling on this point either way. One respondent noted that “this could result in an enabler facing a larger penalty than a tax evader, which appears perverse”; another noted that a lower limit would “disproportionately impact those who advise the lower end of the market”.
- 3.65. One respondent thought the proposal did not go far enough and suggested a minimum penalty level of £25,000 or £50,000.

### Government response

- 3.66. As noted at paragraph 5.4 of the consultation document, one of the principles that HMRC believes should underpin a penalty regime is that penalties must provide a credible threat. If there is a penalty, HMRC must have the operational capability and capacity to raise it accurately, and if they raise it, they must be able to collect it in a cost-efficient manner. The Government wishes any penalty levied on an enabler of offshore tax evasion to be meaningful, and believes a minimum of £1,000 for unprompted disclosure and £3,000 for prompted disclosure strikes the right balance between reducing the disproportionate impact at the lower end of the market and providing a credible threat. Consequently it also proposes a minimum penalty of £3,000 for cases where the enabler receives no reductions for cooperation.

**Q16. Do you agree that there should be an upper limit to the penalty or should it be unlimited?**

**AND**

**Q17. Which of a) and b) below is your preferred option for setting the upper limit to the penalty and why?**

- a) The penalty before reduction or a fixed amount (£X); or
- b) The penalty after a reduction or a fixed amount (£X)

**AND**

**Q18. Do you consider there are other, better options for setting the upper limit, e.g. as a percentage of turnover?**

- 3.67. The vast majority who responded felt that an upper limit would be appropriate, citing consistency with MLRs and Disclosure of Tax Avoidance Schemes

legislation, and the view that an unlimited fine is only appropriate in the criminal sphere. Regarding how that upper limit is calculated, option b) was the most favoured.

- 3.68. However rather than setting a fixed upper limit of “£X”, some thought that an alternative should be considered. Whilst some considered that setting the upper limit as a percentage of turnover could result in arbitrary or disproportionate outcomes as it was too remote from the evasion, others noted that using a multiple of the fees, revenue or turnover directly raised by providing the enabling services would be a more proportionate option. The penalty cap in the MLRs<sup>1</sup> of 10% of a business’s gross profit in a preceding 12 month period was put forward as a suitable upper limit.
- 3.69. One extension to this, relating to multiple enabling acts, was to have a “per case” limit as outlined in (b), subject to an upper aggregate limit, perhaps linked to turnover.

### Government response

- 3.70. The Government notes that in some cases the penalty cap for MLR purposes is calculated with respect to profit, and in other cases turnover. However HMRC is currently reviewing its MLR penalties. The cap may not always result in a proportionate penalty where there are concerns over the profit recorded by the seriously non-compliant. For this reason, the Government is minded to not impose an upper limit on penalties for deliberate enabling.

### General comments

- 3.71. The majority of respondents agreed in broad terms with the design of the penalty, and their responses are set out under questions 7 to 19 above.

However some disagreed with the design, with one respondent commenting that the proposals are “*neither practical nor practicable.*”

- 3.72. A small number of stakeholders asked whether it was intended that the proposals would apply retrospectively.
- 3.73. Several respondents also expressed concern as to how the proposed civil penalties interact with the proposed corporate criminal offence as well as other existing law, particularly the regulatory responses available under MLRs.

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<sup>1</sup> See <http://www.hmrc.gov.uk/manuals/mlr1ppmanual/mlr1pp9150.htm>

## Government response

3.74. In the Government's view, it would not be appropriate for the same legal person to be given a civil penalty (which is punitive in nature) for conduct in respect of which they had already been convicted and thus face punishment by a criminal court (i.e. *ne bis in idem*, commonly referred to as the rule against double jeopardy). Nevertheless, the rule against double jeopardy would not be breached where:

- a) different legal persons were being penalised and prosecuted for the same activity (e.g. a company being penalised and its director prosecuted or a company being prosecuted for failing to prevent tax evasion and a director being penalised for enabling tax evasion); or
- b) different acts of wrongdoing committed by the same legal person were being both penalised and prosecuted (e.g. where a person is prosecuted under regulation 45 of the Money Laundering Regulations 2007 while also facing a civil penalty for the tax evasion enabling aspects of that same act).

3.75. Much will depend on the specific facts of each case whether the rule against double jeopardy is at risk of being breached. Finally, it is worth keeping in mind that the Crown Prosecution Service (CPS) prosecutes offences which HMRC investigates and applies the Full Code Test, which requires the prosecutor first to be satisfied that there is sufficient evidence and then to consider that a prosecution is required in the public interest. Any penalty imposed would inform the CPS decision as to whether a prosecution was in the public interest. The Government will continue to consider how the proposed sanctions interact with other existing legislation and welcomes views in this regard, as part of the consultation on the draft legislation.

3.76. The Government confirms that the proposed penalty would only be levied in respect of enabling acts and services provided after it becomes law and will not be retrospective.

**Q19. Do you agree that [the safeguards listed on page 23 of the consultation document] are sufficient? Are there any others you consider to be appropriate?**

3.77. The consultation proposed safeguards as follows:

- Only deliberate enablers will be penalised;
- Anyone charged a penalty would have the right to appeal to an independent tribunal;



- No provision to challenge a penalty on the grounds of reasonable excuse, because HMRC do not consider there can be any reasonable excuse for behaviour that was deliberate.

3.78. The majority of respondents agreed that these safeguards are sufficient, with the following caveats:

- the onus should be on HMRC to demonstrate deliberate action on the part of the enabler (this has been dealt with above);
- there needs to be more certainty around terms such as “deliberate” and “enabler;”
- approval should be sought at a senior level (Grade 6 or higher) before enabler penalties are charged;
- a small number of respondents asked what the position would be if the enabler was coerced by the evader.

### Government response

3.79. The Government takes these comments on board and has reflected this in the draft legislation, in particular by proposing a special reduction which HMRC has the discretion to use in limited circumstances. This would be primarily to cover the situation where the enabler can show they had been coerced into enabling the evasion. However, if the enabler had been coerced and took no action to remedy the position, we would consider penalties as normal.

### Proposed sanctions – naming deliberate enablers

**Q20. Which of the options below for naming deliberate enablers do you consider to be best, and why?**

**Publish the details of:**

- All enablers who are charged a penalty for deliberate enabling;**
- Enablers who are charged one or more penalties for deliberate enabling, where the aggregated lost revenue relating to those penalties exceeds £25,000; or**
- Enablers who are charged one or more penalties and who enabled, say, 5 or more UK taxpayers to evade tax through the use of offshore arrangements.**

3.80. Most respondents were broadly supportive of naming provisions; indeed, one professional body noted that they have anecdotal evidence that naming is a deterrent. However, most also noted the seriousness of naming provisions and the potential for it to be a career-ending measure. They therefore considered

that naming should apply to only the worst offenders, and were strongly in favour of a combination of options (b) and (c).

### Government response

3.81. The Government agrees that a combination of options (b) and (c) would be the most proportionate outcome. As set out in the draft legislation, the Government will publish the details of those deliberate enablers who have been charged a financial penalty, and either:

- a) The taxpayer's potential lost revenue in relation to the enabler's penalty (or the aggregate of the potential lost revenue in relation to each of the penalties) exceeds £25,000 (and the enabler would be named within 12 months of the penalty becoming final); or
- b) The enabler has been charged 5 or more penalties related to deliberate enabling during a rolling period of 5 calendar years. In this case the enabler would be named within 12 months of the last penalty becoming final.

**Q21. We propose protecting enablers from naming, where they have been given maximum penalty reductions. Do you consider this additional criterion for naming enablers appropriate? Are there any others that should be taken into account?**

3.82. Most respondents agreed that those given the maximum penalty reduction for full unprompted disclosure should be protected from publication, and many also expressed a preference for full prompted disclosures to be protected also.

### Government response

3.83. The Government's focus on enablers is in its early stages, and so it is right that enablers should not be disincentivised from coming forward and disclosing their misdemeanours. On the other hand, those who have evaded tax have been provided with a number of opportunities to come forward over the last few years and so it is right that those who continue to evade now face increased sanctions, including a higher risk of their names being published (see HMRC's consultation paper *Tackling offshore evasion: Strengthening civil deterrents for offshore evaders*).

3.84. On reflection, the Government agrees with the view that, at this stage, enablers who provide a full prompted disclosure should also be protected from public naming. However as with naming of offshore evaders, the Government may review this policy in the fullness of time to ensure that the position remains appropriate.

**Q22. What are your views on ... proposed arrangements for naming enablers? [Set out at Annex C in this document for ease of reference]**

**AND**

**Q23. Do you agree that these safeguards, in respect of naming enablers, are sufficient?**

- 3.85. The proposed arrangements are modelled on those with which stakeholders were already familiar under the s.94 FA2009 legislation for Published Details of Deliberate Defaulters and s.316C and D of FA 2004 in respect of avoidance arrangements, and hence most respondents agreed with mirroring these arrangements. However, it was noted by a number of respondents that it may be more appropriate to publish their general area of residence or business operation, rather than a specific address, to avoid vigilante action or otherwise exposing the enabler to significant personal risk.
- 3.86. A number of respondents thought that the enabler should have a right of appeal to the independent Tribunal given the potentially serious consequences for an enabler in being publicly named.

### **Government response**

- 3.87. The Government notes that, as with s.94 FA 2009, there will already be a right of appeal against the penalty. The naming provision depends on the correct charging of the penalty so in the Government's view there is no need to insert further formal appeal procedures.
- 3.88. The enabler might wish to argue that there are particular circumstances about their case that mean publishing their details could have unintended, undesirable or dangerous consequences. This is why, as with s.94, they would be given advance warning of HMRC's intention to publish and have the opportunity to make representations before publication goes ahead. Changes to the Money Laundering Regulations scheduled for 2017 will implement the 4th Anti Money Laundering Directive, and give HMRC powers to publish details of financial and non-financial sanctions. This is similar to the information which can be published under s.94 FA2009. In the Government's view, imposing an additional appeal mechanism for enablers would therefore be inconsistent with current and proposed approaches elsewhere.

## Assessment of impacts

### Q24. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

- 3.89. One respondent said the table needs to indicate the additional tax which will be collected as a result of this measure, to justify the measure.
- 3.90. Some respondents were concerned about additional burdens they perceived would be placed on businesses as a result of these civil penalties.

## Government response

- 3.91. HMRC uses penalties as a deterrent – they are not designed to raise money, or collect additional tax.
- 3.92. The Government has not been provided with evidence to suggest how businesses will be additionally burdened as a result of these civil penalties. The Government notes the concerns raised but in respect of the proposed civil sanctions it does not believe businesses will need to perform any due diligence over and above that which is already undertaken.
- 3.93. It is already the case that individuals and legal persons should not deliberately and knowingly aid and abet a taxpayer to evade tax as this is already a criminal offence (along with similar offences such as conspiracy to defraud the public revenue). As noted elsewhere in this document, this sanction merely extends HMRC's response to that behaviour to the civil arena. The scope of the sanction has already been discussed above and it is clear that it would apply to legal persons only when HMRC can demonstrate on a balance of probabilities the requisite *mens rea* at that level.

## 4. Next Steps

- 4.1. Draft legislation for inclusion in Finance Bill 2016 has been published today to allow the Government to take effective civil action against those who enable offshore tax evasion.
- 4.2. HMRC will need appropriate information to carry out investigations where an enabler may be due to pay a penalty for deliberate behaviour. Where necessary we intend to use the current information powers at Schedule 36 FA 2008 to obtain the appropriate information and the Government wants to ensure that those powers would operate correctly in these circumstances. We believe that there are three restrictions in the legislation which may not be appropriate where an information notice is issued to a suspected enabler for the purpose of checking whether they have deliberately enabled evasion. These three restrictions are:
  - Paragraph 21 (taxpayer notices following tax return) - it should be clear that the notice can be given whether or not the enabler has made a tax return under section 8, 8A or 12AA of Taxes Management Act 1970.
  - Paragraph 24 (auditors) - this restriction should not prevent an information notice requiring a suspected enabler (who is also an auditor) to provide information, or produce documents, reasonably required for checking whether he has deliberately enabled offshore evasion when such information/documents are also connected with his duties as an auditor.
  - Paragraph 25 (tax advisers) - this restriction should not prevent an information notice requiring a suspected enabler (who is also a tax adviser) to provide information, or produce documents, reasonably required for checking whether he has deliberately enabled offshore evasion when such information/documents are connected with tax advice.

The Government would welcome comments on whether these are the appropriate consequential amendments and whether any others are required.

- 4.3. The Government will continue to work closely with professional and representative bodies and other stakeholders who are interested in this measure over the coming months.
- 4.4. There are a number of points raised in consultation which will be covered in the technical and operational guidance that will be produced by HMRC in due course.

# Annex A: List of consultation respondents

The following representative bodies and firms responded to the consultation either in writing or through meetings. In addition one individual also responded to the consultation.

- Association of Accounting Technicians
- Association of British Insurers
- Association of Chartered Certified Accountants
- Association for Financial markets in Europe
- Baker Tilly
- Barclays PLC
- BDO
- British Bankers Association
- Chartered Institute of Taxation
- Compliance Reform Forum
- Criminal Bar Association
- Deloitte LLP
- Department for International Development
- Ernst & Young LLP
- Fraud Lawyers' Association
- Grant Thornton
- Institute of Chartered Accountants of England & Wales
- Institute of Chartered Accountants Scotland
- Investment Association
- KPMG LLP
- Law Society of England Wales
- Law Society Scotland
- Mazars LLP
- Moore Stephens LLP
- Oxfam GB
- Peters & Peters Solicitors LLP
- PwC LLP
- Society of Trust and Estate Practitioners
- Stanbridge Accountants
- Tax Investigations Practitioners Group

# Annex B: What is an enabler?

## How might an individual or business enable offshore evasion?

There are a number of ways in which an individual or business might knowingly or unknowingly enable someone to evade tax through the use of offshore structures. They are:

- 1) **Acting as a “middleman”**– arranging access and providing introductions to others who may provide services relevant to evasion.
- 2) **Providing planning and bespoke advice** on the jurisdictions, investments and structures that will enable the taxpayer to hide their money and any income, profit or gains.
- 3) **Delivery of infrastructure** – including setting up companies, trusts and other vehicles that are used to hide beneficial ownership; opening bank accounts; providing legal services and documentation which underpin the structures used in the evasion such as notary services and powers of attorney.
- 4) **Maintenance of infrastructure** – providing professional trustee or company director services including nominee services; providing virtual offices, IT structures, legal services and documentation which obscures the true nature of the arrangements such as audit certificates.
- 5) **Financial assistance** – helping the evader to move their money or assets out of the UK, and/or keep it hidden by providing ongoing banking services and platforms; providing client accounts and escrow services; moving money through financial instruments, currency conversions etc.
- 6) **Non-reporting** – not fulfilling their reporting, regulatory or legal obligations, which in itself helps to hide the activities of the evader from HMRC.

## What behaviours might an enabler exhibit?

Broadly speaking, in our view an enabler can exhibit one of three behaviours in relation to offshore tax evasion:



# Annex C: Naming deliberate enablers - practical issues

## What are the details that would be published?

The details we propose should be published are:

- the enabler's name (including any trading name, previous name or pseudonym);
- the enabler's address (or registered address);
- high-level information on the general actions the enabler took to enable someone to evade UK tax, including timescales and years involved;
- the number of people the enabler helped;
- the total amount of penalty(ies) charged on the enabler; and
- the total amount of revenue loss related to the penalty(ies) charged on the enabler.

## When would HMRC publish these details?

Publication would not occur before:

- the time for making any appeal or further appeal against the penalty had expired; and / or
- any appeal made had been finally determined and upheld HMRC's decisions:
  - to treat the enabler's behaviour as deliberate; and
  - not to give the maximum reduction for full unprompted disclosure.

## For how long would the details be published?

We intend to follow the practice already established for publishing the details of serious defaulters, and remove published details when one year has elapsed. This follows existing practice as set out in section 94(8) Finance Act 2009.

## Where would HMRC publish the details?

We intend to follow the practice already established for publishing the details of serious defaulters, and use gov.uk for publication.



## Annex D: Draft legislation

The draft legislation follows on the next page. The draft legislation should not be viewed as final and we welcome comments on the legislation, in writing, to [consult.nosafehavens@hmrc.gsi.gov.uk](mailto:consult.nosafehavens@hmrc.gsi.gov.uk) by 3<sup>rd</sup> February 2016.

**7 Civil penalties for enablers of offshore tax evasion**

- (1) Schedule {js7012} makes provision for civil penalties for persons who enable offshore tax evasion by other persons.
- (2) Schedule {js7012} comes into force on such day as the Treasury may appoint by regulations made by statutory instrument.
- (3) Regulations under this section may –
  - (a) appoint different days for different purposes, and
  - (b) make such transitional provision as the Treasury considers appropriate in connection with the coming into force of any provision of this Part.

## SCHEDULE 1

Section [j7012]

## PENALTIES FOR ENABLERS OF OFFSHORE TAX EVASION [Js7012]

## PART 1

## LIABILITY FOR PENALTY

*Liability for penalty*

- 1 (1) A penalty is payable by a person (P) where conditions A and B are met.
- (2) Condition A is that P—
  - (a) has enabled another person (Q) to carry out offshore tax evasion, and
  - (b) knew when P's actions were carried out that they enabled, or were likely to enable, Q to carry out offshore tax evasion.
- (3) For the purposes of this Part P enables Q to carry out offshore tax evasion by encouraging, assisting or otherwise facilitating Q to carry out offshore tax evasion.
- (4) Q carries out "offshore tax evasion" by—
  - (a) committing a relevant offence where the tax at stake is income tax, capital gains tax or inheritance tax, or
  - (b) engaging in behaviour that makes Q liable (if the applicable conditions are met) to a relevant penalty where the tax at stake is income tax, capital gains tax or inheritance tax.
- (5) The relevant offences are—
  - (a) an offence of cheating the public revenue involving offshore activity, or
  - (b) an offence under section 106A of TMA 1970 (fraudulent evasion of income tax) involving offshore activity,
  - (c) an offence under section 106B, 106C or 106D of TMA 1970 (offences relating to certain failures to comply with section 7 or 8 by a taxpayer chargeable to income tax or capital gains tax on or by reference to offshore income, assets or liabilities).
- (6) The relevant penalties are—
  - (a) a penalty under paragraph 1 of Schedule 24 to FA 2007 (errors in taxpayer's document) involving an offshore matter or an offshore transfer (within the meaning of that Schedule),
  - (b) a penalty under paragraph 1 of Schedule 41 to FA 2008 (failure to notify etc) in relation to a failure to comply with section 7(1) of TMA 1970 involving offshore activity,
  - (c) a penalty under paragraph 1 of Schedule 55 to FA 2009 (failure to make returns) involving offshore activity,
  - (d) a penalty under paragraph 1 of Schedule 21 to FA 2015 (penalties in connection with relevant offshore asset moves).
- (7) Condition B is that—
  - (a) in the case of offshore tax evasion consisting of the commission of a relevant offence, Q has been convicted of the offence and the conviction is final, or

- (b) in the case of offshore tax evasion consisting of behaviour that makes Q liable to a relevant penalty, Q has been found to be liable to such a penalty, assessed and notified, and the penalty is final.
- (8) A conviction becomes final when the time allowed for bringing an appeal against it expires or, if later, when any appeal against conviction has been determined.
- (9) A penalty becomes final –
  - (a) when the time allowed for any appeal or further appeal relating to it expires or, if later, any appeal or final appeal relating to it is determined, or
  - (b) if a contract is made between the Commissioners and the person under which the Commissioners agree not to take proceedings to recover it, at the time the contract is made.

*Meaning of “involving offshore activity” and related expressions*

- 2 (1) This paragraph has effect for the purposes of this Schedule.
- (2) Conduct involves offshore activity if it involves –
  - (a) an offshore matter,
  - (b) an offshore transfer, or
  - (c) a relevant offshore asset move.
- (3) Conduct involves an offshore matter if it results in a potential loss of revenue that is charged on or by reference to –
  - (a) income arising from a source in a territory outside the United Kingdom,
  - (b) assets situated or held in a territory outside the United Kingdom,
  - (c) activities carried on wholly or mainly in a territory outside the United Kingdom, or
  - (d) anything having effect as if it were income, assets or activities of the kind described above.
- (4) Where the tax at stake is inheritance tax, assets are treated for the purposes of sub-paragraph (3) as situated or held in a territory outside the United Kingdom if they are so held or situated immediately after the transfer of value by reason of which inheritance tax becomes chargeable.
- (5) Conduct involves an offshore transfer if –
  - (a) it does not involve an offshore matter,
  - (b) it is deliberate (whether or not concealed) and results in a potential loss of revenue,
  - (c) the condition set out in paragraph 4AA of Schedule 24 to FA 2007 is satisfied.
- (6) Conduct involves a relevant offshore asset move if at a time when Q is the beneficial owner of an asset (“the qualifying time”) –
  - (a) the asset ceases to be situated or held in a specified territory and becomes situated or held in a non-specified territory,
  - (b) the person who holds the asset ceases to be resident in a specified territory and becomes resident in a non-specified territory, or
  - (c) there is a change in the arrangements for the ownership of the asset,

and Q remains the beneficial owner of the asset, or any part of it, immediately after the qualifying time.

- (7) Paragraphs 4(2) to (4) of Schedule 21 to FA 2015 apply for the purposes of sub-paragraph (6) above as they apply for purposes of paragraph 4 of that Schedule.
- (8) In sub-paragraph (6) above, “specified territory” has the same meaning as in paragraph 4 of Schedule 21 to FA 2015.

#### *Amount of penalty*

- 3 The penalty payable under paragraph 1 is the higher of—
  - (a) 100% of the potential lost revenue, or
  - (b) £3,000.

#### *Meaning of “potential lost revenue”*

- 4 (1) The potential lost revenue in respect of conduct resulting in a liability to a penalty under paragraph 1 is the additional amount due or payable in respect of the tax at stake as a result of correcting any inaccuracy in information in a document (including an inaccuracy attributable to a supply of false information or withholding information) or a failure to notify an under-assessment
- (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 been erroneously paid by way of repayment of tax,
  - (b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.
- (3) Paragraphs 6 to 8 of Schedule 24 to FA 2007 apply (so far as relevant) for the purposes of this Schedule as they apply for the purposes of Schedule 24.

#### *Reduction of penalty for disclosure etc by P*

- 5 (1) If P (who would otherwise be liable to a penalty under paragraph 1)—
  - (a) makes a disclosure to HMRC of—
    - (i) a matter relating to an inaccuracy in a document, a supply of false information or a failure to disclose an under-assessment,
    - (ii) P’s enabling of actions by Q that constituted (or might constitute) a relevant offence or that made (or might make) Q liable to a relevant penalty, or
    - (iii) any other matter HMRC regard as assisting them in relation to the assessment of P’s liability to a penalty under paragraph 1, or
  - (b) assists HMRC in any investigation leading to Q being charged with a relevant offence or found liable to a relevant penalty,HMRC must reduce the penalty to one that reflects the quality of the disclosure or assistance.
- (2) But the penalty may not be reduced—

- (a) in the case of unprompted disclosure or assistance, below whichever is the higher of –
    - (i) 10% of the potential lost revenue, or
    - (ii) £1,000, or
  - (b) in the case of prompted disclosure or assistance, below whichever is the higher of –
    - (i) 30% of potential lost revenue, or
    - (ii) £3,000.
- 6 (1) This paragraph applies for the purposes of paragraph 5.
- (2) P discloses a matter by –
  - (a) telling HMRC about it,
  - (b) giving HMRC reasonable help in relation to the matter (for example by quantifying an inaccuracy in a document, an inaccuracy attributable to the supply of false information or withholding of information or an under-assessment), and
  - (c) allowing HMRC access to records for any reasonable purpose connected with resolving the matter (for example for the purpose of ensuring that an inaccuracy in a document, an inaccuracy attributable to the supply of false information or withholding of information or an under-assessment is fully corrected).
- (3) P assists HMRC in relation to an investigation leading to Q being charged with a relevant offence or found liable to a relevant penalty by –
  - (a) assisting or encouraging Q to disclose all relevant facts to HMRC,
  - (b) allowing HMRC access to records, or
  - (c) any other conduct which HMRC considers assisted them in investigating or assessing Q’s liability to such a penalty.
- (4) Disclosure or assistance by P –
  - (a) is “unprompted” if made at a time when P has no reason to believe that HMRC have discovered or are about to discover Q’s offshore tax evasion (including any inaccuracy in a document, supply of false information or withholding of information, or under-assessment), and
  - (b) otherwise is “prompted”.
- (5) In relation to disclosure or assistance, “quality” includes timing, nature and extent.
- 7 (1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1.
- (2) In sub-paragraph 1 “special circumstances” does not include –
  - (a) ability to pay, or
  - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –
  - (a) staying a penalty, or
  - (b) agreeing a compromise in relation to proceedings for a penalty.

*Procedure for assessing penalty, etc*

- 8 (1) Where a person becomes liable for a penalty under paragraph 1 HMRC must –
- (a) assess the penalty,
  - (b) notify the person, and
  - (c) state in the notice the period in respect of which the penalty is assessed.
- (2) A penalty must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.
- (3) An assessment of a penalty –
- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule), and
  - (b) may be enforced as if it were an assessment to tax.
- (4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax that would have been shown in a return.
- (5) Sub-paragraph (6) applies if –
- (a) an assessment in respect of a penalty is based on a liability to tax that would have been shown on a return, and
  - (b) that liability is found by HMRC to have been excessive.
- (6) HMRC may amend the assessment so that it is based upon the correct amount.
- (7) But an amendment under sub-paragraph (6) –
- (a) does not affect when the penalty must be paid,
  - (b) may be made after the last day on which the assessment in question could have been made under paragraph 9.
- 9 An assessment of a person as liable to a penalty under paragraph 1 may not take place more than 2 years after the fulfilment of the conditions mentioned in paragraph 1(1) (in relation to that person) first came to the attention of an officer of Revenue and Customs.

*Appeals*

- 10 A person may appeal against –
- (a) a decision of HMRC that a penalty under paragraph 1 is payable by that person, or
  - (b) a decision of HMRC as to the amount of a penalty under paragraph 1 payable by the person.
- 11 (1) An appeal under paragraph 10 is to be treated in the same way as an appeal against an assessment to the tax at stake (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
- (2) Sub-paragraph (1) does not apply –

- (a) so as to require the person bringing the appeal to pay a penalty before an appeal against the assessment of the penalty is determined,
  - (b) in respect of any other matter expressly provided for by this Schedule.
- 12 (1) On an appeal under paragraph 10(a) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 10(b) that is notified to the tribunal, the tribunal may –
  - (a) affirm HMRC's decision, or
  - (b) substitute for that decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its own decision for HMRC's, the tribunal may rely on paragraph 5 or 7 (or both) –
  - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point),
  - (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.
- (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.
- (5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 11(1)).

#### *Double jeopardy*

- 13 A person is not liable to a penalty under paragraph 1 in respect of conduct for which the person –
  - (a) has been convicted of an offence, or
  - (b) has been assessed to a penalty under any provision other than paragraph 1.

#### *Application of provisions of TMA 1970*

- 14 Subject to the provisions of this Part, the following provisions of TMA 1970 apply for the purposes of this Part 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 114 (delivery and service of documents).

#### *Interpretation of Part 1*

- 15 (1) This paragraph applies for the purposes of this Schedule.
- (2) References to an assessment to tax, in relation to inheritance tax, are to a determination.



## PART 2

## PUBLISHING DETAILS OF PERSONS FOUND LIABLE TO PENALTIES

*Naming etc of persons assessed to penalty or penalties under paragraph 1*

- 16 (1) HMRC may publish information about a person if—
- (a) in consequence of an investigation, one or more penalties under paragraph 1 is found to have been incurred by the person, and
  - (b) the potential lost revenue in relation to the penalty (or the aggregate of the potential lost revenue in relation to each of the penalties) exceeds £25,000.
- (2) HMRC may also publish information about a person if the person has been assessed to 5 or more penalties under paragraph 1 in any 5 year period.
- (3) The information that may be published is—
- (a) the person's name (including any trading name, previous name or pseudonym),
  - (b) the person's address (or registered office),
  - (c) the nature of any business carried on by the person,
  - (d) the amount of the penalty or penalties in question,
  - (e) the periods or times to which the actions giving rise to the penalty or penalties relate,
  - (f) any other information that HMRC consider it appropriate to publish in order to make clear the person's identity.
- (4) The information may be published in any manner that HMRC consider appropriate.
- (5) Before publishing any information HMRC must—
- (a) inform the person that they are considering doing so, and
  - (b) afford the person the opportunity to make representations about whether it should be published.
- (6) No information may be published before the day on which the penalty becomes final or, where more than one penalty is involved, the latest day on which any of the penalties becomes final.
- (7) No information may be published for the first time after the end of the period of one year beginning with that day.
- (8) No information may be published about a penalty if the amount of the penalty—
- (a) is reduced under paragraph 5 to—
    - (i) 10% of the potential lost revenue (in the case of unprompted disclosure or assistance), or
    - (ii) 30% of potential lost revenue (in a case of prompted disclosure or assistance),
  - (b) would have been reduced to 10% or 30% of potential lost revenue but for the imposition of the minimum penalty,
  - (c) is reduced under paragraph 7 to nil or stayed.

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- (9) For the purposes of this paragraph a penalty becomes final if it has been assessed and the time for any appeal or further appeal relating to it expires or, if later, any appeal or final appeal relating to it is finally determined.
- 17 (1) The Treasury may by regulations amend paragraph 16(1) to vary the amount for the time being specified in sub-paragraph (1)(b).
- (2) Regulations under this paragraph are to be made by statutory instrument.
- (3) A statutory instrument under this paragraph is subject to annulment in pursuance of a resolution of the House of Commons.