



Modernising Powers, Deterrents and Safeguards

Working with Tax Agents: Dishonest Conduct

Discussion document

Publication date: 14 July 2011

Closing date for comments: 16 September 2011

- Subject:** This discussion document seeks comments on revised draft legislation which will enable HM Revenue & Customs (HMRC) to tackle tax agents who act dishonestly in tax matters.
- Scope:** HMRC has consulted on a number of aspects of the tax system with a view to modernisation and alignment across taxes. As part of this process it is looking at how HMRC interacts with tax agents to deal with dishonest conduct other than by way of a criminal investigation.
- HMRC is now at Stage 3 of the new approach to Tax Policy making and this discussion document seeks views on draft legislation which has been revised in the light of earlier consultation documents. A response document is being published separately.
- Who should read this:** Tax agents, their representative bodies and others involved with the preparation of tax returns as well as individuals or businesses who use the services of a tax agent.
- Duration:** 14 July 2011 - 16 September 2011.
- Enquiries:** Enquiries should be sent to powers.review-of-hmrc.gsi.gov.uk or please telephone 0207 147 3223.
- How to respond:** Comments should be sent:
by e-mail to: powers.review-of-hmrc@hmrc.gsi.gov.uk;
or by post to: HMRC Review of Powers, Working with Tax Agents, Room 1/72, 100 Parliament Street, London SW1A 2BQ
or by fax to: 0207 147 0666.
- Additional ways to be involved:** HMRC will be inviting tax agents, their representative bodies and other interested parties to meet with the Review team and discuss the issues raised in the consultation document.
- After the discussion document:** Responses to this discussion document will be published later this year. Subject to a further consultation in autumn 2011 on draft legislation, any changes might be introduced through the 2012 Finance Bill. The aim would be for the new legislation to come into effect from 1 April 2013.
- Getting to this stage:** The Review of Powers, Deterrents and Safeguards (the Review) was set up to provide a modernised framework of law and practice for HMRC appropriate to the merged Department's tasks and which allows those tasks to be carried out effectively and efficiently.
- The Review is looking at how to deal with the small numbers of tax agents who engage in dishonest conduct. Here is a link to the Review's website: <http://www.hmrc.gov.uk/about/powers-appeal.htm>

**Previous
engagement:**

HMRC has previously issued two formal consultation documents in this area: *Working with Tax Agents* was published in April 2009 and *Working with Tax Agents: the next stage* in December 2009. Draft legislation was published for consultation in February 2010.

Since then HMRC has been working closely with the agent representative bodies and other groups to address concerns highlighted in the 2010 consultation.

This discussion document responds to the comments received and sets out HMRC's proposed model and revised legislation.

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Chapter 1: Introduction

- 1.1 Tax agents play a vital role in the delivery of the tax system which could not function effectively without them. 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.
- 1.2 But there is a very small number of dishonest tax agents whose actions can affect a larger group of taxpayers. If their dishonesty extends across a number of clients, the effect is magnified and has a disproportionate effect on the Exchequer, HMRC and the financial affairs of the clients themselves. HMRC needs to be able to deter dishonest behaviour in the first place and penalise it when it does occur, while rewarding co-operation and disclosure. It also needs to identify the scale of the dishonesty in order to be able to put matters right for the taxpayers whose affairs are incorrect.
- 1.3 This discussion document sets out HMRC's latest proposals for penalising dishonest tax agents civilly and getting access to their working papers to determine the extent of their dishonesty. There have been two previous consultations on this subject, including publication of draft legislation in 2010¹.
- 1.4 HMRC issued a consultation document on 31 May 2011² seeking views on its proposed Agent Strategy. One element of the Strategy is to look at agent performance in order to provide support but also to identify those few agents who are found to act dishonestly. The work being done by the Review to modernise and amend the existing legislation to address dishonest agents will form part of the Strategy.
- 1.5 HMRC's policy aim is to select the most effective, appropriate and proportionate approach to handling those few tax agents who have been identified as dishonest, either by effective and firm civil action or in more serious cases by the use of criminal procedures. Not all cases are suitable for criminal investigation, and even prosecuting all that are suitable could unbalance HMRC's criminal investigation coverage. This document is about devising an effective civil approach to dishonest agents.
- 1.6 Consultation shows that the tax agent professional bodies fully support HMRC in taking strong action against the small minority of tax agents who deliberately help others to evade tax, provided appropriate safeguards are in place and the steps taken are proportionate.
- 1.7 But the professional bodies in common with other respondents had concerns about how this should be best achieved. The draft legislation was not well received and prompted numerous responses. It was felt that the draft legislation was too widely drawn and would be disproportionate in effect. Many also felt that HMRC had not demonstrated why new legislation was needed.

¹ *Working with Tax Agents* published in April 2009, *Working with Tax Agents: The Next Stage* published on 9 December 2009. Draft legislation was published on 8 February 2010.

² *Establishing the future relationship between the tax agent community and HMRC* 31 May 2011.

- 1.8 HMRC has looked critically at the proposed approach in the light of those responses. It has held a number of meetings and workshops to explore some of the ways in which legislation might be framed to better reflect the policy aim. This discussion document responds to the comments, proposing a new model and revised legislation to underpin it. It is split into several chapters:
- Chapter 2 summarises the key changes being made and sets out the revised model;
 - Chapter 3 provides more detail on the problem areas identified with the draft legislation and how HMRC has addressed them;
 - Chapter 4 lists the safeguards now being proposed;
 - Chapter 5 shows the revised draft legislation and explanatory material;
 - Chapter 6 sets out the Taxes Impact Assessment; and
 - Chapter 7 lists the specific questions being asked.
- 1.9 A full response document is published alongside this document listing those who responded to the last consultation and the main areas of concern.
- 1.10 HMRC welcomes views on whether the draft legislation achieves the stated policy aim, and in particular whether it:
- fairly balances the rights of tax agents against the interests of taxpayers generally and the Exchequer;
 - encourages those who have been dishonest to put their affairs in order; and
 - has appropriate safeguards.
- 1.11 The closing date for comment is 16 September. Subject to responses to this document and Ministers' views, a further draft of this legislation will be published, along with other clauses, later this year. It is expected that this autumn consultation would be for a 12 week period.

Chapter 2: The changes made and the revised model

- 2.1 This chapter sets out HMRC's policy aim, summarises the main changes and sets out HMRC's proposals for a new model.

Policy Aim

- 2.2 HMRC's overall policy aim remains as previously consulted on. HMRC needs to augment its criminal powers with an effective suite of civil powers to address those prepared to act dishonestly. HMRC's current powers are both flawed and inadequate, as they do not apply across all of the taxes and duties HMRC administers. HMRC seeks a modernised framework allowing it both to penalise dishonest tax agents and to get access to their working papers to examine whether the dishonesty extends further through the client base (described in the 1983 Keith report as seeing "how far the rot has spread"). And following earlier consultation on the principle, it aims to discourage dishonesty by publishing details of those who have been penalised and do not help put right their actions by fully disclosing the extent of their actions.
- 2.3 Putting that policy aim into effect will require amended legislation. This would replace sections 99 and 20A of the Taxes Management Act (TMA) 1970 and extend the new legislation to all taxes and duties. These direct tax provisions were enacted at a time when the statutory landscape for penalties and information powers was very different from today, and lack the level of safeguards introduced by HMRC over the past few years.
- 2.4 HMRC published consultation on its proposed policy in December 2009 and draft legislation intended to give effect to the policy in February 2010. While there was agreement that taxpayers, HMRC and the tax profession had a shared interest in rooting out dishonesty, there was little agreement that the draft legislation achieved the policy aim. It was felt to be too widely drawn and disproportionate in effect.
- 2.5 HMRC has gone back to basics to consider how the policy could be refined, and the draft legislation further developed, to address these concerns. Before discussing these in detail, it is worth summarising what has changed.
- 2.6 The draft legislation now contains more safeguards than before, notably a new right of appeal for the agent. The legislation separates out the "determination of dishonest conduct" from the approval of the file access notice. Both functions are overseen by the Tribunal, but they are now separate stages, with a clear distinction between the appeal against a notice of dishonest conduct and the application for a file access notice.
- 2.7 Moving away from a model which used the same language as Schedule 24 to Finance Act (FA) 2007 now results in a model that is closer to sections 99 and 20A TMA. It is not exactly the same because it uses a modern approach in the language used and the way the legislation is drafted.

Summary of changes

2.8 The table below summarises the main changes made (more details in Chapter 3) and the main safeguards are summarised in Chapter 4.

Area of concern	Change made
Including all tax agents	Including only agents in the course of business
Penalising “deliberate wrong doing”	Penalising “dishonest conduct”
Schedule 24 type approach does not work	Move away from basing the legislation too closely on Schedule 24/36 precedents. More tailored to dishonest agents.
Concern that loss of tax definition caught “legitimate” tax loss like ISAs	Clear that only “illegitimate” loss of tax is caught
That advice in the course of a radio programme would be caught	Advice to the general public would not be caught
Individual or firm to be penalised?	Clear that it is the individual that will be penalised rather than the firm
Single tribunal hearing to establish wrongdoing and authorise a notice	Finding of dishonest conduct and file access notice split into separate stages
No appeal for agent as notice pre-authorized by tribunal	New appeal right for agent
No appeal for third party	New appeal for third party on ground of onerousness
Without notice (“ex parte”) hearings where the agent is not entitled to be present	No without notice (“ex parte”) hearings – agents can attend all hearings
Scope of notice is too wide	New restriction on access to documents over 20 years old unless still relevant
Tax geared penalty	“Not exceeding” type of penalty

The revised model

Determination of dishonest conduct

2.9 HMRC will find what they see as evidence of dishonest conduct on the part of an individual acting as a tax agent, by carrying out compliance checks into one or more clients often using the powers under Schedule 36 FA 2008:

- in the light of any discussions, HMRC will issue a notice to the agent to say that they have determined that the agent has engaged in dishonest conduct (a notice of dishonest conduct);
- an authorised HMRC officer will approve this notice before issue;
- the agent will have a right of appeal against the notice to the First-tier tribunal (and onwards if appropriate);

- the agent will have the right to attend the hearing and to access all the other protections available to an appellant in the Tribunal rules.

Access to working papers

2.10 HMRC describes working papers as all documents that relate to the work the agent has done in relation to the client's tax affairs, including the preparation of accounts, returns and claims, and covering correspondence, analysis, calculations etc. Documents include electronic documents³.

2.11 Working papers include tax advice and audit papers. They would not include material which is subject to legal privilege. Existing procedures⁴ to settle whether any particular material is privileged will apply.

- There will be no access to working papers until the appeal route against the notice of dishonest conduct has been exhausted (i.e. no appeal, or the appeal has run its course);
- Once the appeal route is exhausted HMRC is able to apply to the First-tier Tribunal for permission to issue a notice to access working papers of the dishonest tax agent;
- This application will require the consent of an authorised officer within HMRC;
- The agent will have the right to make representations to the tribunal and attend the hearing;
- A notice cannot be approved in respect of papers over 20 years old unless still relevant for tax purposes;
- A notice cannot be approved in respect of papers covered by Legal Professional Privilege, personal information etc;
- A third party who holds the papers will have a right of appeal to the tribunal;
- If the tribunal approves a notice there will be a penalty for not complying with it. This will carry a right of appeal to the tribunal.

Penalty

2.12 Once HMRC has quantified the dishonest conduct it may assess a penalty for the dishonest conduct.

- The penalty will normally be set on the basis of the working papers, but in some cases it may not be necessary to seek access to those papers;
- The amount of the penalty will reflect the level of disclosure ("telling, giving and helping") by the agent;

³ See section 114 FA 2008

⁴ Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009/1916)

- The agent will have a right of appeal to the First-tier tribunal against the penalty and the amount;
- There will be provision for a reduction in special circumstances.

Publication of details

- 2.13 Where there has not been full disclosure, HMRC will publish details of dishonest tax agents. This follows consultation on the principle in December 2009.
- 2.14 Where an agent complies with a tribunal approved notice and makes full disclosure their details will not be published. Where an agent does not have possession of the working papers but discloses as fully as they could their details will not be published.
- 2.15 The policy aim is to follow the approach taken in section 94, so that publication of the details will follow automatically, without tribunal involvement, if the maximum reduction for disclosure is not earned. Publication would only take place once all avenues of appeal are exhausted. Only if representations were made to HMRC and accepted would details not be published.
- 2.16 Unlike section 94 FA 2009, HMRC does not consider there should be a de minimis of £25,000 due to the agent's position of trust and responsibility.

Chapter 3: Key problem areas and HMRC's proposed solutions

3.1 This Chapter explains the main areas of concern with the February 2010 draft of the legislation and HMRC's proposed approach to address them.

Summary of original proposals

- 3.2 The original draft legislation focussed on those tax agents involved in "deliberate wrongdoing" likely to lead to a "loss of tax". This approach was modelled on the behaviours introduced to penalise taxpayers for such acts as a deliberate inaccuracy in a return, deliberately withholding information by failing to file a tax return or deliberately committing various Excise offences⁵.
- 3.3 It provided a power for HMRC to seek tribunal approval of an information notice in order to access that agent's working papers. A notice would only be approved if the tribunal decided that there had been "deliberate wrongdoing". There was a penalty if the agent did not comply with the notice.
- 3.4 Once HMRC had accessed the papers it could set a penalty for "deliberate wrongdoing" which was appealable.
- 3.5 The penalty charged was calculated by reference to the tax at stake up to a proposed maximum of £50,000 and the amount set reflected any disclosure provided by the agent.
- 3.6 HMRC envisaged that where the agent did not make a full disclosure, details of the agent would be published, but no draft legislation on this was published in 2010.

New proposals

Definition of tax agent

- 3.7 The policy aim is to tackle dishonesty not only amongst those who submit incorrect information to HMRC on behalf of another person, but also those who provide advice and assistance to the taxpayer or another agent. But the overwhelming view of respondents was that the original definition of tax agent, when taken together with the definition of loss of tax, went wider than necessary to achieve this. Many felt it could catch a wide range of people including those who give casual advice to friends, family and acquaintances; bank or building society staff suggesting an ISA; and charities who help vulnerable taxpayers. It was also felt it could include secretarial and other support staff working on documents.
- 3.8 Although HMRC does not accept all these points, it does agree that a tighter definition would better meet the policy aim. It has changed the definition so that

⁵ Schedule 24 to FA 2007, Schedule 41 to FA 2008, etc

it now only includes agents who assist clients in the course of business. This now broadly aligns with HMRC's Agent Strategy, which focuses on paid agents. The definition will therefore not cover charities which provide tax advice on the radio. Depending on the particular circumstances, professional tax agents providing pro bono assistance will not be caught.

Individual/firm

- 3.9 There were concerns that because the legislation referred initially to the tax agent as a "person" rather than to an "individual" it would catch a company or an LLP, as well as each person within a firm who assisted a client.
- 3.10 The legislation now makes it clear that only an individual can be a tax agent for this Schedule.

Deliberate wrongdoing

- 3.11 The draft legislation penalised "deliberate" acts by an agent, seeking alignment with the penalty framework which applies to taxpayers under Schedule 24 FA 2007 and other provisions. "Deliberate" needs something to act on, and for agents "wrongdoing" seemed to describe fully the range of actions and impart a sense of knowledge and intention.
- 3.12 The phrase "deliberate wrongdoing" was criticised during consultation as providing too low a test. It was also thought to be too widely drawn when it was combined with the proposed wide definition of loss of tax. Some preferred more familiar terms such as "fraud" and "evasion" which were thought to be clearer and more appropriate.
- 3.13 HMRC has concluded that alignment with the language of taxpayer provisions is desirable but cannot be the main priority. Agents are in a different position from taxpayers and it is not essential to have the same language, given that the actions involved are different.
- 3.14 To HMRC "deliberate wrongdoing" had the same weight as dishonesty. But this view was not shared. To respond to the external concerns, HMRC is therefore proposing that the test should now be that a tax agent has engaged in "dishonest conduct". This is a significant test and is a familiar legal concept.

Loss of tax

- 3.15 The initial legislation penalised deliberate wrongdoing involving a loss of revenue from tax. It was argued that this could catch legitimate tax planning via an ISA, since it was a deliberate act with the intention of bringing about a reduction in tax.
- 3.16 Although HMRC does not agree this interpretation it is not the intention to catch advice in respect of ISAs. The latest draft makes clear that a loss of tax revenue in this context means a loss of tax which is "illegitimate" or one not envisaged by tax legislation. A loss of tax is defined as paying less tax than the law requires or gaining more relief than the law allows, or gaining a timing

advantage not allowed by law. So an ISA which has a specific statutory basis is not a loss of tax for this purpose. And any loss of tax has to be the result of dishonest conduct. It would not include tax avoidance or tax planning, whether effective or not, which lack the required element of dishonesty.

Tribunal role and Right of appeal for the agent

- 3.17 The draft legislation envisaged HMRC applying to the tribunal for an information notice to access the agent's working papers. One of the conditions which had to be met before a notice could be issued was that the tribunal had to be satisfied that the agent had engaged in deliberate wrongdoing.
- 3.18 There was concern over the procedure whereby the existence of deliberate wrongdoing was to be decided as part of a hearing to approve a notice. Some respondents were worried that the legislation read as if it were a routine application for a notice rather than requiring the tribunal to establish dishonest conduct. Such a hearing was felt to be a lesser safeguard. It would put the agent in an unusual position as regards the tribunal rules, by making the agent the respondent rather than the appellant. For example, under Rule 25 of the Tribunal rules⁶ the agent would need to produce the statement of case without necessarily being aware of HMRC's case.
- 3.19 The original legislation was clear that the tribunal would first need to establish deliberate wrongdoing and then look at the notice. HMRC believes that the tribunal rules are flexible enough to address this situation. Doing this at a single hearing reduces the scope for delay. But it has been argued that whatever the legislation provides, the tribunal would always deal with the dishonesty at a separate hearing so, in practice, HMRC would not save any time.
- 3.20 HMRC appreciates that this is a key point, and that the legislation should bring out more clearly the stages of the process.
- 3.21 A further key objection was that the original draft did not give the agent a right of appeal against the finding of deliberate wrongdoing. This is the norm for pre-authorised notices, but external commentators felt this did not recognise the serious nature of the decision given that deliberate wrongdoing could affect the agent's livelihood. Under the existing section 20A TMA 1970 access to papers cannot be granted until the appeal against a section 99 penalty is exhausted.
- 3.22 HMRC recognises the argument for a right of appeal as an extra safeguard.
- 3.23 HMRC has concluded that two important principles are that access to working papers will not be given until that right of appeal has been exhausted (or not invoked), and that the model adopted should be clear that the process is more significant than a simple application for a notice.
- 3.24 The draft legislation seeks to reflect these principles. HMRC recognise that how the safeguards will work in practice is a key area of concern and it will continue discussions with agents, their representative bodies and the Ministry of Justice

⁶ The Tribunal procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 SI 2009 No. 273

to reach a common understanding of the opportunities available to agents to make representations and have their voice heard.

Burden of proof

- 3.25 In tax appeals the burden of proof generally lies on the taxpayer who seeks to displace an assessment or overturn a decision. But case law shows that the burden of proof is reversed where, as here, HMRC alleges fraud or dishonesty⁷. So it would be for HMRC to substantiate its determination of dishonest conduct to the Tribunal's satisfaction. Some have suggested that the legislation should make this explicit, along the lines of the now repealed section 60 VATA 1994. HMRC has considered this carefully, but given the strength of the case law and that it is set out in the guidance given to those attending the First- tier Tribunal, is of the view that no specific provision is needed.

Standard of proof

- 3.26 The standard of proof in civil cases is the balance of probability. However, the more unlikely the offence, the more compelling the evidence must be to substantiate the allegation. As Lord Nicholl said in *Re H* (1996) AC 563:

“Fraud is usually less likely than negligence.... Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”

HMRC's notice of dishonest conduct

- 3.27 HMRC is now proposing that if it is satisfied that a tax agent has engaged in dishonest conduct it will, after appropriate initial discussions with the agent, issue a dishonest conduct notice. Such a notice would need approval by an authorised officer before issue and would carry a right of appeal. Given the serious nature of such a notice HMRC intend that approval would be reserved to a suitably senior authorised officer.
- 3.28 The tribunal would hear any appeal against HMRC's notice of dishonest conduct. Once the appeal period is up or the appeal is resolved in HMRC's favour, HMRC would apply for a file access notice. HMRC would not be able to obtain such a notice until the appeal route is exhausted. Once the tribunal has approved the file access notice, HMRC will have access to the agent's working papers. After reviewing the papers and any further enquiries, HMRC will quantify the lost tax and assess the penalty, the amount of which will depend on the level of disclosure.

⁷ Examples include *Khan v Revenue and Customs Comms* [2006] EWCA Civ 89, or *Brady (HMIT) v Group Lotus Car Companies* [1987] 3 All ER 1050.

Right of appeal for third party

- 3.29 While it is the working papers of the individual tax agent that HMRC wants to obtain, in practice they might be owned by a third party (for example the employer of the dishonest agent) or by a successor. There were also concerns over the period for which papers could be requested from such third parties.
- 3.30 HMRC is now proposing that a third party holding relevant working papers should also be able to appeal against the content of the file access notice on grounds of onerousness (but not the notice of dishonest conduct). This would protect an innocent third party from the trouble and disruption that an unlimited access power could cause.

Without notice tribunal hearings

- 3.31 HMRC had originally suggested that in some cases the tribunal should be able to decide to issue an information notice without the agent being present (without notice (“ex parte”) hearings).
- 3.32 HMRC agreed in 2010 that it would not pursue this option of without notice hearings and this is made clear in the draft legislation.

Old documents

- 3.33 In recognition of the concern about the potential scope of the file access notice, HMRC is proposing a new provision to exclude documents from the scope of the notice. This would apply to documents over 20 years old, unless they are still relevant to later accounting periods.

Penalty

- 3.34 The original legislation envisaged a tax geared penalty which would be capped. There were doubts about how proportionate a tax geared penalty was, since the agent would not benefit directly from the amount of tax foregone. The legislation required to provide for the annual cap was also complex.
- 3.35 HMRC is now proposing that the penalty will be up to a certain amount rather than tax geared. The amount currently proposed is £50,000 as in the previous consultation, with that amount reduced to reflect any disclosure made by the agent (“telling, giving, helping”).
- 3.36 In line with current legislative practice, the penalty will only be assessed after all relevant information has been obtained.
- 3.37 This model is closer to the existing penalty in section 99 TMA 1970, which penalises each offence of knowingly assisting or inducing the preparation or delivery of incorrect information or documents with a penalty not exceeding £3,000.

Chapter 4: Proposed Safeguards

4.1 This Chapter summarises the proposed safeguards for agents⁸.

- “Dishonest conduct” is a high test;
- A dishonest conduct notice will need approval by a senior HMRC authorised officer before it is issued;
- An agent can appeal against a dishonest conduct notice;
- An agent can attend all appeal hearings;
- Access to working papers will require tribunal approval - the file access notice must be authorised by the tribunal;
- An application to the tribunal for a file access notice will require approval by an HMRC authorised officer;
- On receipt of an application, the tribunal will inform the dishonest agent, who will have an opportunity to respond;
- The dishonest agent and any relevant third party can attend the hearing on the file access notice and make representations;
- HMRC cannot issue a file access notice until the appeal against the dishonest conduct notice is either out of time or has been resolved in HMRC’s favour or the agent has been convicted of a serious tax offence;
- The tribunal will consider whether the file access notice is reasonable in the circumstances;
- A third party holding the papers will have a right of appeal against a file access notice on grounds of onerousness;
- There are restrictions on the scope of the notice – old papers, privileged material, etc;
- A dishonest agent or third party who is charged a penalty for not complying with a file access notice can appeal to the tribunal against that penalty;
- A dishonest agent who is charged a penalty for “dishonest conduct” can appeal against the penalty and the amount to the tribunal;
- The tribunal can consider the level of disclosure in the context of the amount of penalty, which will affect whether the tax agent’s details are published;
- A dishonest agent can escape publication of their details despite being penalised if they make full disclosure;
- The dishonest agent can make representations to HMRC about publication of their details.

⁸ There are other, more general, safeguards which apply across all HMRC’s work including the Charter (<http://www.hmrc.gov.uk/charter/index.htm>), complaints and redress procedures and the Adjudicator’s Office.

Chapter 5: Draft legislation and explanatory material

This Chapter contains the current draft of the legislation and explanatory material.

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 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.

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- (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 is or has at any time been a tax agent,
 - (b) the individual has been convicted of a serious tax offence,
 - (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 sub-paragraph (3) –
 - (a) a “serious tax offence” is any offence relating to tax that involves fraud or dishonesty,
 - (b) the individual does not need to have been a tax agent when the offence was committed, and
 - (c) the capacity in which the offence was committed is irrelevant.
- (5) 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.
- (6) For a conviction in Scotland, sub-paragraph (3)(c)(i) has effect as if it read “the period of 28 days beginning with the date of conviction has expired”.
- (7) 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).

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 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 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(5) 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 Material

Schedule 1, Part 1: Introduction

- 5.1 Paragraph 2 defines a “tax agent” as an individual who assists others with their tax affairs. The assistance must be done in the course of business, so that, for example, free advice, lectures and pro bono work by tax agents are not caught. Assistance includes advice or acting for a client in relation to tax. This definition is narrower than the present section 99 TMA 1970 which is framed in terms of “any person”.

Q1: HMRC welcomes views on the revised definition of a tax agent.

- 5.2 Paragraph 3 explains the new test of engaging in dishonest conduct which replaces “deliberate wrongdoing” in the previous draft.
- 5.3 Sub-paragraph (1) defines “dishonest conduct”. It is where the tax agent does something dishonest with the view to bringing about a loss of tax revenue in the course of assisting clients with their tax affairs. It does not matter whether or not there is an actual loss of tax, or whether the agent is acting on the instructions of the client. Sub-paragraphs (4)-(7) provide further detail. Sub-paragraph (4) sets out what is meant by a loss of tax. This includes assistance in dishonest timing advantages, but does not include assistance to obtain any relief allowed by law. Sub-paragraph (6) explains what is meant by “tax relief” and is primarily designed to cover VAT situations. The definition of the taxes covered by the Schedule is in paragraph 37.

Q2: HMRC welcomes views on moving away from the terminology of “deliberate wrongdoing” to “dishonest conduct”.

Q3: HMRC welcomes views on the revised definition of “loss of tax”.

Part 2: Establishing dishonest conduct

- 5.4 Paragraph 4 is new. It provides for HMRC to notify an individual of a determination that they have engaged in dishonest conduct. This is referred to as a conduct notice. The notice must set out the grounds for HMRC’s determination and must be approved by an authorised officer of HMRC.
- 5.5 Paragraph 5 provides a new right for the recipient of a conduct notice to appeal HMRC’s determination to the independent Tribunal.
- 5.6 Paragraph 6 provides for an offence where material documents are destroyed etc after a conduct notice is given or when a person is informed that a conduct notice is likely to be given. It applies both to the tax agent, and to any other person who reasonably might be expected to know of the notice. No offence is committed where a third party who destroys documents was not aware of the issue of the conduct notice. There is a similar provision at paragraph 42 of Schedule 36 to Finance Act (FA) 2008.

Part 3: Power to obtain tax agent's files etc

- 5.7 Paragraph 7 describes the circumstances in which a notice can be issued to obtain a tax agent's files (a file access notice). It is only where a tax agent has engaged in dishonest conduct (Case A) or has already been convicted of an offence of dishonesty in relation to tax (Case B). In both cases a notice can only be issued with tribunal approval. In Case A a notice can only be issued once any appeal under paragraph 5 has been finally concluded in HMRC's favour or no appeal was made.
- 5.8 Paragraph 8 says that an officer of HMRC may issue a file access notice to a tax agent, or other person that the officer believes holds relevant documents (the document holder), requiring them to provide the documents.
- 5.9 Paragraph 9 describes "relevant documents". These are the tax agent's working papers and other documents used etc in assisting clients with their tax affairs. It does not matter who owns the papers.
- 5.10 Paragraph 10 describes what documents may be required by a file access notice.
- 5.11 Paragraphs 11 and 12 describe the means by which a tax agent may comply with a notice. These are similar to paragraphs 7 and 8 of Schedule 36 to FA 2008.
- 5.12 Paragraph 13 says that HMRC may only issue a file access notice with the approval of the Tribunal (First-tier Tribunal or, where appropriate, Upper Tribunal).
- 5.13 Sub-paragraph (1) describes what has to be done, and what the Tribunal needs to be satisfied of, in order for it to approve the giving of a file access notice. Under sub-paragraph (1)(a) an application for approval has to have been agreed by an authorised officer of HMRC. Under sub-paragraphs (1)(b) and (c) the Tribunal must be satisfied that Case A or B is met (i.e. that the tax agent has engaged in dishonest conduct or been guilty of a similar tax offence) before approving a notice, and that in the circumstances HMRC is justified in giving the notice.
- 5.14 Sub-paragraph (1)(d) requires that the document holder or agent must be given an opportunity to make representations to HMRC. This opportunity is in addition to the agent and document holder's rights to attend and make representations to the tribunal under the Tribunal rules.
- 5.15 Sub-paragraph (1)(e) requires HMRC to give the Tribunal a summary of any representations it has received. As with requests under Schedule 36 FA 2008, HMRC's guidance will advise that copies of all documents received should be provided unless this is impractical.
- 5.16 Sub-paragraph (3) says that the Tribunal's decision to approve a notice is final.

- 5.17 Paragraph 14 provides that a tax agent notice can only require a document-holder to provide a document that is in their possession or power. This is similar to paragraph 18 of Schedule 36 to FA 2008.
- 5.18 Paragraph 15 describes information that a document-holder is not required to provide. This includes material that relates to a pending tax appeal, is journalistic or personal. This is modelled on paragraph 23 of Schedule 36 to FA 2008.
- 5.19 Paragraph 16 provides that a notice cannot require access to documents over 20 years old unless they are of continuing relevance. This ties in with the assessing time limits for deliberate actions.
- 5.20 Sub-paragraph (1) of paragraph 17 says that a document-holder is not required to provide legally privileged material. Under sub-paragraph (3) the arbitration procedure in Schedule 36 to FA 2008 applies where there is a dispute about whether or not a document is privileged. This is modelled on paragraph 19 of Schedule 36 to FA 2008.
- 5.21 Paragraphs 18 and 19 allow HMRC to copy or retain documents provided and set the conditions for retention of documents. These are broadly similar to paragraphs 15 and 16 of Schedule 36 to FA 2008.
- 5.22 Paragraph 20 is new. It 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 also sets out the procedure for an appeal by a third party. The Tribunal may confirm, vary or set aside the notice or a requirement in it and their decision is final. Sub-paragraph (6) says that the Tribunal's decision to approve a notice is final.
- 5.23 Paragraph 21 says that a person is guilty of an offence if they intentionally conceal, destroy or otherwise dispose of a document required by a file access notice. This is similar to paragraph 6 of the draft legislation, in respect of a dishonest conduct notice.
- 5.24 Under paragraph 22 a person who fails to comply with a notice is liable to a civil penalty of £300. Under paragraph 23 there will be a daily civil penalty if the failure continues. There is no daily penalty if a person cannot comply with the notice because the document in question is no longer in the person's possession or power. These are based on paragraphs 39 and 40 of Schedule 36 to FA 2008.
- 5.25 Paragraph 24 says that there is no liability to a penalty where an officer of HMRC allows extra time for a requirement to be complied with, which is then met. Under paragraph 25 there is no penalty if there was a reasonable excuse for the failure. The comparable provisions in Schedule 36 FA 2008 are paragraphs 44 and 45.

Part 4: Sanctions for dishonest conduct

- 5.26 Paragraph 26 says that a tax agent who engages in dishonest conduct is liable to a penalty. The proposed range of penalties for dishonest conduct will be from

£5,000 to £50,000 and will be subject to the special reduction provision in paragraph 27.

- 5.27 Paragraph 26 also sets out the factors to be taken into account in assessing the penalty for dishonest conduct: when a disclosure is prompted or unprompted, how an agent may disclose dishonest conduct and the definition of “quality”.

Q4: HMRC welcomes views on any issues about moving to a “not exceeding” penalty, including the level of the penalty.

- 5.28 Paragraph 27 provides that where HMRC proposes to assess the minimum penalty for dishonest conduct, and there are special circumstances, HMRC may reduce a penalty, stay (desist from) proceedings for a penalty, or agree a compromise in those proceedings. It explains what does not constitute special circumstances.
- 5.29 Paragraph 28 allows HMRC to publish the details of a tax agent who has incurred a penalty for dishonest conduct. This is based on section 94 of FA 2009 which allows HMRC to publish the details of taxpayers who act deliberately. No details may be published if a penalty has been reduced to or below the minimum. As with section 94 there is no right of appeal, although the tax agent can make representations to HMRC. The law sets out what information may be published, including where a firm is involved. Certain provisions of section 94 of FA 2009 will apply when publishing information about a tax agent so that a name can only be published once any appeal against the penalty has been exhausted.

Part 5: Penalties under this Schedule: assessment etc

- 5.30 Paragraphs 29 and 30 provides machinery provisions for HMRC to assess penalties for dishonest conduct. These are based on paragraph 46 of Schedule 36 to FA 2008. Under paragraph 29 HMRC can only assess a penalty for dishonest conduct where the appeal route has been exhausted.
- 5.31 Paragraph 31 says that a person may appeal against a decision to impose a penalty, or against the amount of any penalty and paragraph 32 describes the procedures for appealing a penalty (paragraphs 47 and 48 of Schedule 36 to FA 2008).
- 5.32 Paragraph 32 also describes the means by which collection of a penalty charged under this schedule may be enforced (paragraph 49 of Schedule 36 to FA 2008).
- 5.33 Paragraph 33 and 34 provide that a person is not liable to a penalty for dishonest conduct for behaviour for which that person has been convicted of an offence or liable to other specified penalties. Paragraph 33 is based on paragraph 52 of Schedule 36 to FA 2008.
- 5.34 Paragraph 35 allows the amount of penalties to be up-rated if there has been a change in the value of money by means of a Treasury order (as in paragraph 41 of Schedule 36 to FA 2008).

Part 6: Miscellaneous provision and interpretation

5.35 Paragraph 36 describes those parts of the Taxes Management Act 1970 which apply to this Schedule and paragraph 37 says which taxes are covered by this Schedule. Paragraph 38-43 cover other definitions and the interaction with other legislation.

Part 7: Consequential provisions

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

Chapter 6: Taxes Impact Assessment

- 6.1 The aim of this measure is to support the Government's objective of a fairer tax system by deterring and penalising dishonest conduct by tax agents.
- 6.2 The table below set out the impacts identified by HMRC at this stage of the policy development process.

Exchequer impact (£m)	<p>The impact assessment published alongside the December 2009 consultation highlighted the lack of comprehensive HMRC data.</p> <p>Since then HMRC has looked at the range of tax at risk from analysis of the HMRC random enquiry programme data for represented taxpayers where under-declared liabilities were due to evasion. HMRC's modelling, using assumptions derived from operational experience, suggests estimated tax at risk attributable to dishonest tax agents from SA and CT in the region of £2m annually.</p> <p>The total tax at risk will be higher as the data is currently not available for other taxes and duties.</p>
Economic impact	This measure is not expected to have any significant economic impacts.
Impact on individuals and households	This measure is not expected to have a direct impact on individuals or households though individuals may benefit from fewer dishonest tax agents.
Equalities impact	An initial equality impact screening exercise has been completed for this measure. HMRC do not routinely collect personal data among the agent population. However the HMRC research report number 120 'Usage and attitude survey of Agents' finding on Agent profile was that 'The agent community is dominated by men (68%) and the middle aged (51% aged 35-54 years). Most are employed full time (85%), but dispersed across different business structures.'
Impact on businesses and third sector	<p>This measure is intended to only affect a small minority of 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.</p> <p>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 agent. The third party will have a right of appeal on grounds that it would be onerous for them to comply.</p> <p>Competition assessment: HMRC consider that by deterring 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>Small firms impact test: HMRC want to deter all agents from acting dishonestly. HMRC consider that excluding individuals working within firms with less than 20 employees would reduce the effectiveness of this measure. HMRC received over 40 responses from sole practitioners or small firms with fewer than 20 employees to earlier consultation on this measure. These responses have been taken into account and this discussion document now seeks further views on the revised draft legislation.</p>

Operational impact (£m)	Changes would need to be made to existing HMRC processes and IT 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 would be in the range of £2 million to £3 million.
Other impacts	<p>Privacy: 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 an agent complies with a tribunal approved notice and makes full disclosure their details will not be published.</p>

Evaluation and Monitoring: 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.

Chapter 7: Summary of Questions

HMRC welcomes views in general on the proposals in this document, the draft legislation (Chapter 5) and the Taxes Impact Assessment at Chapter 6. Specific questions are posed in Chapter 5 which are:

- Q1: HMRC welcomes views on the revised definition of a tax agent.
- Q2: HMRC welcomes views on moving away from the terminology of “deliberate wrongdoing” to “dishonest conduct”.
- Q3: HMRC welcomes views on the revised definition of “loss of tax”.
- Q4: HMRC welcomes views on any issues about moving to a “not exceeding” penalty, including the level of the penalty.