



HM Revenue
& Customs

Modernising Powers, Deterrents and
Safeguards

Working with Tax Agents: the next stage

Draft legislation on deliberate wrongdoing by tax agents, with commentary and
explanatory note
February 2010

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Chapter 1: Introduction

- 1.1 This document supplements the consultation document: **Working with Tax Agents: The Next Stage**, the **Impact assessment** and the **Summary of responses** to the first consultation, published on 9 December 2009 and available at <http://www.hmrc.gov.uk/consultations/index.htm>.
- 1.2 The review of HM Revenue and Customs (HMRC) powers, deterrents and safeguards has been taking forward a programme of consultation and legislative change to provide a modern and effective framework of law and practice for the Department.
- 1.3 A framework of legislation introduced in Finance Acts 2007, 2008 and 2009 included powers for checking taxpayers' compliance with tax law, and civil penalties in cases of inaccuracy or failure, alongside appropriate safeguards.
- 1.4 At Budget 2009, HMRC published a consultation document *Working with Tax Agents* to begin the process of exploring with tax agents, representative bodies and other stakeholders what further work could be done to ensure the highest standards of performance by those working as tax agents, whether or not they are affiliated to a professional body.
- 1.5 HMRC now seeks the views on draft legislation for one of the measures included in the further consultation published in December 2009. The aim is that more tax returns and claims are correct when submitted. The proposed new powers directed at tax agents will sit alongside the framework of powers which apply to taxpayers.
- 1.6 HMRC proposes new powers to address **deliberate wrongdoing by tax agents**. The aim is not root and branch reform, but rather a modernisation of existing powers which already apply to direct taxes to, in future, apply across taxes and duties. The proposals would:
 - enable HMRC to access the working papers of tax agents who engage in deliberate wrongdoing which leads or is intended to lead to a loss of tax; and
 - make a tax agent who has been involved in deliberate wrongdoing liable to a sanction which acts as an effective deterrent.
- 1.7 The trigger to access working papers and for liability to penalty will be the same. It will be deliberate wrongdoing by the tax agent intended to cause a loss of tax. This is broadly the same test as applies for direct taxes currently under sections 20A and 99 of the Taxes Management Act 1970. The new powers are underpinned by appropriate safeguards to ensure they are used only in such cases.

- 1.8 HMRC is also consulting on:
- **publishing the names of tax agents** who are penalised for deliberate wrongdoing, but draft legislation is not being published at this time.
 - new powers to address revenue losses caused by **high volume agents**, that is the type of tax agent who makes claims for repayment on behalf of many clients, most of which are invalid or significantly wrong, but draft legislation is not being published at this time.
 - revised procedures for **disclosure to professional bodies** in the case of misconduct, for which no new legislation is required.
- 1.9 HMRC anticipates future consultation to consider the need for financial penalties or other sanctions for behaviour that goes beyond simple errors or mistakes, but is not deliberate, particularly in cases where the disclosure option is not available.
- 1.10 Further details of all these proposals are in the consultation document **Working with Tax Agents: The Next Stage** which can be found at <http://www.hmrc.gov.uk/consultations/index.htm>.
- 1.11 As well as answers to the specific questions posed in that document, and summarised in Chapter 11, HMRC welcomes comments on the draft legislation and suggestions for improvement.
- 1.12 Further work will be carried out on the draft legislation, including the interaction of penalties for deliberate wrongdoing with other penalties.

How to comment

- 1.13 HMRC would welcome views and feedback on any aspect of the draft legislation. Comments should be received by **3 March 2010**. They may be made:

by email to: powers.review-of-hmrc@hmrc.gsi.gov.uk;

or by post to: HMRC review of powers: penalties
Room 1/72, 100 Parliament Street, London SW1A
2BQ;

or by fax to: 020 7147 2375.

- 1.14 This document can also be accessed from the HMRC internet site: www.hmrc.gov.uk/consultations/index.htm.
- 1.15 Hard copies are available from the above address. The Review team can be contacted by telephone on: 020 7147 3223.

Confidentiality

- 1.16 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.
- 1.17 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If HMRC receive a request for disclosure of the information they will take full account of your explanation, but they cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HMRC.
- 1.18 HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Chapter 2: Commentary on the draft legislation

- 2.1 This chapter introduces the draft legislation and the explanatory notes relating to deliberate wrongdoing by tax agents.

Structure of the legislation

- 2.2 The clause introduces the schedule and allows the Treasury to introduce an order commencing different provisions at different times.
- 2.3 There are two main components to the schedule. It describes (in Part 2) the powers to access a tax agent's files by means of a notice to the tax agent, or other person holding the documents. It describes (in Part 3) the penalties that may be charged on a tax agent who is engaged in deliberate wrongdoing.
- 2.4 Part 1 gives the meaning of terms such as "tax agent" and "deliberate wrongdoing" which are the same for the whole schedule. This means that an act or acts which trigger the power to access working papers under part 2 will also trigger a liability to a penalty under part 3.
- 2.5 Part 2 follows a structure derived from the compliance checking provisions in Schedule 36 Finance Act 2008. Where a tax agent has engaged in deliberate wrongdoing, it gives HMRC the powers to issue a notice allowing access to the tax agent's working papers, either from the tax agent, or from any other person who holds them.
- 2.6 Such access is subject to a number of safeguards. A tax agent notice may not be issued unless it has been approved by the Tribunal. An application for approval must be made or agreed by an authorised officer of HMRC. HMRC has stated¹ that the authorised officer for these purposes would be of a similar grade to those giving identity unknown notices under Schedule 36 FA2008, and the consent of a member of the Senior Civil Service would be required in each case. There are limitations to HMRC's powers to access material where it relates to a tax appeal, is legally privileged or journalistic. HMRC would be able to obtain material relating to tax advice.
- 2.7 The draft legislation proposes that an application for approval of a tax agent notice may be made without notice being given to the tax agent (*ex parte*), and the Tribunal would decide whether or not to accept such an application. Such applications would not concern whether a tax agent had engaged in deliberate wrongdoing, where the agent would always be entitled to be present. Without notice applications would relate solely to the content of a notice, as in a small number of cases HMRC may need to protect the source of its information. The consultation document seeks views on whether this is the appropriate approach.

¹ Footnote to paragraph 6.12 of the consultation document *Working with Tax Agents: The Next Stage*.

- 2.8 There are also provisions concerning the retention and copying of material, and the criminal and civil sanctions available to HMRC where material is intentionally destroyed or concealed.
- 2.9 Part 3 follows a structure that is derived from Schedule 24 FA2007 which penalises errors in taxpayer's documents. It describes the sanctions that would be available to HMRC where a tax agent engages in deliberate wrongdoing intending to cause a loss of tax.
- 2.10 The maximum penalty (based on that which could apply to a taxpayer who did a similar act) is 100 per cent of the tax understated by their clients as a result of the deliberate wrongdoing, subject to the following:
- Where the tax agent makes prompted or unprompted disclosure of the deliberate wrongdoing to HMRC, the penalty may be reduced to reflect the quality of the disclosure. The "quality" could include helping HMRC to identify clients who have underpaid tax as a result of the deliberate wrongdoing, and helping to collect the unpaid tax from those clients. The penalty may not be reduced below 50 per cent of the tax due, in the case of prompted disclosure and 30 per cent for unprompted disclosure.
 - Where the penalty that would be calculated in respect of all the tax agent's clients for tax periods ending in a calendar year exceeds £50,000, the penalty for that year will be capped at £50,000.
- 2.11 There is also a minimum penalty. This takes into account that in some cases, the tax liability which results in an act of deliberate wrongdoing may be wiped out by a loss or credit from elsewhere. It also reflects that another party may prevent the tax agent's wrongdoing from leading to a loss of tax (such as a client refusing to act on the agent's advice). In such cases it would still be necessary for HMRC to demonstrate both the behaviour of the tax agent, and the intent for it to cause a loss of tax, in order to charge a penalty.
- 2.12 The minimum penalty is set at a level of £5,000 subject to reduction for disclosure. The penalty may not be reduced below £2,500 in the case of prompted disclosure and £1,500 in the case of unprompted disclosure.
- 2.13 The draft legislation does not include full details on how penalties for deliberate wrongdoing may interact with any other penalties for which there is a liability. Further consideration to this subject will be given having regard to the responses received to Chapter 8 of the consultation document.
- 2.14 The draft legislation does not include any details of how a system of publishing the names of tax agent who are penalised for engaging in deliberate wrongdoing may operate. Further consideration to this subject will be given having regard to the responses received to Chapter 8 of the consultation document.

- 2.15 Part 4 contains details of the machinery provisions for assessing penalties, rights of appeal and enforcement of penalties.
- 2.16 Part 5 contains details of interpretation and relationships with other legislation. In particular it specifies which taxes are subject to this schedule, and defines some other key terms used in this schedule.
- 2.17 Part 6 describes legislation which would need to be omitted or amended as a result of this schedule coming into force.
- 2.18 For further information on how the proposed new powers would work, please look at chapters 5 to 9 of the consultation document.

Chapter 3: Draft legislation

This Chapter contains the current draft of the legislation.

1 Tax agents: deliberate wrongdoing

- (1) Schedule 1 contains provision about tax agents who engage in deliberate wrongdoing.
- (2) The Schedule comes into force on such day as the Treasury may by order appoint. 5
- (3) An order under subsection (2) –
 - (a) may make different provision for different purposes, and
 - (b) may include transitional provisions and savings.
- (4) The Treasury may by order make any incidental, supplemental, consequential, transitional or transitory provision or saving that appears appropriate in consequence of, or otherwise in connection with, this section or Schedule 1. 10
- (5) An order under subsection (4) may –
 - (a) make different provision for different purposes, and
 - (b) make provision amending, repealing or revoking an enactment or instrument (whenever passed or made). 15
- (6) An order under this section is to be made by statutory instrument.
- (7) A statutory instrument containing an order under subsection (4) is subject to annulment in pursuance of a resolution of the House of Commons.

- (3) Nor does it matter whether the tax agent does the act alone or on the instruction of the client.
- (4) “Loss of tax” means loss of revenue from tax, and includes a loss involving a relief, deduction, repayment or credit of any kind.
- (5) “Tax” is defined in Part 5 of this Schedule. 5
- (6) Sub-paragraph (1)(a) applies in particular to –
 - (a) acts done on behalf of clients in respect of which a penalty could have been imposed on the client under an enactment relating to tax, had the client done the act, and
 - (b) advising or otherwise assisting clients to do any such act. 10

PART 2

POWER TO OBTAIN TAX AGENT’S FILES ETC

Tax agent notice

- 4 The power in paragraph 5 is exercisable if a tax agent –
 - (a) has engaged in deliberate wrongdoing (whether or not a penalty has been or is to be imposed in respect of it), or 15
 - (b) has been convicted within the last 12 months of an offence relating to tax.
- 5 (1) An officer of Revenue and Customs may by notice in writing require any person mentioned in sub-paragraph (2) to provide relevant documents. 20
- (2) The persons are –
 - (a) the tax agent, and
 - (b) any other person the officer believes may hold relevant documents.
- (3) A notice under this paragraph is referred to as a tax agent notice.
- (4) The person to whom a tax agent notice is addressed is referred to as the document-holder. 25

Relevant documents

- 6 (1) “Relevant documents” means the tax agent’s working papers and other documents, including –
 - (a) documents that the tax agent (or anyone working with or for the tax agent) has received, prepared or used for the purpose of or in the course of assisting the tax agent’s clients with their tax affairs, and 30
 - (b) any other documents of the tax agent, or of the firm or business where the tax agent works or has worked, that relate to the tax affairs of such clients. 35
- (2) A reference in sub-paragraph (1) to the tax agent’s clients –
 - (a) includes but is not limited to the clients with respect to whose tax affairs the tax agent has engaged in deliberate wrongdoing or committed the offence, and
 - (b) includes former clients. 40

Content of notice

- 7 (1) A tax agent 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. 5
- (2) A tax agent notice does not need to identify the clients of the tax agent.
- (3) A tax agent notice addressed to anyone other than the tax agent must name the tax agent.

Compliance

- 8 A tax agent notice may require documents to be provided— 10
- (a) within such period,
 - (b) by such means and in such form, and
 - (c) to such person and place,
- as is reasonably specified in the notice or in a document referred to in the notice. 15
- 9 Unless otherwise specified in the notice, a tax agent notice may be complied with by providing copies of the relevant documents.

Approval by tribunal

- 10 (1) An officer of Revenue and Customs may not give a tax agent notice without the approval of the tribunal. 20
- (2) The tribunal may not approve the giving of a tax agent 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 requirements of paragraph 4 are met,
 - (c) the tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so, 25
 - (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 30
 - (e) the tribunal has been given a summary of any representations made by them.
- (3) “Authorised officer” means an officer of Revenue and Customs who is, or is a member of class of officers who are, authorised by the Commissioners for the purposes of this paragraph. 35
- 11 (1) Nothing in paragraph 10 requires the tribunal to determine whether a tax agent has engaged in a deliberate wrongdoing if—
- (a) that matter has already been finally determined by the tribunal (whether in previous proceedings under that paragraph or in other proceedings), or 40
 - (b) sub-paragraph (2) applies.
- (2) This sub-paragraph applies if—

	(a) a penalty has been assessed on the tax agent under paragraph 24 for the deliberate wrongdoing,	
	(b) the time for giving notice of appeal has expired, and	
	(c) either no such notice was given within that time or notice was given but the appeal has been withdrawn.	5
	(3) “Appeal” means appeal under paragraph 32(a) against the decision of HMRC that the penalty was payable.	
12	(1) An application for approval under paragraph 10 may be made without notice (except as required under sub-paragraph (2) of that paragraph).	
	(2) If it is made without notice, the tribunal may nonetheless permit the tax agent –	10
	(a) to provide submissions or evidence for the purpose of determining (where applicable) whether the tax agent has engaged in deliberate wrongdoing, and	
	(b) to participate in the proceedings in any other way the tribunal thinks necessary for that purpose.	15
13	A decision by the tribunal under paragraph 10 or 12 is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).	
	<i>Documents not in person’s possession or power</i>	20
14	A tax agent notice only requires the document-holder to provide a document if it is in the document-holder’s possession or power.	
	<i>Types of information</i>	
15	(1) A tax agent notice does not require the document-holder to provide –	
	(a) parts of a document that contain information relating to the conduct of a pending tax appeal, or	25
	(b) journalistic material (as defined in section 13 of the Police and Criminal Evidence Act 1984).	
	(2) A tax agent notice does not require the document-holder to provide personal records (as defined in section 12 of the Police and Criminal Evidence Act 1984).	30
	(3) But a tax agent notice may require the document-holder –	
	(a) to provide documents that are personal records, omitting any information whose inclusion (whether alone or with other information) makes the original documents personal records (“personal information”), and	35
	(b) to provide information contained in such records that is not personal information.	
	(4) “Tax appeal” means an appeal relating to tax made by or on behalf of any of the tax agent’s clients.	40
	<i>Privileged communications between professional legal advisers and clients</i>	
16	(1) A tax agent 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. 5

Power to copy documents

- 17 If a document is provided pursuant to a tax agent notice, an officer of Revenue and Customs may take copies of or make extracts from the document. 10

Power to retain documents

- 18 (1) If a document is provided pursuant to a tax agent notice, HMRC may retain the document for a reasonable period if an officer of Revenue and Customs thinks it necessary to do so. 15
- (2) While a document is being 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. 20
- (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. 25

Offence of concealment etc

- 19 (1) A person (P) is guilty of an offence if P intentionally –
- (a) conceals, destroys or otherwise disposes of a material document, or
- (b) arranges for the concealment, destruction or disposal of a material document. 30
- (2) A document is a material document if at the time when P acts –
- (a) P has received a tax agent notice requiring P to provide the document, or
- (b) P has not received such a notice but has been informed by an officer of Revenue and Customs that P will do so or is likely to do so. 35
- (3) A document is not a material document by virtue of sub-paragraph (2)(a) if the tax agent notice has already been complied with, unless –
- (a) P has been notified in writing by an officer of Revenue and Customs that P must continue to preserve the document, and
- (b) the notification has not been withdrawn. 40
- (4) A document is not a material document by virtue of sub-paragraph (2)(b) if –

- (a) more than 6 months have elapsed since P was, or was last, so informed, or
 - (b) a tax agent notice has been given to P requiring the document to be provided.
- (5) A person guilty of an offence under this paragraph is liable— 5
- (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 to both.

Penalty for failure to comply 10

- 20 (1) A person who fails to comply with a tax agent notice is liable to a penalty of £300.
- (2) Failure to comply with a tax agent notice also includes—
- (a) concealing, destroying or otherwise disposing of a material document, or 15
 - (b) arranging for any such concealment, destruction or disposal.
- (3) “Material document” has the same meaning as in paragraph 19.

Daily penalty for failure to comply

- 21 If the failure continues after notification of a penalty under paragraph 20 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. 20

Failure to comply with time limit

- 22 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 this Part of this Schedule if the thing was done within such further time (if any) as an officer of Revenue and Customs may have allowed. 25

Reasonable excuse

- 23 (1) Liability to a penalty under this Part of this Schedule 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. 30
- (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, 35
 - (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. 40

PART 3

SANCTIONS FOR DELIBERATE WRONGDOING

Liability to penalty

- 24 A tax agent who engages in deliberate wrongdoing is liable to a penalty.

Amount of penalty

- 25 (1) In Case 1 or Case 2, the penalty to which the tax agent is liable is the greater of—
- (a) 100% of the potential lost revenue (or, if the deliberate wrongdoing concerns more than one client, the sum of the potential lost revenue from each of them), and 10
 - (b) £5,000.
- (2) In all other cases, the penalty is £5,000.
- (3) If a deliberate wrongdoing involves more than one type of tax or affects more than one tax period, the tax agent is liable to a separate penalty for each type of tax and each tax period. 15
- (4) Case 1 and Case 2 are described in paragraph 26.
- (5) Potential lost revenue is determined in accordance with paragraph 27.
- (6) Sub-paragraphs (1) and (2) are subject to paragraphs 28 to 30.
- 26 (1) Case 1 is where—
- (a) the wrongful act— 20
 - (i) corresponds to an act for which a penalty could be imposed under Schedule 24 to FA 2007 (penalties for errors), or
 - (ii) involves advising or otherwise assisting clients to do an act for which a penalty could be imposed under that Schedule, and 25
 - (b) a loss of tax is brought about as a result.
- (2) Case 2 is where—
- (a) the wrongful act—
 - (i) corresponds to an act for which a penalty could be imposed under Schedule 41 to FA 2008 (penalties: failure to notify and certain VAT and excise wrongdoing), or 30
 - (ii) involves advising or otherwise assisting clients to do an act for which a penalty could be imposed under that Schedule, and
 - (b) a loss of tax is brought about as a result. 35
- (3) A reference to an act for which a penalty could be imposed is a reference to an act for which a penalty could be imposed if it were done by the clients concerned.

Potential lost revenue

- 27 (1) In Case 1, the potential lost revenue from each client concerned is to be determined in accordance with paragraphs 5 to 8 of Schedule 24 to FA 2007. 40

- (2) Those paragraphs have effect for these purposes as if –
 - (a) a reference to the person liable to a penalty under a provision of that Schedule were a reference to the tax agent,
 - (b) a reference to a potential loss of revenue from P were a reference to a potential loss of revenue from the client or clients concerned, and 5
 - (c) a reference to P’s tax liability were a reference to a tax liability of the client or clients concerned.
- (3) In Case 2, the potential lost revenue from each client concerned is to be determined in accordance with paragraphs 7 to 11 of Schedule 41 to FA 2008.
- (4) Those paragraphs have effect for these purposes as if – 10
 - (a) a reference to P were a reference to the client or clients concerned, but
 - (b) the reference in paragraph 11 to a relevant act or failure on the part of P were a reference to a relevant act or failure on the part of the tax agent.

Reductions for disclosure 15

- 28 (1) If the tax agent discloses the deliberate wrongdoing, the tax agent is liable to a percentage only of the penalty to which the tax agent would otherwise have been liable by virtue of paragraph 25.
- (2) The percentage is such percentage, not below the relevant minimum, as reflects the quality of the disclosure. 20
- (3) The relevant minimum is –
 - (a) 30%, in the case of an unprompted disclosure, and
 - (b) 50%, in the case of a prompted disclosure.
- (4) A disclosure is “unprompted” if it is made at a time when the tax agent has no reason to believe that HMRC have discovered or are about to discover the deliberate wrongdoing. 25
- (5) Otherwise, a disclosure is “prompted”.
- (6) A tax agent “discloses” a deliberate wrongdoing 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 (if any) brought about by it, and 30
 - (c) allowing HMRC access to records for the purpose of ensuring that any such loss is recovered or otherwise properly accounted for.
- (7) In relation to disclosure, “quality” includes timing, nature and extent. 35
- (8) Sub-paragraph (1) is subject to paragraphs 29 and 30.

Special reduction

- 29 (1) If they think it right because of special circumstances, HMRC may take one or more of the following steps in relation to a penalty under paragraph 24 – 40
 - (a) reduce the penalty,
 - (b) stay the penalty, or
 - (c) agree a compromise in relation to proceedings for the penalty.

- (2) “Special circumstances” does not include—
- (a) ability to pay, or
 - (b) the fact that a loss of tax from a client is balanced by an over-payment by another person (whether or not a client).

Annual cap

5

- 30 (1) This paragraph applies if at any time—
- (a) HMRC are assessing a penalty under paragraph 24 for a deliberate wrongdoing, and
 - (b) the annual cap would be exceeded.
- (2) The annual cap would be exceeded if—
- (a) the penalty that HMRC would assess on the tax agent in accordance with the preceding paragraphs of this Part (amount X), and
 - (b) the sum of all the related penalties already notified to the tax agent (amount Y),
- together exceed £50,000. 15
- (3) In place of amount X, HMRC must assess a penalty equal to the difference (if any) between—
- (a) amount Y, and
 - (b) £50,000.
- (4) If no related penalties have been notified to the tax agent by that time, amount Y is taken to be zero. 20
- (5) “Related penalty” means a penalty imposed under paragraph 24 for a deliberate wrongdoing where—
- (a) the loss of tax that the tax agent intended to bring about by that wrongdoing, and
 - (b) the loss of tax that the tax agent intended to bring about by the wrongdoing mentioned in sub-paragraph (1)(a),
- relate to periods ending in the same calendar year. 25
- (6) The period to which a loss of tax relates is—
- (a) in Case 1 or Case 2, the tax period or other period by reference to which the potential lost revenue is calculated, and
 - (b) in any other case, the tax period or other period to which the loss may reasonably be attributed (whether or not it was actually brought about). 30

PART 4

35

PENALTIES UNDER THIS SCHEDULE: ASSESSMENT ETC

Assessment of penalties

- 31 (1) If a person becomes liable to a penalty under Part 2 or Part 3 of this Schedule, HMRC may assess the penalty.
- (2) If they do so, they must—
- (a) notify the person, and
- 40

- (b) in the case of a penalty under Part 3, state in the notice the period to which the loss of tax relates (see paragraph 30(6)).
- (3) An assessment of a penalty under Part 2 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty. 5
- (4) An assessment of a penalty under Part 3 must be made by the end of the period of 12 months beginning with date X.
- (5) Date X is the latest of –
- (a) the date on which HMRC ascertain that the wrongful act amounted to deliberate wrongdoing, 10
 - (b) the date on which HMRC identify all the clients concerned, and
 - (c) the date on which –
 - (i) the amount of tax lost as a result of the deliberate wrongdoing is ascertained, or
 - (ii) it is ascertained that no tax was lost. 15
- (6) If there is an assessment (or determination) of any of the tax lost, the amount of tax lost is considered to be ascertained on the date immediately following the end of appeal period –
- (a) for the assessment (or determination), or
 - (b) if the deliberate wrongdoing concerned more than one client, the last of the assessments (or determinations). 20
- (7) The appeal period is the period during which –
- (a) an appeal could be brought, or
 - (b) an appeal that has been brought has not been determined or withdrawn. 25
- (8) In the case of a penalty under Part 3, a supplementary assessment may be made if an earlier assessment operated by reference to an underestimate of the potential lost revenue.
- (9) Sub-paragraph (4) applies to a supplementary assessment as it applies to the earlier assessment. 30

Right to appeal against penalty

- 32 A person may appeal against a decision of HMRC –
- (a) that a penalty is payable under this Schedule, or
 - (b) as to the amount of such a penalty.

Procedure on appeal against penalty

- 33 (1) Notice of an appeal under this Part of this Schedule must be given –
- (a) in writing,
 - (b) before the end of the period of 30 days beginning with the date on which notification of the penalty is issued, and
 - (c) to HMRC. 40
- (2) It must state the grounds of appeal.
- (3) On an appeal under paragraph 32(a) that is notified to the tribunal, the tribunal may confirm or cancel the decision.

- (4) On an appeal under paragraph 32(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. 5
- (5) If, in the case of an appeal against a penalty under Part 3 of this Schedule, the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 29 (special reduction) –
- (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or 10
 - (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).
- (6) Subject to this paragraph and paragraph 34, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax. 15

Enforcement of penalty

- 34 (1) A penalty under this Schedule must be paid – 20
- (a) before the end of the period of 30 days beginning with the date on which notification of the penalty was issued, or
 - (b) if a notice of appeal under paragraph 33 is given, before the end of the period of 30 days beginning with the date on which the appeal is finally determined or withdrawn. 25
- (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

- 35 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. 30
- 36 (1) A person is not liable to a penalty under Part 3 of 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 35
 - (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

- 37 (1) If it appears to the Treasury that there has been a change in the value of money since the last relevant date, they may by regulations substitute for the sums for the time being specified in paragraphs 20(1), 21 and 25(1)(b) and (2) such other sums as appear to them to be justified by the change. 40
- (2) “Relevant date”, in relation to a specified sum, means –

- (a) the day on which this Act is passed, and
 - (b) each date 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 wrongdoing that began before the date on which they come into force. 5
- (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 5

10

MISCELLANEOUS PROVISION AND INTERPRETATION

Application of provisions of TMA 1970

- 38 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 – 15
- (a) section 108 (responsibility of company officers),
 - (b) section 114 (want of form), and
 - (c) section 115 (delivery and service of documents).

Tax

- 39 “Tax” means – 20
- (a) income tax,
 - (b) capital gains tax,
 - (c) corporation tax,
 - (d) construction industry deductions,
 - (e) VAT, 25
 - (f) insurance premium tax,
 - (g) inheritance tax,
 - (h) stamp duty land tax,
 - (i) stamp duty reserve tax,
 - (j) petroleum revenue tax, 30
 - (k) aggregates levy,
 - (l) climate change levy,
 - (m) landfill tax, and
 - (n) any duty of excise other than vehicle excise duty.
- 40 (1) The definition of “tax” is to be read in accordance with this paragraph. 35
- (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 – 40
- (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

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41 In this Schedule –

“act” includes an omission;

“client” (except in paragraph 16) –

(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;

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“the client”, in relation to a deliberate wrongdoing, means the client with respect to whose tax affairs the wrongful act is done;

“the Commissioners” means the Commissioners for Her Majesty’s Revenue and Customs;

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“the document-holder” has the meaning given in paragraph 5;

“document” includes a copy of a document (see also section 114 of FA 2008);

“HMRC” means Her Majesty’s Revenue and Customs;

“specified” includes described;

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“tax agent notice” has the meaning given in paragraph 5;

“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;

25

“the wrongful act”, in relation to a deliberate wrongdoing, means the act mentioned in paragraph 3(1)(a).

42 A reference in this Schedule to clients of a tax agent or to a tax agent’s clients is a reference to the persons assisted by the tax agent with their tax affairs.

43 A loss of tax is taken for the purposes of this Schedule to have been brought about as a result of a deliberate wrongdoing despite the fact that the loss can be recovered or properly accounted for following discovery of the wrongdoing (and a reference to the tax lost as a result of a deliberate wrongdoing is to be read accordingly).

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Relationship with other enactments

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44 Except as provided in paragraph 36, 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.

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PART 6

CONSEQUENTIAL PROVISIONS

TMA 1970

- 45 TMA 1970 is amended as follows.
- 46 Omit – 5
- (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).
- 47 (1) Section 20BB (falsification etc of documents) is amended as follows.
- (2) In subsection (1) – 10
- (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) – 15
- (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 the Board has notified the person in writing that the order has not been complied with to the officer’s satisfaction”. 20
- (5) Omit subsection (4).
- 48 In section 20D (interpretation of sections 20 to 20CC) – 25
- (a) in subsection (1), for “sections 20A and 20BA” substitute “section 20BA”, and
 - (b) omit subsection (2).
- 49 In section 103 (time limits for penalties) –
- (a) omit subsection (3), and 30
 - (b) in subsection (4), for “neither subsection (1) nor subsection (3) applies” substitute “subsection (1) does not apply”.
- 50 In section 103ZA (disapplication of sections 100 to 103) –
- (a) omit “or” at the end of paragraph (d),
 - (b) at the end of paragraph (e) insert “, or”, and 35
 - (c) after that paragraph insert –
 - “(f) Schedule to FA 2010 (tax agents).”
- 51 In section 118 (interpretation), in the definition of “tax”, omit the words from “except that” to the end.

 OTA 1975

- 52 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

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

FA 2003

- 54 (1) FA 2003 is amended as follows.
- (2) In section 93 (information powers) – 10
- (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) – 15
- (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 20
- (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 order under Part 6 of this Schedule to deliver. 25
- (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 Customs and Excise, or
- (b) after the document has been delivered. 30
- (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 Customs and Excise has notified the person, in writing, that the order has not been complied with to the officer’s satisfaction. 35
- (5) A person guilty of an offence under this paragraph is liable –
- (a) on summary conviction, to a fine not exceeding the statutory maximum; 40
- (b) on conviction on indictment, to imprisonment for a term of years not exceeding 2 years or a fine or to both.”

Chapter 4: Draft explanatory note

This Chapter contains the draft explanatory note based on the current draft of the legislation.

CLAUSE 1 SCHEDULE 1: TAX AGENTS: DELIBERATE WRONGDOING

SUMMARY

1. Clause 1 introduces Schedule 1 which makes provision about powers to obtain working papers from and impose penalties on tax agents who engage in deliberate wrongdoing. The clause also provides for the schedule to come into force by means of a Treasury order, made by statutory instrument.

DETAILS OF THE CLAUSE

2. Clause 1 introduces Schedule 1.
3. Subsection (3) provides that an order to bring the schedule into force may make different provision for different purposes, and may include transitional provision and savings.
4. Subsection (7) provides that a statutory instrument, which contains an order under subsection (4), which includes provision to amend or repeal primary legislation, is subject to the negative procedure (meaning the instrument takes effect on a specified future date but is subject to annulment in pursuance of a resolution of the House of Commons).

DETAILS OF THE SCHEDULE

Part 1: Introduction

5. Paragraph 2 explains what is meant by the term “tax agent”. It makes clear that a person is still a “tax agent” even if the assistance they give is free of charge, not for a business purpose, not provided directly to the client, or where they know or expect it to be used to assist their client’s tax affairs, even if not provided specifically for that purpose.

6. Sub-paragraph 2(4) says that references to assistance include tax advice, or acting or purporting to act as an agent of a client in respect of tax.
7. Sub-paragraph 2(5) says that if more than one person within a firm provides assistance to a client, each one may be regarded as a tax agent.
8. Paragraph 3 explains the circumstances where a tax agent engages in deliberate wrongdoing. It is where the tax agent does an act which, directly or indirectly, is capable of leading to a loss of tax from a client, and that act is done deliberately, intending to cause such a loss. It does not matter whether or not there is a loss of tax.
9. Sub-paragraph 3(6) says that the deliberate wrongdoing applies in particular to acts for which the client could have been penalised if they had done the act. Examples would be penalties for incorrect returns or other documents (under Schedule 24 to Finance Act 2007) or a failure to notify chargeability to tax etc. (under Schedule 41 to Finance Act 2008). It also includes advising a client to do such an act.

Part 2: Power to obtain tax agent's files etc

10. Paragraph 4 describes the circumstances in which HMRC may issue a tax agent notice. It is only where a tax agent has engaged in deliberate wrongdoing, or has been convicted of a tax offence.
11. Paragraph 5 says that an officer of HMRC may issue a notice to a tax agent, or other person that the officer believes holds relevant documents, requiring them to provide the documents.
12. Paragraph 6 describes "relevant documents". These are any documents that a tax agent, or anyone working with a tax agent, has used in assisting clients with their tax affairs, or which otherwise relate to the tax affairs of those clients.
13. Paragraph 7 describes what documents a tax agent notice may require to be provided.

14. Paragraphs 8 and 9 describe the means by which a tax agent may comply with the contents of a tax agent notice.
15. Paragraph 10 says that HMRC may only issue a tax agent notice with the approval of the Tribunal (First-tier Tribunal or, where appropriate, Upper Tribunal).
16. Sub-paragraph 10(2) 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 tax agent notice. In particular, an application for approval has to have been agreed by an authorised officer of HMRC, and the Tribunal has to be satisfied that the tax agent has been involved in deliberate wrongdoing.
17. Paragraph 11 says that where there has already been the opportunity for a court or tribunal to consider whether a tax agent has engaged in deliberate wrongdoing, the Tribunal does not need to consider this again.
18. Paragraph 12 says that an application for approval may be made without notice being given to the tax agent (*ex parte*). Such applications would not concern whether a tax agent had engaged in deliberate wrongdoing; they would only relate to the content of the notice. The Tribunal would decide whether or not to accept such an application.
19. Paragraph 13 says that the Tribunal's decision is final.
20. Paragraph 14 says that a tax agent notice can only require a document-holder to provide a document that is in their possession or power.
21. 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.
22. Paragraph 16 says that a document-holder is not required to provide material which is legally privileged.
23. Paragraph 17 allows HMRC to copy documents provided.
24. Paragraph 18 allows HMRC to retain documents provided, and describes the conditions that apply to that retention.

25. Paragraph 19 says that a person is guilty of an offence if they intentionally conceal, destroy or otherwise dispose of a material document. It describes what is meant by a material document, and the sanctions that may be imposed where a person is found guilty of such an offence.
26. Paragraph 20 says that a person who fails to comply with a notice may be liable to a civil penalty of £300.
27. Paragraph 21 says that in the case of a continuing failure, a person may be liable to a daily civil penalty, not exceeding £60 per day.
28. Paragraph 22 says that where an officer of HMRC allows extra time for a requirement to be complied with, which is then met, there is no liability to a penalty.
29. Paragraph 23 describes the circumstances where a person has a reasonable excuse for a failure, and thus no liability to a penalty arises.

Part 3: Sanctions for deliberate wrongdoing

30. Paragraph 24 says that a tax agent who engages in deliberate wrongdoing is liable to a penalty.
31. Paragraph 25 says that in Case 1 or Case 2, the maximum amount of the penalty is 100 per cent of the potential lost revenue, or £5,000 where the potential lost revenue is less than £5,000. For any other case, for instance where there is no loss of tax, the maximum amount of the penalty is £5,000.
32. Sub-paragraph (1) of Paragraph 26 says that Case 1 corresponds to an act which, if done by the client, could lead to a penalty on the client being imposed under Schedule 24 FA2007 (penalties for errors). It includes advising or assisting the client to do such an act.
33. Paragraph 26(2) says that Case 2 corresponds to an act which, if done by the client, could lead to a penalty on the client being imposed under Schedule 41 FA2008 (penalties for failure to notify etc.). It includes advising or assisting the client to do such an act.

34. Paragraph 27 provides for potential lost revenue for Case 1 and Case 2 to be determined in accordance with Schedule 24 FA2007 and Schedule 41 FA2008 respectively.
35. Paragraph 28 provides for a penalty under paragraph 25 to be reduced for disclosure by the tax agent, the level of reduction depending upon the quality of the disclosure. For an unprompted disclosure the minimum penalty is 30 per cent of the potential lost revenue (or £1,500 where the maximum amount of penalty is £5,000). For a prompted disclosure the minimum penalty is 50 per cent of the potential lost revenue (or £2,500 where the maximum amount of penalty is £5,000).
36. Paragraph 29 says that where there are special circumstances, HMRC may reduce a penalty, stay (desist from) proceedings for a penalty, or agree a compromise in those proceedings. It also says what does not constitute special circumstances.
37. Paragraph 30 provides for an annual cap on the total penalty or penalties chargeable on an individual tax agent. The maximum penalty chargeable in respect of tax lost by all of a tax agent's clients taken together for tax periods ending in a calendar year, shall be £50,000.

Part 4: Penalties under this schedule: assessment etc

38. Paragraph 31 provides machinery provisions for HMRC to assess penalties for which a person is liable under this schedule.
39. Paragraph 32 says that a person may appeal against a decision to impose a penalty, or against the amount of any penalty.
40. Paragraph 33 describes the procedures for appealing a penalty.
41. Paragraph 34 describes the means by which collection of a penalty charged under this schedule may be enforced.
42. Paragraph 35 provides that a person who is convicted of an offence is not liable to a penalty under this schedule in respect of the same matter.

43. Paragraph 36 provides that a person who is personally liable to a tax-geared penalty is not liable to a penalty under this schedule in respect of the same matter.
44. Paragraph 37 provides for the amount of penalties in a specified sum to be changed by statutory instrument if there is a change in the value of money.

Part 5: Miscellaneous provision and interpretation

45. Paragraph 38 describes those parts of the Taxes Management Act 1970 which apply to this schedule as they do to the Taxes Acts.
46. Paragraph 39 says which taxes are covered by this schedule.
47. Paragraph 40 describes how, in some specific circumstances, “tax” should be interpreted for the purposes of this schedule.
48. Paragraphs 41 to 43 describe how some specified terms, including clients of a tax agent, should be interpreted for the purposes of this schedule.
49. Paragraph 43 says that, for the purposes of this schedule, a loss of tax is taken to have been brought about even if subsequently recovered or properly accounted for.
50. Paragraph 44 describes the relationship between this schedule and other enactments.

Part 6: Consequential provisions

51. Paragraphs 45 to 54 describe other legislation which is omitted or amended as a consequence of this schedule.