
60 General anti-abuse rule: penalty

(1) Part 5 of FA 2013 (general anti-abuse rule) is amended as follows.

(2) After section 212 insert –

“212A Penalty

(1) A person is liable to pay a penalty if –

- (a) the person has given a tax document to HMRC on the basis that a tax advantage results from particular tax arrangements,
- (b) the person has been given a notice under paragraph 12 of Schedule 43 or paragraph 3 of Schedule 43A stating that the tax advantage is to be counteracted, and
- (c) the tax advantage has been counteracted by the making of adjustments under section 209.

(2) The penalty is 60% of the value of the counteracted advantage.

(3) Schedule 43B –

- (a) gives the meaning of “the value of the counteracted advantage”, and
- (b) makes other provision in relation to penalties under this section.

(4) In this section “tax document” means any return, claim or other document submitted in compliance (or purported compliance) with any provision of, or made under, an Act.”

(3) In section 209 (counteracting the tax advantages), after subsection (7) insert –

“(8) Where a notice under paragraph 3 of Schedule 43 has been given to a person and the matter is referred to the GAAR Advisory Panel, the person must not make any GAAR-related adjustments in relation to the person’s tax affairs in the period which –

- (a) begins immediately after the end of the 30 day open period (see subsection (9)), and
- (b) ends immediately before the day on which the person is given the notice under paragraph 12 of Schedule 43 (notice of final decision after considering opinion of GAAR advisory panel).

(9) In subsection (8) the “30 day open period” means –

- (a) if the case falls within paragraph 5 of Schedule 43 (no representations made), the period of 30 days beginning immediately after the end of the 45 day period mentioned in paragraph 4(1) of that Schedule, or
- (b) if the case falls within paragraph 6(2) of that Schedule (referral after consideration of representations), the period of 30 days beginning with the day on which the designated HMRC officer gives the notice under paragraph 6(3) of that Schedule.

(10) Where a person has been given a notice under paragraph 1 of Schedule 43A (notice to taxpayer of proposed binding of arrangements) in relation to any tax arrangements, the person must not make any GAAR-related adjustments in the period that –

- (a) begins with the 31st day after the day on which that notice is given, and

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- (b) ends with the day before the day on which the person is given a notice under paragraph 3(2) of Schedule 43A in relation to the tax arrangements (notice of final decision after considering opinion of GAAR Advisory Panel).
- (11) In this section “GAAR-related adjustments” means –
- (a) for the purposes of subsection (8), adjustments which give effect (wholly or in part) to the proposed counteraction specified in the notice under paragraph 3 of Schedule 43;
 - (b) for the purposes of subsection (10), adjustments which give effect (wholly or partly) to the proposed counteraction specified in the notice under paragraph 1 of Schedule 43A.”
- (4) Schedule 43 (general anti-abuse rule: procedural requirements) is amended in accordance with subsections (5) and (6).
- (5) In paragraph 3 –
- (a) in sub-paragraph (2)(e), for “of paragraphs 5 and 6” substitute “of –
 - (i) paragraphs 5 and 6,
 - (ii) section 212A, and
 - (iii) subsections (8) and (9) of section 209.”;
 - (b) in sub-paragraph (3), after “may” insert “(subject to subsections (8) and (9) of section 209).
- (6) In paragraph 6, after sub-paragraph (2) insert –
- “(3) The officer must, as soon as reasonably practicable after the day on which the officer decides whether or not the matter is to be referred to the GAAR Advisory Panel, give the taxpayer written notice of the decision.”
- (7) After Schedule 43 insert –

“SCHEDULE 43B

PENALTY UNDER SECTION 212A: SUPPLEMENTARY PROVISION

Value of the counteracted advantage: introduction

- 1 Paragraphs 2 to 4 set out how to calculate the “value of the counteracted advantage” for the purposes of section 212A.

Value of the counteracted advantage: basic rule

- 2 (1) The “value of the counteracted advantage” is the additional amount due or payable in respect of tax as a result of the counteraction mentioned in section 212A(1)(b).
- (2) The reference in sub-paragraph (1) to the additional amount due and payable includes a reference to –
- (a) an amount payable to HMRC having erroneously been paid by way of repayment of tax, and
 - (b) an amount which would be repayable by HMRC if the counteraction were not made.
- (3) The following are ignored in calculating the value of the counteracted advantage –

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- (a) group relief, and
 - (b) any relief under section 458 of CTA 2010 (relief in respect of repayment etc of loan) which is deferred under subsection (5) of that section.

(4) This paragraph is subject to paragraphs 3 and 4.

Value of counteracted advantage: losses

- 3
- (1) To the extent that the tax advantage mentioned in section 212A(1)(b) (“the tax advantage”) resulted in the wrong recording of a loss for the purposes of direct tax and the loss has been wholly used to reduce the amount due or payable in respect of tax, the value of the counteracted advantage is determined in accordance with paragraph 2.
 - (2) To the extent that the tax advantage resulted in the wrong recording of a loss for purposes of direct tax and the loss has not been wholly used to reduce the amount due or payable in respect of tax, the value of the counteracted advantage is –
 - (a) the value under paragraph 2 of so much of the tax advantage as results (or would in the absence of the counteraction result) from the part (if any) of the loss which was used to reduce the amount due or payable in respect of tax, plus
 - (b) 10% of the part of the loss not so used.
 - (3) Sub-paragraphs (1) and (2) apply both –
 - (a) to a case where no loss would have been recorded but for the tax advantage, and
 - (b) to a case where a loss of a different amount would have been recorded (but in that case sub-paragraphs (1) and (2) apply only to the difference between the amount recorded and the true amount).
 - (4) To the extent that the tax advantage creates or increases (or would in the absence of the counteraction create or increase) an aggregate loss recorded for a group of companies –
 - (a) the value of the counteracted advantage is calculated in accordance with this paragraph, and
 - (b) in applying paragraph 2 in accordance with sub-paragraphs (1) and (2), group relief may be taken into account (despite paragraph 2(3)).
 - (5) To the extent that the tax advantage results (or would in the absence of the counteraction result) in a loss, the value of it is nil where, because of the nature of the loss or the person’s circumstances, there was no reasonable prospect of the loss being used to support a claim to reduce a tax liability (of any person).

Value of counteracted advantage: deferred tax

- 4
- (1) To the extent that the tax advantage mentioned in section 212A is a deferral of tax, the value of the counteracted advantage is –
 - (a) 25% of the amount of the deferred tax for each year of the deferral, or

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- (b) a percentage of the amount of the deferred tax, for each separate period of deferral of less than a year, equating to 25% per year,
or, if less, 100% of the amount of the deferred tax.
- (2) This paragraph does not apply to a case to the extent that paragraph 3 applies.

Assessment of penalty

- 5 (1) Where a person is liable for a penalty under section 212A, HMRC must assess the penalty.
- (2) Where HMRC assess the penalty, HMRC must –
- (a) notify the person who is liable for the penalty, and
 - (b) state in the notice a tax period in respect of which the penalty is assessed.
- (3) A penalty under this paragraph must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.
- (4) An assessment –
- (a) is to be treated for procedural purposes as if it were an assessment to tax,
 - (b) may be enforced as if it were an assessment to tax, and
 - (c) may be combined with an assessment to tax.
- (5) An assessment of a penalty under this paragraph must be made before the end of the period of 12 months beginning with –
- (a) the end of the appeal period for the assessment which gave effect to the counteraction mentioned in section 212A(1)(b),
or
 - (b) if there is no assessment within paragraph (a), the date (or the latest of the dates) on which that counteraction becomes final.
- (6) The reference in sub-paragraph (5)(b) to the counteraction becoming final is to be interpreted in accordance with section 210(8).

Alteration of assessment of penalty

- 6 (1) After notification of an assessment has been given to a person under paragraph 5(2), the assessment may not be altered except in accordance with this paragraph or paragraph 7, or on appeal.
- (2) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the value of the counteracted advantage.
- (3) An assessment may be revised as necessary if operated by reference to an overestimate of the value of the counteracted advantage.

Revision of assessment following consequential relieving adjustment

- 7 (1) Sub-paragraph (2) applies where a person –

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- (a) is notified under section 210(7) of a consequential adjustment relating to a counteraction under section 209, and
 - (b) an assessment to a penalty in respect of that counteraction of which the person has been notified under paragraph 5(2) does not take account of that consequential adjustment.
 - (2) HMRC must make any alterations of the assessment that appear to HMRC to be just and reasonable in connection with the consequential amendment.
 - (3) Alterations under this paragraph may be made despite any time limit imposed by or under an enactment.

Aggregate penalties

- 8 (1) Sub-paragraph (3) applies where –
 - (a) two or more penalties are incurred by the same person and fall to be determined by reference to an amount of tax to which that person is chargeable,
 - (b) one of those penalties is incurred under section 212A, and
 - (c) one or more of the other penalties are incurred under a relevant penalty provision.
- (2) But sub-paragraph (3) does not apply if section 212(2) of FA 2014 (follower notices: aggregate penalties) applies in relation to the amount of tax in question.
- (3) The aggregate of the amounts of the penalties mentioned in subsection (1)(b) and (c), so far as determined by reference to that amount of tax, must not exceed –
 - (a) the relevant percentage of that amount, or
 - (b) in a case where at least one of the penalties is under paragraph 5(2)(b) of, or sub-paragraph (3)(b), (4)(b) or (5)(b) of paragraph 6 of, Schedule 55 to FA 2009, £300 (if greater).
- (4) In the application of section 97A of TMA 1970 (multiple penalties) no account shall be taken of a penalty under section 212A.
- (5) “Relevant penalty provision” means –
 - (a) Schedule 24 to FA 2007 (penalties for errors),
 - (b) Schedule 41 to FA 2008 (penalties: failure to notify etc),
 - (c) Schedule 55 to FA 2009 (penalties for failure to make returns etc), or
 - (d) Part 4 of the Schedule to section 63 of FA 2016 (penalty under Serial Avoiders Regime).
- (6) “The relevant percentage” means –
 - (a) 200% in a case where at least one of the penalties is determined by reference to the percentage in –
 - (i) paragraph 4(4)(c) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(4)(a) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(3A)(c) of Schedule 55 to FA 2009,
 - (b) 150% in a case where paragraph (a) does not apply and at least one of the penalties is determined by reference to the percentage in –

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- (i) paragraph 4(3)(c) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(3)(a) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(3A)(b) of Schedule 55 to FA 2009,
- (c) 140% in a case where neither paragraph (a) nor paragraph (b) applies and at least one of the penalties is determined by reference to the percentage in –
- (i) paragraph 4(4)(b) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(4)(b) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(4A)(c) of Schedule 55 to FA 2009,
- (d) 105% in a case where at none of paragraphs (a), (b) and (c) applies and at least one of the penalties is determined by reference to the percentage in –
- (i) paragraph 4(3)(b) of Schedule 24 to FA 2007,
 - (ii) paragraph 6(3)(b) of Schedule 41 to FA 2008, or
 - (iii) paragraph 6(4A)(b) of Schedule 55 to FA 2009, and
- (e) in any other case, 100%.

Appeal against penalty

- 9 (1) A person may appeal against –
- (a) the imposition of a penalty under section 212A, or
 - (b) the amount assessed under paragraph 5.
- (2) An appeal under sub-paragraph (1)(a) may only be made on the grounds that the arrangements were not abusive or there was no tax advantage to be counteracted.
- (3) An appeal under sub-paragraph (1)(b) may only be made on the grounds that the assessment was based on an overestimate of the value of the counteracted advantage (whether because the estimate was made by reference to adjustments which were not just and reasonable or for any other reason).
- (4) An appeal under this paragraph must be made within the period of 30 days beginning with the day on which notification of the penalty is given under paragraph 5(2).
- (5) An appeal under this paragraph is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC's review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
- (6) Sub-paragraph (5) does not apply –
- (a) so as to require a person to pay a penalty before an appeal against the assessment of the penalty is determined, or
 - (b) in respect of any other matter expressly provided for by this Part.
- (7) On an appeal against the penalty the tribunal may affirm or cancel HMRC's decision.
- (8) On an appeal against the amount of the penalty the tribunal may –
- (a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC has power to make.

(9) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of sub-paragraph (5)).

Mitigation of penalties

10 (1) The Commissioners for Her Majesty's Revenue and Customs may in their discretion mitigate a penalty under section 212A, or stay or compound any proceedings for such a penalty.

(2) They may also, after judgment, further mitigate or entirely remit the penalty.

References to an "assessment"

11 In this Schedule a reference to an assessment to tax is to be interpreted, in relation to inheritance tax, as a reference to a determination."

(8) In section 103ZA of TMA 1970 (disapplication of sections 100 to 103 in the case of certain penalties) (as amended by the Schedule to section 63) –

(a) omit "or" at the end of paragraph (h), and

(b) after paragraph (i) insert "or

(i) section 212A of FA 2013 (general anti-abuse rule)."

(9) In section 212 of FA 2014 (follower notices: aggregate penalties) (as amended by the Schedule to section 63), in subsection (4) –

(a) omit "or" at the end of paragraph (c), and

(b) after paragraph (d) insert " , or

(e) section 212A of FA 2013 (general anti-abuse rule)."

(10) FA 2015 is amended in accordance with subsections (11) and (12).

(11) In section 120 (penalties in connection with offshore matters and offshore transfers), in subsection (1), omit "and" before paragraph (c) and after paragraph (c) insert – " , and

(d) Schedule 43B to FA 2013 (as amended by FA 2016)."

(12) In Schedule 20 to that Act, after paragraph 19 insert –

"General anti-abuse rule: aggregate penalties

20 (1) In Schedule 43B to FA 2013 (general anti-abuse rule: supplementary provision about penalty), sub-paragraph (6) of paragraph 7 is amended as follows.

(2) After paragraph (b) insert –

"(ba) 125% in a case where neither paragraph (a) nor paragraph (b) applies and at least one of the penalties is determined by reference to the percentage in –

(i) paragraph 4(2)(c) of Schedule 24 to FA 2007,

(ii) paragraph 6(2)(a) of Schedule 41 to FA 2008,

(iii) paragraph 6(3A)(a) of Schedule 55 to FA 2009,".

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- (3) In sub-paragraph (c) for “neither paragraph (a) nor paragraph (b) applies” substitute “none of paragraphs (a) to (ba) applies.”
 - (4) In sub-paragraph (d) for “none of paragraphs (a), (b) and (c) applies” substitute “none of paragraphs (a) to (c) applies”.
- (13) The amendments made by subsections (1) to (12) have effect in relation to tax arrangements entered into on or after the day on which this Act is passed.