

Six-figure penalties!

Mark McLaughlin warns that not providing relevant information and documents in response to an HMRC information notice could be an expensive compliance failure

Information notices have been a key weapon in HMRC's armoury of compliance enforcement measures since the relevant legislation was introduced in Finance Act 2008.

The information powers provisions feature a penalty regime for offences, which include failure to comply with an information notice, and obstructing an HMRC officer during an inspection that has been approved by the tax tribunal.

Higher and higher

For those offences, the initial penalty is £300. If the failure or obstruction continues, further penalties of up to £60 per day may be imposed (FA 2008, Sch 36, para 39-40).

In addition, a tax-related penalty can be imposed by the Upper Tribunal (UT) if a person fails to comply with an information notice or deliberately obstructs an inspection, and that failure continues after an initial penalty has been imposed (FA 2008, Sch 36, para 50). However, an authorised HMRC officer must have reason to believe that the result of the non-compliance is that the person has paid, or is likely to pay, significantly less tax than would otherwise have been the case.

HMRC must make an application to the UT for the tax-related penalty within 12 months of the 'relevant date'. For an information notice where the person has a right of appeal, the relevant date is the later of the date on which the person became liable to the initial penalty; or the end of the period for appealing against the information notice; or if an appeal has been made, the date on which the appeal is determined or withdrawn. In any other case, the relevant date is the date on which the person became liable to the initial penalty.

If an additional penalty is considered appropriate, the amount of the penalty is decided by the UT. In deciding on the amount of the penalty, the UT is required to have regard to the amount of tax which has not been, or is not likely to be, paid by the person. The tax-related penalty is payable in addition to the initial and any daily penalties already imposed. HMRC must notify the person about their liability to a tax-related penalty. This penalty is not taken into account when considering various other types of penalty (see FA 2008, Sch 36, para 50(6)), where multiple penalties are payable under those provisions in respect of the same tax.

Tax-related penalties must be paid no later than 30 days from the date on which the penalty notification is issued. The penalty is enforced by HMRC as if it was income tax charged in an assessment which is due and payable (FA 2008, Sch 36, para 51).

How serious?

In practice, tax-related penalties are normally only considered in the 'most serious' cases where tax is at risk because of a failure to comply with an information notice. The tax at risk must be 'substantial' (see HMRC's Compliance Handbook manual at CH26720). The onus will generally be on HMRC to provide evidence of this tax risk to the UT.

The UT's task in deciding on an appropriate level of tax-related penalty will probably be a difficult one, because HMRC needs the information and documents requested in the information notice to establish the amount of tax unpaid. Consequently, the UT must use its best judgment. Nevertheless, it is likely that the tax-related penalty may not be an accurate reflection of the tax actually at risk.

Reduced from seven figures

A stark illustration of the potentially expensive nature of these tax-related penalties was provided in *Tager & Anor v Revenue and Customs* [2018] EWCA Civ 1727. In that case, Mr Tager, an eminent barrister, submitted tax returns for 2008/09, 2009/10 and 2010/11. HMRC opened an enquiry into those returns,

and subsequently issued an information notice. He only partially complied with the notice, and HMRC issued fixed and daily penalties.

Tager was also the personal representative of his late father's estate. Following the submission of an inheritance tax (IHT) return in respect of the estate, HMRC raised various queries, and later issued information notices. Penalties were imposed for non-compliance. HMRC subsequently applied to the UT for tax-related penalties for continued failure to comply with the information notices, in both Tager's own capacity and as a personal representative.

The UT considered that the starting point for the tax-related penalty must be 100%, but the amounts of tax could not be ascertained. Based on its conclusions about the tax at risk, the UT imposed tax-related penalties amounting to just over £1,246,000 (subsequently reduced following the correction of errors) to £1,075,210. However, on appeal, the Court of Appeal noted that the tax unpaid was now agreed to be income tax of £1,250 and IHT of just under £195,500. The court concluded that the appropriate penalties to impose would be: (a) £20,000 for failure to comply with the relevant income tax notices; and (b) £200,000 for the failures to comply with the IHT notice.

And there's more!

Although substantially lower than the penalty originally charged by the UT, this six-figure penalty will understandably seem severe to most taxpayers. Unfortunately, Tager was not an isolated instance of six-figure penalties.

In *Mattu v Revenue and Customs* [2021] UKUT 245, the full amount of tax at risk was estimated at almost £2 million. However, the UT applied a discount of 50% to this figure because the tax liability figure remained uncertain and took various points into account by way of mitigation. Having regard to the principles of fairness and proportionality, the UT eventually determined the penalty at £350,000.

More recently, in *Revenue and Customs v AML Tax (UK) Ltd* [2022] UKUT 81 (TC), HMRC believed that the potential tax at risk due to AML's non-compliance with the information notice was £1.34 million. HMRC applied to the UT for a penalty by reference to this amount of tax. The UT considered relevant factors, including in particular the high level of uncertainty about the tax at risk, and concluded in the circumstances that a penalty of £150,000 would be appropriate.

In practice, a tax-related penalty could, of course, be seven figures or more; quite a sobering thought.

Other points

There is a general right of appeal against the decision to impose a penalty in respect of non-compliance with an information notice (FA 2008, Sch 36, para 47). However, that right of appeal applies to a decision of HMRC to impose the initial or daily penalties, or a decision about the amount of such penalties. There is no similar right of appeal in respect of the UT's decision to impose a tax-related penalty.

There is no liability to initial and daily penalties for failing to comply with an information notice or obstructing an inspection, if HMRC (or the tribunal, on appeal) is satisfied that the person has a 'reasonable excuse' for their non-compliance, and the person has put right their action or inaction without unreasonable delay after the excuse has ended (FA 2008, Sch 36, para 45). However, the 'reasonable excuse' defence does not apply to tax-related penalties.

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