

Electronic sales suppression (Lecture P1360 - 11.25 minutes)

This article considers HMRC's focus on the misuse of electronic till systems, and other electronic sales suppression methods, and the sophisticated methods being adopted by some businesses to under-declare their profits.

What is Electronic Sales Suppression?

Electronic Sales Suppression ("ESS") is where a business (for example, bars, restaurants and retail) uses a tool to either hide or reduce the value of individual transactions on electronic sales records. This goes beyond software manipulation in electronic tills, and also includes computer code and hardware. The definition of "tool", at Paragraph 1 (6), Schedule 14, Finance Act 2022 is wide-ranging.

HMRC consider that you are involved in ESS if you made, supplied, or promoted an ESS tool. You are also involved in ESS if:

- you own an ESS tool;
- have access to an ESS tool;
- have tried to access an ESS tool.

The manipulation can take place either at, or after, the point of sale. The result is that the records appear to be correct and complete.

Penalties, and HMRC's information powers

Advisers will be aware that HMRC have extensive information powers, and a considerable array of penalties that can be imposed on taxpayers. Those penalties, and powers, were extended by the provisions of Schedule 14, Finance Act 2022.

The provisions introduce the ability for HMRC to charge penalties to those making, supplying or promoting the use of an electronic sales suppression tool. The maximum penalty is £50,000, although the exact amount is subject to various factors, including the complexity of the tool.

The provisions also allow HMRC to charge taxpayers a penalty when they are in possession of an ESS tool. The penalty is worked out differently from that noted above, with a maximum initial fixed penalty of £1,000, plus daily penalties of up to £75 per day. HMRC's guidance states that it is their policy to charge the full £1,000 fixed penalty where the taxpayer has already been charged an ESS penalty in the last five years. In addition, after the fixed penalty has been charged, the daily penalty rate will normally be £75. Although the penalty for possession of an ESS tool may seem more favourable than the penalty charged for making, supplying or promoting the use of an ESS tool, advisers should be aware that other penalties may be applied (including for failing to notify, or the submission of an incorrect tax return, etc).

The provisions at Schedule 14, Finance Act 2002, extend the existing information powers at Schedule 36, Finance Act 2008, to include persons that HMRC suspect may be liable to an ESS penalty. The provisions enable HMRC to ask for certain information that only applies to ESS, and allows HMRC to issue a notice to a 'relevant person' for a 'relevant purpose'.

Disclosure facility

On 8 December 2022, HMRC announced that they would provide a disclosure facility for taxpayers who had misused their electronic till system to under-declare their profits, with a consequent underpayment of tax. The facility provides that disclosures can be made between 6 January 2023 and 9 April 2023. Details of the undeclared sales for all years must be provided to HMRC.

Advisers can use the facility on behalf of their client. HMRC have, so far, produced limited guidance on the disclosure facility, but state that the maximum penalty is 100%. The guidance states that they will open an investigation if the information that is provided by the taxpayer is “significantly incorrect”. Advisers should note that, in common with other recent disclosure facilities, HMRC do not provide immunity from prosecution. Advisers need to proceed with care when considering using the facility, and should consider the other options available.

Where there has been a significant under-declaration of profits by the business, or the taxpayer’s behaviour may be considered “deliberate” or fraudulent by HMRC, advisers should consider making a disclosure under Code of Practice 9 (the Contractual Disclosure Facility, covered in a separate session).

Practical points for advisers

As with most of HMRC’s disclosure facilities, there has not been widespread publicity regarding the process relating to electronic sales suppression. Most taxpayers are not in the habit of scouring HMRC’s website for information that may relate to them. Advisers may want to consider whether they should contact their clients who may be impacted by the new provisions, to make them aware of the disclosure facility. The skill in any such communication is in not being accusatory, but providing the relevant information to clients. Advisers may, for example, want to consider a comment in their newsletter, if they have one, if they feel uncomfortable contacting specific clients, or a group of clients, directly. I appreciate that some may consider this to be a controversial suggestion. However, I would take the view that it is better that clients learn of the facility from their own adviser, rather than a third party. Whether affected clients make themselves known is another matter.

Where a client indicates that they have a disclosure to make, advisers need to ensure that they consider whatever options are available to the client. The disclosure facility may not be the only option. Where there has been a significant under-statement of profits, or HMRC may view the client’s behaviour as deliberate or fraudulent, consideration should be given to using the Code of Practice 9 process (the Contractual Disclosure Facility). Advisers should seek specialist assistance if they are unsure how to proceed, or do not have suitable experience in these matters.

As noted earlier, the disclosure facility is only open for a very limited period. After the expiry of that period, clients may approach you for assistance. Also, HMRC can be expected to follow-up on the information they have obtained, and will continue to obtain, regarding electronic sales suppression. That will mean the issue of enquiry or investigation letters, as well as a significant number of nudge letters to taxpayers they suspect may have participated in such behaviour.

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