

Information notices: Tax-related penalties (Lecture P1319 – 9.35 minutes)

Background

Information notices are an important weapon in HMRC's armoury of compliance enforcement measures. The information powers legislation features its own penalty regime for offences, which include penalties for failing to comply with an information notice, and for obstructing an HMRC officer during an inspection which has been approved by the tax tribunal (FA 2008, Sch 36, para 39-40).

Turning the screw

For those offences, there's an initial penalty of £300. If the failure or obstruction continues, further penalties of up to £60 per day may be imposed. In addition, a tax-related penalty can be imposed by the Upper Tribunal (UT) where 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. 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 a 'relevant date' defined in the legislation. 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appealing against the information notice; or if an appeal has been made, the date on which the appeal is determined or withdrawn.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.

The amount of any tax-related 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 (FA 2008, Sch 36, para 50).

How much is enough?

In practice, the tax-related penalty is normally only considered for the 'most serious' cases where tax is at risk because of a failure to comply with an information notice (see CH270400). The task at risk must be 'substantial' (CH26720).

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. This means that the UT must use its best judgment; but even so, it's likely that the tax-related penalty may not be an accurate reflection of the tax actually at risk.

Case law

In *Tager & Anor v Revenue and Customs* [2018] EWCA Civ 1727. Mr Tager, an eminent barrister, was issued with an information notice. He only partially complied with the notice, and HMRC issued fixed and daily penalties. Mr 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 his own capacity and as a personal representative.

Based on its conclusions about the tax at risk, the UT imposed tax-related penalties amounting to just over £1,246,000 (i.e., £75,000 in respect of personal tax, and £1,171,000 in respect of IHT), but these were 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. Taking everything into account, 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.

Subsequently, in *Mattu v Revenue and Customs* [2021] UKUT 245, the full amount of tax at risk was considered to be almost £2 million. However, the UT applied a discount of 50% to this figure because the tax liability figure remained uncertain, and also 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.

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 an additional penalty by reference to this amount of tax, subject to some discount to reflect uncertainty in the amount of tax involved and certain other factors. The UT took into account relevant factors, including in particular the high level of uncertainty as to the tax at risk. The UT concluded in the circumstances that a penalty of £150,000 would be appropriate.

Other points

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

As with some other tax compliance provisions, there is no liability to a penalty 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 applies to initial and daily penalties, but not tax-related penalties.

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