

Electronic sales suppression penalties (Lecture P1365 – 12.14 minutes)

In a previous article I covered issues relating to electronic sales suppression (“ESS”). This article will cover the penalty regime associated with ESS. An ESS penalty is one charged under the provisions of Schedule 14, Finance Act 2022.

Penalty for making, supplying, or promoting an ESS tool

The ESS penalty provisions provide for a liability to a penalty in certain circumstances. Penalties can be charged for making an ESS tool, supplying an ESS tool, or promoting use of a tool to suppress an electronic sales record. The penalties for these offences are subject to the same provisions.

As a brief recap from the previous session, an ESS tool is used to either hide or suppress the value of individual transactions in electronic sales records. There is a definition of various terms used in the legislation, at Paragraph 1, Schedule 14, Finance Act 2022. There is a wide-ranging definition of “tool”, and the term can include software, computer code, hardware, and “any other thing”.

A penalty of up to £50,000 per tool can be charged to:

- A person who makes an ESS tool (including modifying a tool that is not an ESS tool so that it becomes an ESS tool);
- A person who supplies an ESS tool to other persons;
- A person who promotes the use of a tool to suppress a relevant electronic sales record (a penalty can be applied for each such occasion).

The penalty is a percentage of the maximum that can be applied, by reference to 3 things.

1. The type of ESS tool:

- Where the tool is considered to be of “low complexity”, the maximum penalty for this category is 40% of the maximum £50,000 penalty;
- Where the tool is considered to be of “medium complexity”, the maximum penalty for this category is 80% of the maximum £50,000 penalty;
- Where the tool is considered to be of “high complexity”, the maximum penalty for this category is 100% of the maximum £50,000 penalty.

2. The type of disclosure (‘unprompted’ or ‘prompted’) - This determines the minimum penalty percentage that HMRC will charge.

3. The ‘quality of disclosure’:

- Telling – up to 30% of the maximum reduction;
- Helping – up to 40% of the maximum reduction;
- Giving – up to 30% of the maximum reduction.

The penalty range is determined by reference to the type of ESS tool and whether the disclosure was prompted or unprompted.

Nature of ESS tool	Unprompted disclosure	Prompted disclosure
Low complexity	10% to 40%	20% to 40%
Medium complexity	30% to 80%	45% to 80%
High complexity	50% to 100%	70% to 100%

HMRC have produced a factsheet on ESS (CC/FS68), which includes consideration of what is meant by “low complexity”, etc. The factsheet can be accessed here:

<https://www.gov.uk/government/publications/compliance-checks-electronic-sales-suppression-ccfs68/electronic-sales-suppression-ccfs68#:~:text=Penalty%20for%20making%2C%20supplying%2C%20or,or%20promoted%20an%20ESS%20tool.>

The penalty is calculated by reference to the reduction for telling/helping/giving. When determining the quality of the disclosure, HMRC will take into account how long it has taken the person to make it. Where it has taken the person a ‘long time’, which HMRC consider to mean three years or more, to correct or disclose what is wrong, they will usually restrict the maximum reduction applied for the quality of the disclosure. In these circumstances, HMRC will restrict the maximum reduction to 10 percentage points less than the maximum reduction.

Penalty for being in possession of an ESS tool

A penalty of up to £1,000 can be charged if a person possesses, has obtained or has access to an ESS tool and one of two conditions is met.

The first condition is where HMRC has notified the person (in writing) that an officer of HMRC has reason to believe that the person is in possession of, or has otherwise obtained access to, an ESS tool. There is a 30-day period of grace, in which the person can satisfy the officer that they are not, or are no longer, in possession of, and does not otherwise have access to, an ESS tool.

The second condition is that the person has been assessed to an ESS penalty within five years of the day on which HMRC has reason to believe that the person has access to an ESS tool. If this condition is met, HMRC have stated that their policy will be to charge the full £1,000 fixed penalty.

Where a fixed penalty has been charged under these provisions, a further, daily, penalty can be charged if the person continues to possess, or have access to, the ESS tool. The penalty is up to £75 per day for each subsequent day for which the default continues, subject to a maximum penalty of £50,000. HMRC have stated that where they charge the full £1,000 fixed penalty following the imposition of a previous ESS penalty, see above, the daily penalty rate will normally be £75 per day.

The penalty for possession, etc, can be charged whether or not the person owns the tool, whether or not they only access the tool remotely, or whether or not other persons also have access to the tool. A penalty for possession will not be charged if the person has been assessed to a penalty for making, supplying or promoting the tool that they are in possession of, or has otherwise obtained access to. A penalty will also not be charged if the person can satisfy HMRC, or, on appeal, the tribunal, that they were not aware that the tool they were in possession of, etc, was an ESS tool.

Other penalty considerations

There are provisions within the legislation (see Part 3, Schedule 14, Finance Act 2022) which impact on the ability to impose a penalty, or the level of a penalty. These include where the activity that would otherwise give rise to a penalty is a legitimate activity.

In addition, the principle of double jeopardy applies, and person will not be charged an ESS penalty where they have been convicted of an offence.

Advisers are likely to be familiar with the concept of a “special reduction” from other penalty regimes, and those provisions are mirrored in the ESS legislation. Where a person becomes liable to an ESS penalty, if HMRC assess the penalty they must notify the person. However, the notification must be made within two years from the day on which sufficient evidence of facts to indicate liability to the penalty, in the opinion of HMRC, comes to HMRC’s knowledge.

When a penalty is assessed, the person has the usual rights of appeal, including to the tribunal. Finally, advisers need to be aware that HMRC may be able to impose other penalties, in addition to those charge under the ESS provisions, including, for example, for the submission of an incorrect return.

Practical points for advisers

The ESS provisions are relatively new, at the time of writing, being introduced in February 2022, so it is too early to determine their application by HMRC, and any subsequent considerations by the tribunal. When faced with a client with a potential ESS penalty position, the adviser needs to establish the facts, particularly in view of the potential high level of penalties that can be charged.

Advisers need to be pro-active if there is a disclosure to make, and consideration needs to be given to the ‘unprompted v prompted’ position, particularly where HMRC have started an enquiry, or initiated contact with the client. Unfortunately, the adviser is often faced with a “damage-limitation” exercise and needs to ensure that the client acts in an appropriate way to maximise the potential for penalty reduction. Finally, advisers should consider seeking specialist help, to minimise the penalty, and assist with the overall “damage limitation” exercise.

Contributed by Phil Berwick (Director at Berwick Tax)