

Information notices – penalties (Lecture P1460 – 13.06 minutes)

This article will consider the general penalty provisions relating to information notices issued by HMRC under the provisions of Schedule 36, Finance Act 2008, and the associated assessment and appeal procedures for those penalties. Unless stated otherwise, all statutory references are to Schedule 36, Finance Act 2008.

Failure to comply with an information notice

A person fails to comply with an information notice if the information to be provided, or documents to be produced, have not been provided or produced within the time limit given in the notice. In such circumstances, the person may become liable to a penalty under Paragraph 39 for failure to comply with the notice.

If the person has provided some, but not all, of the information, or produced some, but not all, of the documents stated in the notice, HMRC's guidance instructs their officers to consider whether the information and documents provided are sufficient to enable the compliance check to be completed. If that is the case, officers are instructed not to take any further action to obtain the missing items. Otherwise, the officer may charge a penalty, £300, for the failure.

A penalty does not arise in relation to Paragraph 39 if the person complies with the notice within such further time, if any, that is granted by a HMRC officer.

A Paragraph 39 penalty can also be imposed where a person conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of Paragraphs 42 or 43. These paragraphs relate to the concealment, etc of documents following an information notice and informal notification respectively.

Daily default penalties

A daily default penalty can be charged, under Paragraph 40, if the failure to comply with an information notice continues after an initial penalty under Paragraph 39 has been imposed for that failure. The penalty can be up to £60 for each subsequent day on which the failure continues.

Advisers should note that there is a provision for increased daily default penalties in relation to a notice issued under Paragraph 5. Please refer to the session on those notices, which includes details of the relevant penalty.

Inaccurate information

Paragraph 40A provides that a penalty can be imposed for providing inaccurate information or documentation in complying with an information notice. The penalty, not exceeding £3,000, can be imposed where any of the following conditions are satisfied:

- the inaccuracy is careless or deliberate;
- the person knows of the inaccuracy at the time the information or document is provided but does not inform HMRC at that time;
- the person who provided the inaccurate information or document discovers the inaccuracy some time later and fails to take reasonable steps to inform HMRC.

The legislation provides that where the information or document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax-related penalty

The Upper Tribunal can impose a tax-related penalty in certain circumstances, in accordance with Paragraph 50. F

or the purposes of this session, the penalty can be imposed where a person fails to comply with an information notice, the failure continues after an initial penalty has been imposed, and HMRC have reason to believe that tax has been underpaid as a result of that failure. HMRC may apply to the Upper Tribunal in such circumstances, although they will only do so where the amount of tax is considered to be substantial.

HMRC must make their application to the Upper Tribunal within 12 months of the relevant date. The relevant date for this purpose is the date that the person becomes liable to the penalty under Paragraph 39. The date is extended if the associated information notice has been appealed, but there is no similar extension if the Paragraph 39 penalty has been appealed.

The Upper Tribunal decide the amount of the penalty, and, in doing so, must have regard to the amount of tax which has not been, or is not likely to be, paid by the person

A relatively recent tribunal case considered HMRC's ability to seek a penalty under this provision. In *Baxendale-Walker v HMRC* [2024] UKUT 154 (TCC), HMRC tried to impose a £14 million penalty on the taxpayer for continued non-compliance with a Schedule 36, Finance Act 2008 notice. HMRC had sought the approval of the tribunal before the notice was issued, and had allowed the taxpayer further time to comply. The Upper Tribunal's judgment addresses complex issues around whether HMRC has the authority to amend the time allowed for compliance after an information notice is issued, and the interaction between the penalty provisions. The outcome was that the tribunal allowed Mr Baxendale-Walker's strike-out application.

The repercussions of the case are likely to impact on future recipients of information notices, with HMRC being less lenient in granting further time to comply with such notices.

Penalty assessment

HMRC have 12 months to assess, and notify, a penalty under the provisions of Paragraphs 39, 40 and 40A (Paragraph 46).

The penalty assessment under Para. 39 or 40 must be made within 12 months beginning with the date on which the person became liable to the penalty, subject to the following:

"In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—

- (a) the date on which the person became liable to the penalty,
- (b) the end of the period in which notice of an appeal against the information notice could have been given, and
- (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn" (Paragraph 46, (3))."

The assessment of a penalty under Paragraph 40A must be made within the period of 12 months beginning with the date on which the inaccuracy first came to the attention of and HMRC officer, and within the period of six years beginning with the date on which the person became liable to the penalty.

Appeals

A person may appeal against the imposition of a default or inaccuracy penalty (Paragraphs 39, 40 or 40A), or the amount of any such penalty (Paragraph 47). Any such appeal must be made to HMRC within 30 days of the penalty notice, and must be in writing.

Where HMRC, or the First-tier Tribunal, are satisfied that there is a reasonable excuse for failing to comply with an information notice, a penalty does not arise under Paragraphs 39 or 40 (Paragraph 45). There is not a statutory definition of 'reasonable excuse', and the position needs to be considered by reference to the circumstances of the case. The legislation states the following:

“(2) For the purposes of this paragraph—

- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,
- (b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure ..., and
- (c) where the person had a reasonable excuse for the failure ... but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, ... without unreasonable delay after the excuse ceased”.

The appeal against the penalty can be settled by agreement with HMRC, or notified to the tribunal. The adviser may consider using the statutory review process, or HMRC's Alternative Dispute Resolution process to conclude the matter. The burden of proof in an appeal against a penalty for non-compliance is on HMRC.

Practical considerations

The adviser's primary aim should be that the client does not become subject to a penalty for a failure, or other offence, in relation to an information notice. The reality is that the objective should be that the client does not become subject to an information notice, at least not in relation to their own affairs.

However, where a penalty is assessed, the adviser needs to make sure that, firstly, any penalty charges have been correctly assessed by HMRC (as noted above), and that any appeal is submitted within the statutory 30 days. This sounds very basic advice, and it is, but I have seen numerous examples in the nearly 30 years that I have been helping professional advisers and their clients where the relevant deadline has been missed or overlooked. There is provision for a late appeal to be accepted, but failing to make the appeal on time adds an additional, and unnecessary, hurdle into the process.

Advisers need to be mindful of the wider implications where a penalty is imposed in relation to an information notice. Where additional tax liabilities are established, the HMRC officer is likely to reduce mitigation for any resulting penalty on those liabilities, if a formal information notice has had to be issued, and there has been a failure to comply with that notice, or other offence, such that penalties are charged. Such behaviour by the client is likely to be seen as a lack of co-operation, or otherwise helping with the enquiry.

In addition, the imposition of penalties for failure to comply with an information notice may impact on the HMRC officer's view of the case and may result in a stricter approach to any future information requests.

This session focuses on civil penalties relating to information notices. Advisers need to be aware that criminal proceedings may be considered where a person conceals, destroys, or disposes of a document. HMRC's guidance notes, at CH27200, that "criminal proceedings may be appropriate where:

- the information notice was issued with the approval of the tribunal, or it was your intention to seek approval, and
- any document required by, or to be included in, the notice has been concealed, destroyed or otherwise disposed of".

Contributed by Phil Berwick, director at Berwick Tax Limited