

Finance Bill 2021

Representation from the Association of Taxation Technicians (ATT)

Clause 112 and Schedule 23: Penalties for failures to make returns, etc

Executive Summary

Clause 112 together with Schedule 23 (“the Schedule”) introduces the concept of a points-based penalty system for the failure to make, or late submission of, various returns.

Our main concern relates to the time limits in this legislation. Given that the stated purpose of the points regime is to encourage an early return to compliance by taxpayers, allowing HMRC up to 48 weeks (in some circumstances) to notify a person of the award of a penalty point, and – even more significantly - up to two years to assess a penalty liability, is excessive. These periods should be reduced and/or assurances given by ministers that the full extent of these time periods will only be used in exceptional circumstances.

1. Background

- 1.1. The concept of a points-based penalty system was the subject of extensive consultation between 2015 and 2018. This culminated in the publication in July 2018 (as part of the Draft provisions for Finance Bill) of relevant draft legislation (“the 2018 draft provisions”).
- 1.2. ATT and others submitted comments to HMRC on those draft provisions at the time but no legislation was brought forward until the inclusion of the proposals in the current Finance Bill.
- 1.3. We welcome the fact that some of our 2018 suggestions are reflected in the Schedule.
- 1.4. The penalty points system of penalties will be phased in from 1 April 2022 starting with VAT returns.
- 1.5. We identify below two areas where we consider further amendment is required.

2. Notification by HMRC to a person of the award of a penalty point

- 2.1. The 2018 draft provisions proposed that HMRC had a specified number of months after the month in which the relevant failure occurred in which to award the penalty. The number of months depended on the frequency of the type of return in question with HMRC accordingly having 1, 3 or 12 months after the month of the failure in which to award the penalty point.
- 2.2. We (and no doubt others) drew attention to the fact that these time limits were out of step with the express purpose of the points-based penalty system which is to promote compliance. The award of a penalty point needs to be made as soon as possible after the failure and in time to prevent recurrence of the failure.
- 2.3. Paragraph 6 of the Schedule partially addresses this concern by requiring (in a Date A

situation) the award of the penalty to be made within 2, 11 or 48 weeks of the day on which the failure occurred. The 48-week time limit for notifying failure to submit an annual tax return still looks excessive. Given that HMRC will know almost immediately in the vast majority of cases that an annual return has not been submitted, it is difficult to see why the relevant penalty point should not be awarded within (say) the same 11-week time limit for quarterly return submission failures.

Remaining concern

- 2.4. Paragraph 6(2) requires HMRC to *notify* the person of the award of a penalty point but it does not explicitly require that notification to be made on the same day as the award of the penalty point. That appears to have the potential to reduce the benefit of the shorter time limits referred to in 3.3 above. Possibly even more significantly, the paragraph is silent on how HMRC must make the required notification. There may be a presumption that the notification will be made electronically – in which case the award and its notification could be simultaneous. However, if the notification can be made by post, that could mean that a person still only received the notification when it was already too late to prevent a further failure to file a return on time. This could be particularly significant for a taxpayer who was digitally excluded and dependent on postal communications.

Recommendation

- 2.5. We recommend either that the time limits for notifying the award of a penalty are further tightened or that there is a ministerial assurance that HMRC will always endeavour to ensure that taxpayers receive notice sufficiently early to avoid a repeated failure.

2.6. Suggested amendments concerning the award and notification of penalty points

First

Schedule 23, paragraph 6(2), page 242, line 7

In paragraph 6(2) after “they must” insert “at the same time”.

The amendment ensures that the award of a penalty point and its notification are simultaneous.

Second

Schedule 23, paragraph 6(5), page 242, line 27

In paragraph 6(5)(a) delete “48 weeks” and insert “3 months”.

The amendment ensures that the award and notification of a penalty point related to an annual return is in the more common situations made within 3 months.

3. Time limit for assessment of a points-based penalty

- 3.1. The 2018 draft provisions proposed (in a brief four-line paragraph) that assessment of a penalty may not be made after the end of the period of 2 years beginning with the first day of the month after the month in which the failure, in respect of which the person became liable for the penalty, occurred.

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- 3.2. We expressed concern at the time that this raised a similar (but more significant) issue to that identified in section 2 above (time limit for notifying points). Given that the purpose of the points regime is to encourage an early return to compliance, allowing HMRC 24 months (from the triggering point for a penalty) in which to assess that penalty was counter-intuitive.
- 3.3. We noted then that the time limit might have been designed to cater for the unusual situation of HMRC discovering a previously undetected submission failure but recommended that amendment be made to distinguish between that less common situation and the great majority of cases where liability for a penalty was immediately apparent upon the award of the latest penalty point. In the latter situation, the penalty could and should be assessed at the same time as the most recent award of a penalty point.
- 3.4. Paragraph 17 of the Schedule now takes over a page of dense text to set out the time limits for the issue of a penalty but still allows HMRC at least two years from the date of the latest relevant failure. Again this seems to be wholly inconsistent with a penalty system which is intended to drive early compliance. Taxpayers need to know at the earliest opportunity that they have incurred a penalty so that they may take early steps to avoid incurring additional points and the potential for a further monetary penalty.

Recommendation

- 3.5. We recommend either that the time limits in paragraph 17 should be amended to ensure that in straightforward cases the assessment of a penalty occurs as close as possible to the award of the latest penalty point which contributed to the person's liability to a penalty or that there is a ministerial assurance that HMRC will always endeavour to ensure this outcome.

3.6. Suggested amendment concerning the assessment of a penalty

Schedule 23, paragraph 17(2), page 247, line 35

In paragraph 17(2), delete "2 years" and insert "3 months".

The amendment reduces the time limit for assessment of a penalty for failure to make a return in the more common situations.

4. Need for clarification and guidance concerning the time limit for assessment of a penalty

- 4.1. Paragraph 17 identifies three alternative time limits for the assessment of a penalty:
 - 4.1.1. Date A is the default date and is the one to which the amendment suggested in 3.6 above relates
 - 4.1.2. The Explanatory Note related to paragraph 17 (see paragraph 25 on page 271) indicates that Dates A, B and C are "as defined earlier in the legislation in paragraph 6". That is not, however the case in relation to Date A. In the context of paragraph 6, Date A is 48, 11 or 2 weeks from the date of the relevant failure to make a return. In paragraph 17, it is two years from when liability to a penalty arose.
 - 4.1.3. The Explanatory Note related to Date B (in the context of paragraph 6) (see paragraph 13 on page 269) states:

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“Date B replicates provisions at Schedule 55 to the Finance Act 2009 to extend the time limits to cater for cases where HMRC could not reasonably have been aware of a liability in time.”

As the wording of paragraphs 6(6) and 17(3) is identical, this explanation should be correct in both contexts but it is not.

Date B does indeed replicate the Schedule 55 provisions but it is Date C which specifically deals with cases where HMRC could not reasonably be expected to know that a person had an obligation to make a return. Date B appears to apply only where there has been a complete failure by a person to make a return (as distinct from the much more common situation of a delay in making a return by its statutory deadline).

4.1.4. Date C provides a longer time limit where at date A it was not reasonable to expect HMRC to be aware that the person had an obligation to make the return in question.

Confusingly, the Explanatory Note (see paragraph 13 on page 269) states:

“Date C ensures that new MTD reporting obligations that do not involve an assessment of a liability to tax are covered by the time limits.”

The MTD reporting obligations actually appear to be catered for by paragraph 17(1)(b).

4.2. The complex structure of paragraph 17 combined with the confusion created by the published Explanatory Notes make clarification and guidance on the operation of the time limit for the assessment of a penalty essential. This is a penalty which will arise frequently in practice. It will be generated automatically and in many cases be received by taxpayers who do not have professional representation. These factors make it imperative for there to be clarity on its operation.

Recommendation

4.3. We recommend seeking a ministerial assurance that HMRC will in advance of the introduction of the provisions from April 2022 issue clarity and guidance (including examples) which demonstrate how and when the different time limits will apply.

Association of Taxation Technicians

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Note:

The Association of Taxation Technicians

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