

Clause 30, Schedules 11 and 12: Penalties for failure to make returns and deliberately withholding information

Summary

1. The clause and first schedule introduce a new late filing regime that replaces existing late submission penalties with a points based system. If you miss a deadline a point will be given. A penalty will only be charged when a specified number of points are accrued. The number of points required for a penalty to be levied depends on the filing frequency of the return.
2. The clause and second schedule introduce an amended penalty for deliberately withholding information from HM Revenue and Customs (HMRC). The changes to this penalty are required to accommodate the new points based regime and ensure that the penalty works as intended. The schedule gives HMRC the power to charge penalties where a taxpayer deliberately withholds information which would enable HMRC to assess their tax liability. These penalties are based on a percentage of the tax due and can be reduced based on disclosure of the failing.

Details of the Clause

3. The clause introduces two new schedules:
 - Schedule 1 introduces new points based penalties for failure to submit various returns; and
 - Schedule 2 covers penalties for deliberately withholding information by failing to submit returns.
4. The clause also confers HM Treasury the power to make secondary legislation:
 - to commence the schedules for different taxes and returns at different times; and
 - to make incidental changes to legislation, including consequential and transitional arrangements.

Details of Schedule 11

5. Paragraph 1 describes the purpose of the schedule and its structure.

6. Paragraph 2 provides three tables which list each tax and duty and all returns within these taxes. The three tables separate returns by their filing frequency, namely annual, quarterly and monthly.
7. Within each table returns for different taxes are organized into numbered groups. The effect of these numbered groups in combination with subparagraph 5(1) is to establish a points total for each numbered group.
8. For some taxes in the scope of this schedule it is possible for a taxpayer to agree with HMRC non-standard accounting periods that are not exactly monthly, quarterly or annual. Where these non-standard accounting periods are the period for which returns are usually made, the return is treated as the next longest accounting period. For example, a return period of between 3 and 12 months is treated for the purposes of the schedule as an annual return and the taxpayer will be subject to the relevant thresholds and rules for Table 1 annual returns set out at subparagraphs 5(4)(a), 6(4)(a), 8(4)(a), 9(3) and 10(4).
9. This non-standard accounting period process does not impact on one off or transitional changes to return periods, therefore meaning they would be excluded from attracting points. An example of this would be in Aggregates Levy found in table 1.
10. Paragraph 3 provides definitions of various terms used throughout this schedule.
11. Paragraph 4 explains that when a taxpayer with return obligations has multiple businesses that require them to file returns relating to each business he is treated separately for each return for the purposes of points totals and penalty liabilities. The effect of this provision is that each separate return submitted for separate businesses (or a collection of separate businesses) will attract a separate points total and liability to penalties.
12. Paragraph 5 outlines that a point is earned for failing to file a return on time unless the person has already reached the maximum number of points for annual, quarterly and/or monthly returns. In combination with paragraph 16, this paragraph has the effect of setting the threshold number of late returns (and therefore maximum points); once this has been reached a financial penalty is applied.
13. Paragraph 6 outlines that for a point to be imposed HMRC must notify the taxpayer advising of the failure to which it relates and the group to which it has been awarded within the time limit. Time limits start from the first day of the month after the month in which the failure occurs and are 12 months for returns in table 1 (annual returns), 3 months for returns in table 2 (quarterly returns) and 1 month for returns in table 3 (monthly returns).
14. Paragraph 7 outlines rules for expiration of points, this occurs 24 months after the month in which the failure arose. Points do not expire under this rule if a taxpayer has the maximum number of points for that group as defined in paragraph 5.
15. Paragraph 8 explains that all penalty points for a group expire if two conditions are met. Condition A is that all returns are filed on time for a period that depends on if the returns are annual, quarterly or monthly. This period starts from the month after the month in which the most recent failure occurred. Condition B is that all returns

due in the last 24 months have now been filed.

16. Paragraph 9 sets out that paragraphs 10 to 14 apply to persons who change the filing frequency of their returns. There is a table included (subparagraph 3) that lists each tax and the possible filing frequencies.
17. Paragraph 10 explains that if a taxpayer had no points for the old filing frequency they will have no points for the new filing frequency. If they had any points, the number will be adjusted using the table provided in this paragraph. If the result is a negative number of points then points will be set to zero for the new filing frequency.

Change in reporting frequency	Adjustment to points
<i>Annual to annual</i>	<i>No adjustment</i>
<i>Annual to quarterly</i>	<i>+2 points</i>
<i>Annual to monthly</i>	<i>+3 points</i>
<i>Quarterly to annual</i>	<i>-2 points</i>
<i>Quarterly to monthly</i>	<i>+1 point</i>
<i>Monthly to annual</i>	<i>-3 points</i>
<i>Monthly to quarterly</i>	<i>-1 point</i>

18. Paragraph 11 deals with isolated cases where a taxpayer changes the type of return they submit, but the frequency does not change. In this case there is no adjustment and hence all points accrued under the old type of return will be considered points for the purposes of the new type of return. The effect is to ensure that the provisions for expiry of points continue to apply consistently after the change.
19. Paragraph 12 outlines that if after the adjustment using the table from paragraph 11 the number of points for the new filing frequency is less than the original number then the points that remain are the points that accrued the most recently. The effect of this paragraph is to ensure the expiry of points covered in paragraphs 7 and 8 is applied consistently.
20. Paragraph 13 states that if after the adjustment using the table from paragraph 10 the number of points for the new filing frequency is more than the number for the old filing frequency then the additional points are treated as being awarded in respect of the most recent relevant failure. The effect of this paragraph is to ensure the expiry of points covered in paragraphs 7 and 8 is applied consistently.
21. Paragraph 14 sets out the rules for expiry of all points for taxpayers whose filing frequency has changed by modifying paragraph 8. This changes the start point for Condition A from the month after the most recent failure occurred to the month after the new filing obligation for the new frequency.
22. Paragraph 15 states that if filing a return that covers more than one business and the filing frequency changes for some of those businesses then any penalty points expire.
23. Paragraph 16 outlines that if a person fails to file a return on time and either:

- this causes them to reach the points threshold (the maximum number of points); or
- they are already at the points threshold,

They will be liable to a financial penalty. The amount of the financial penalty will be announced in due course.

24. Paragraph 17 sets out the process HMRC must follow to inform taxpayers of the liability to a penalty. HMRC must notify the taxpayer and include details of the filing failures for which they are liable for a penalty. A penalty notice can be issued at the same time as the notice for the final point which immediately led to the penalty.
25. Paragraph 18 sets a 2 year limit for HMRC to assess penalties.
26. Paragraph 19 confers on the Commissioners for HMRC the power to make secondary legislation (affirmative procedure) to change:
 - the penalty threshold;
 - the period of good compliance required to reset points;
 - the period for which outstanding returns are required in order to reset points; and
 - the value of the penalty.
27. Paragraph 20 confers on the Commissioners for HMRC the power to make secondary legislation to allow a period of grace where points and penalties do not apply. This 'familiarisation period' may be used where return obligations are changing substantially.
28. Paragraph 21 sets out reasonable excuse provisions.
29. Paragraph 22 explains a taxpayer is not liable to a point or penalty if they also have a criminal conviction as are result of the same failure to file.
30. Paragraph 23 states that if notice to file an income tax, self-assessment or partnership return is withdrawn any point or penalty in relation to that return can be cancelled in the same notice of withdrawal.
31. Paragraph 24 sets out the right to appeal against liability to both points and penalties.
32. Paragraph 25 outlines appeals under paragraph 24 will follow the same process as an appeal against an assessment of tax concerned. There is no requirement to pay the penalty prior to being permitted to appeal.
33. Paragraph 26 states the tribunal can support or overturn HMRC's decision to impose a point or a penalty. If the appeal relates to a penalty the tribunal can also support or overturn any of the points that led to the penalty.
34. Paragraph 27 sets out that amendments made by secondary legislation under paragraph 19 (penalty value, threshold, periods to reset points) must go through an

affirmative procedure while regulations under paragraph 20 (familiarisation period) are by negative procedure.

Details of Schedule 12

35. Paragraph 1 provides a table of all the taxes and returns etc. in scope of the deliberate withholding penalty. These are the same as for the points-based penalty as the two are designed to be implemented together for particular taxes.
36. Paragraph 2 provides definitions of various terms used throughout the schedule.
37. Paragraph 3 outlines that for a penalty to be charged under this schedule a person must deliberately fail to file a return on time in order to withhold information from HMRC. If the behavior is deliberate with concealment the penalty is the greater of £300 or the relevant percentage of the tax that would have been due. The percentage is based on the category that the information falls into, this is covered in subparagraph (4). If the behavior is deliberate but with no attempt at concealment the penalty is the greater of £300 or a percentage of the tax that would have been due. The percentages for each category are covered in subparagraph (6).
38. Paragraph 4 defines different categories of information: these have been carried over from Schedule 55 to Finance Act 2009 (FA09).
39. Paragraph 5 outlines what will be classed as an offshore transfer: this replicates Schedule 55 of FA09.
40. Paragraph 6 explains how a penalty can be reduced by disclosing information to HMRC: this replicates Schedule 55 of FA09.
41. Paragraph 7 provides a table that outlines how much the percentage rate of each penalty may be reduced to for both prompted and unprompted disclosure. This reduction cannot reduce the penalty below £300. This replicates Schedule 55 of FA09.
42. Paragraph 8 sets out that penalties under this schedule may be reduced in special circumstances: replicating Schedule 55 of FA09.
43. Paragraph 9 explains the penalty will be reduced by the amount of any penalty charged in relation to the same amount of tax. This only applies to a penalty under this schedule that is tax geared and cannot be used to reduce the £300 penalty. It provides two exceptions to this, i) penalties for late payment of tax ii) penalties where corrective action is not taken after a follower notice. This paragraph does not replicate paragraphs 17(3) and (4) of Schedule 55 as these subparagraphs relate to the interaction between tax geared penalties and are therefore not relevant to the interaction between a fixed rate points-based penalty and a tax geared deliberate withholding penalty.
44. Paragraph 10 outlines the procedures if the amount of tax to charge the penalty on is unknown as a result of the return not being submitted. In this case HMRC may either charge the minimum £300 penalty or determine the amount to base the penalty on using information HMRC does hold. When the return is submitted HMRC must re-assess the penalty using the figures from the return. When determining liability to corporation tax no account will be taken for any relief due under section 458 of

Corporation Tax Act 2010.

45. Paragraph 11 outlines the rules for assessing penalties under this schedule. HMRC must notify the person and provide details of the failings to which the penalty relates. Penalties must be paid within 30 days of issue of the notification. For procedural and enforcement purposes these assessments are treated as the same as an assessment to tax and can be combined with one.
46. Paragraph 12 allows supplementary penalty assessments if the initial penalty is found to be insufficient. If the penalty is found to be excessive this paragraph allows HMRC to reduce the original assessment.
47. Paragraph 13 sets time limits for raising assessments under this schedule, the deadline for raising an assessment is the later of i) 2 years from the filing date, ii) 12 months from the end of the appeal period for the assessment of liability to tax on the return or if there is no assessment the date on which the liability is ascertained.
48. Paragraph 14 explains a taxpayer is not liable to a penalty if they also have a criminal conviction as are result of the same failure to file.
49. Paragraph 15 states that if a notice to file an Income Tax self assessment or partnership return is withdrawn HMRC may cancel liability to a penalty relating to that obligation to file.
50. Paragraph 16 outlines that a person may appeal against the decision to charge a penalty and/or the amount of the penalty.
51. Paragraph 17 appeals under paragraph 16 follow the same process as an appeal against an assessment of the tax concerned. This will not require a person to pay the penalty before appealing against it even if that is required for the tax involved.
52. Paragraph 18 sets out possible outcomes of a tribunal appeal. Appeals against the decision to impose a penalty can result in the penalty being confirmed or cancelled. Appeals against the amount of the penalty may confirm the penalty or substitute it with another that was within HMRC's powers to impose. The tribunal is bound by the same penalty percentages and reductions as HMRC and may only differ from this if the tribunal believes a special reduction under paragraph 8 is due.
53. Paragraph 19 sets out how the schedule applies to partnerships. For the purposes of partnerships, references to a 'person' in the legislation are treated as applying to relevant partners. Relevant partners are defined as a partner in the partnership for the period in which the return was required. Partnership penalties under this schedule will be charged on each relevant partner. Appeals against partnership penalties must be submitted by the representative partner (or successor) or the nominated partner. Once received, an appeal will be treated as an appeal against the penalties charged on every relevant partner.
54. Paragraph 20 allows HMRC, by written notice, to transfer up to 100% of a penalty charged on a company to an officer of that company who was responsible for the deliberate withholding of information.

Background note

55. Taxpayers are required to submit tax returns by specified dates. When taxpayers submit their returns late they generally incur a penalty. There are currently a range of different penalties that penalise the same behaviour in different ways across different taxes.
56. The government wishes to encourage compliance with regular return submission obligations but does not want to punish taxpayers who make occasional mistakes. The new late submission penalty regime, announced at Autumn Budget 2018, is designed to be proportionate, penalising only the small minority who persistently fall foul of the rules. Consistent compliance will be encouraged by the opportunity to clear penalty points without incurring a penalty charge. A stronger deterrent is provided in cases where behaviour is shown to be deliberate, and also by other compliance tools. The new regime is designed to be applicable to as many taxes with regular filing obligations as possible to provide a clear, transparent and consistent approach for taxpayers and HMRC.
57. The new points-based penalty regime will only apply to returns (including Making Tax Digital regular updates) with a regular filing frequency, for example monthly, quarterly or annually. It will not apply to occasional returns (for example a return required for a one-off transaction), which will continue to be covered by the current penalty regime for the relevant return.
58. The new regime is likely to initially apply to regular VAT and ITSA obligations. Other excise, environmental, insurance and transport taxes are included within the scope of legislation since the government intends to introduce the new regime more widely after VAT and ITSA. The government intends to bring Corporation Tax within the scope of the regime at a later date.
59. The regime has been developed through three separate consultations. The first consultation entitled 'HMRC penalties: a discussion document' ran from 2 February to 11 May 2015, leading to the 2016 consultation 'Making Tax Digital: Tax Administration' which ran from 15 August to 7 November 2016 and the latest consultation 'Making Tax Digital - sanctions for late submission and late payment' which ran from 20 March to 11 June 2017. The latter consultation proposed three different penalty models, resulting in the majority of respondents favouring the points based model above the others. The summary of responses to this consultation was published on 1 December 2017 and at the same time the government announced it would be taking forward the points based model. Responses to all of these consultations have helped to shape the details of the new penalty regime
60. If you have any questions about this change, or comments on the legislation, please contact Olly Toop on 03000 576764 (email: mtdta@hmrc.gsi.gov.uk).

FINANCE BILL

CLAUSE 30

SCHEDULE 11 and 12