



Carelessness costs

In the last of his three articles on the new penalties regime and the published guidance, *Andy Wells* takes a look at the concepts of 'telling', 'helping' and 'giving access'

My references continue to be to *FA* 2007, Sch 24 and to the Compliance Handbook (CH) paragraphs – which can very easily be accessed at www.hmrc.gov.uk.

Once the behaviour that leads to penalty exposure has been established (careless as a minimum), and it has been established whether or not the disclosure was unprompted, the penalty will be reduced according to the 'quality' of the disclosure. This may be quite controversial. There are three component parts, as shown in the box:

'Telling'	30%
'Helping'	40%
'Giving (access)'	30%
Maximum percentage	100%

CH 82431: 'You should allow the full reduction for those elements that are not required.'
(NB. 100% for disclosure does not mean there will be no penalty!)

Am I the only one who thinks that 'telling' and 'helping' are not an improvement on the terms with which we were previously familiar (disclosure and co-operation)? 'Size and gravity' no longer feature, although size may be a factor in categorising a behaviour.

Telling

At CH82440 this is described as:

- admitting the inaccuracy
 - disclosing it in full
 - explaining how and why it arose
- (The guidance refers to 'Timing, Nature and Extent' under each of the three elements, and I will abbreviate these to 'T, N and E').

- T: How quickly one remembers
- N: A 'positive approach' and not just reacting to questions
- E: Full rather than partial disclosure, covering the scale of the inaccuracy.

I have some concerns about 'a positive approach'. This sits more naturally under the 'helping' (co-operation) heading. It is fair enough for HMRC to expect a high level of co-operation from the non-compliant, but can one really expect taxpayers under enquiry to be in a positive frame of mind? Anyway, what is wrong with reacting to questions? Tax advisers may need to take the initiative and bombard HMRC with offers of help in order to satisfy this requirement. However, see below under Nature (N) of Helping!

Helping

This is dealt with at CH82450 and involves:

- providing reasonable help in quantifying
- positive assistance as opposed to passive acceptance
- actively engaging in the work
- volunteering information
 - T: No avoidable delays – an 'active approach'
 - N: Just to appear to be helpful is not what is required(!)
 - E: For the whole of the time and covering all aspects.

This includes 'attending meetings...where this is the best way'.

Everyone will recognise the significance of the commentary on attending meetings. All I would say is that where there is no requirement to meet, there should be no increased penalty if the taxpayer chooses not to do so. It is not simply a question of HMRC deciding 'what is the best way'.

It can readily be appreciated that it may prove difficult to persuade an inspector that 40% is due under this heading. Difficulties are likely to arise when the relevance of information or documents is disputed. Taxpayers' legitimate rights will need to be guarded, and doing so should not mean increased penalties, but I cannot read this without thinking that the penalty threat may be applied in these situations. It may need a few brave souls to appeal some penalties before a clear line emerges.

Giving access

See CH82460, which suggests that this is:

- allowing access to business 'and other' records
- and other 'relevant documents'
 - T: With no need to issue reminders or to use information powers
 - N: Access at a 'convenient and agreed location'
 - E: Providing relevant records that are 'reasonably required'

This has several problems. The relevance of 'other records' is ripe for dispute. Will HMRC argue that unwillingness to provide things that are not considered relevant is a 'lack of access', or even a lack of access and a 'lack of helping'? Also, I am not comfortable with the expression 'convenient location'. With tax affairs administered who knows where these days, what is convenient for HMRC is not often going to be convenient for the taxpayer. Much of the wording in this guidance is not to be found in the legislation. It may reflect the world that HMRC would like to inhabit (and indeed may some day), but we are not quite there yet!

Special reductions

These are dealt with at CH82480 and could also be known as 'hens' teeth' based on the

guidance, which refers simply to 'extreme and exceptional circumstances'. Why would Parliament enact legislation (Sch 24 (11)) explicitly giving HMRC the power to mitigate, only for HMRC to say that they cannot envisage the circumstances in which it might be exercised? There are no examples of what it might cover, although there are a few descriptions of things that will not count, including 'potential loss of revenue from one person balanced by the potential overpayment of another' (why not?). I cannot blame the guidance for this since the words can be found in Sch 24 (11) (b), but it does not feel very good when read with the 'income shifting' proposals in mind.

Suspension of penalties for careless inaccuracy

I really think this is a missed opportunity. In the world of crime, suspended penalties are routinely handed out to act as a deterrent, and not just for first-time offenders. In the world of taxation, someone has decided that the conditions attaching to a penalty should be 'SMART' – 'Specific, Measurable, Achievable, Realistic and Time-related' (which is somewhat inelegant in relation to the final part!). I can find no mention of SMART in Sch 24 (14). What the legislation says is that HMRC may suspend all or part of a penalty if compliance with a condition of suspension would help the taxpayer to avoid becoming liable to future penalties for careless inaccuracy. The condition must specify action to be taken within a specified period, that is all. HMRC interprets this in such a way that no suspension will be offered unless the money saved – ie, the penalty – could be spent on something tangible such as an improved accounting system.

So, it is not envisaged that suspension will ever be available in relation to inaccuracies in, for example, CGT calculations. In reality it seems likely only to be offered to taxpayers in businesses whose records fall short of the standard required. There may not be too many of these falling into the category of 'careless', and I predict that in practice, suspended penalties could prove to be almost as rare as Special Reductions! In any event, it seems to me that previous compliance history should have played a significant part in this, rather than confining the opportunity to those whose record-keeping is, by definition, deficient. It fails to support the initial objective expressed in the consultation – to 'recognise compliance history'. Careless with good records equals no suspension, but careless with bad records and you may just avoid that penalty. I find that hard to reconcile.

Appeals

When there is no agreement (no contract settlement), HMRC may issue a Penalty Notice Assessment (PNA). The first thing to do will be to check that it includes everything that is required (CH83030) and that it is in time (CH83040). The PNA may be appealed to the Tax Tribunal. In order to succeed, the Tribunal must have reason to believe that HMRC reached a 'flawed decision'. The guidance attempts to discourage appeals in a not very subtle manner (CH84080), emphasising that this is a 'Judicial Review' standard of 'flawed', and is not concerned with 'merits' or 'fairness' – see Sch 24 (17) (6).

Nevertheless, it must be remembered that the HMRC decision-maker must have acted reasonably, which is an objective test,

and there may well have been a failure to listen to valid representations. Taxpayers may have to be prepared to take appeals to the Tribunal. The alternative is to pay up. As has always been the case, some penalties will doubtless be paid for commercial expediency, even when morally wrong, because the appeal costs will be prohibitive. It remains to be seen whether HMRC will seek to exploit this under the new regime.

Conclusion

Some of my comments may sound quite critical, but it must be remembered that the underlying behaviour is absolutely key. Nothing in this article will apply to a person whose inaccuracy was not at least careless. It might be argued that if you are careless, or worse, you have nothing to complain about. I have some sympathy with that view at the serious end of the scale, but I am worried about cases in which HMRC's view of behaviour cannot be reconciled with mine! Once in the wrong silo, the rigours of the disclosure tests are upon you.

I wonder whether the people of Great Britain and Northern Ireland will be ready for a new era of 'Behaviour', 'Telling', 'Helping', 'Monitoring' and 'Suspension', words that can convey feelings associated with their school days. If it is just the bad guys, then perhaps we need not be too concerned. We shall see.

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