

18 June 2025

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HMRC
(tafrcompliance@hmrc.gov.uk)

Our ref Tax/000005-00016/-1/CRWI

By email

Dear HMRC,

Consultation: Reform of behavioural penalties

1. Simmons & Simmons LLP welcomes the opportunity to respond to HMRC's consultation on reform of behavioural penalties.
2. We are a leading international law firm with offices in major business and financial centres throughout Europe, the Middle East and Asia.
3. In preparing this response, we have consulted with a number of clients of our firm. They are businesses drawn from across our firm's four key sectors (Financial Institutions, Asset Managers and Investment Funds, Technology, Media and Telecoms firms, and Healthcare and Life Sciences firms. Most fall within HMRC's Large Business customer group; a small number are at the larger end of Mid-Size Business.
4. This response is intended to give HMRC insight into the views of taxpayers who might not individually respond to a consultation such as this, but may well be affected by the decisions taken by HMRC as part of this process.
5. We would be pleased to discuss the contents of this response. Please feel free to contact craig.kirkham-wilson@simmons-simmons.com to arrange this.

Question 1: What are your views on removing the minimum 10% penalties for:

- **inaccuracies disclosed after 3 years; and**
- **failures to notify disclosed after 12 months for non-deliberate behaviour?**

6. These rules were not particularly well-known to the clients with whom we spoke. We therefore suspect that this rule has little impact on compliance. It should therefore be judged on its merits in principle.

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7. As to this point, clients felt that there was no clear rationale for the rule.
8. Clients agreed with the consultation document's observation that the proposed changes "*could encourage more taxpayers to come forward at a later date, when previously they might have been discouraged from doing so by the prospect of a higher penalty. This could have a positive effect on disclosures and support better cooperation from taxpayers who might have otherwise remained silent*", and were therefore supportive of this proposal.

Question 2: What are your views on the ways in which HMRC could:

- **simplify penalty reductions for unprompted disclosure; and**
- **simplify penalty reductions for the quality of disclosure?**

9. Clients agreed that the current system of penalty reductions is complicated; a number observed that, in cases where they have received a penalty, they have not found it easy to understand why it is a particular percentage of the tax at stake.
10. However, any confusion in the system is not a result of the multi-step calculation required for a penalty – which is simple enough to understand – but rather because clients feel that the relevant factors leave lots to the discretion of the HMRC officer assessing the penalty. That is to say, any confusion stems from the inputs, and how they are valued (and, indeed, how this can differ on a case-by-case basis). Clients tended to feel that more prescriptive guidance would be fairer and help them understand what HMRC requires.
11. For example, some HMRC officers have given full "telling" credit where the taxpayer has told HMRC about all the underlying facts of e.g. a transaction, without prejudice to the taxpayer's argument that their filing position was correct; while other officers have been known to insist on the taxpayer agreeing that they had made an error before giving full credit for "telling". The former approach is preferable for some taxpayers who wish to be transparent with HMRC but simply do not agree with what they expect might be HMRC's technical view. This disparity in approaches means that HMRC is not meeting its obligation to treat like taxpayers alike.
12. Some clients thought that the best means of operating a mitigation regime was an overall category of "cooperation", to include credit for a taxpayer's proactivity, supply of relevant information and documents, and responsiveness over the course of resolving the error.
13. Finally, credit for "giving" presents a particular problem as it applies to privileged documents. A taxpayer's decision not to waive privilege should never be held against them by limiting the credit for quality of disclosure available to them, because the fact that a document is privileged means that it is one to which HMRC is not entitled. This review offers the opportunity to state this matter clearly (e.g. in whatever might replace the guidance currently available at CH82460).
14. There is also scope for disagreement about the meaning of "prompted" disclosure. HMRC's guidance at CH403202 is that disclosure is "unprompted" "where *it is made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the* error. The "*about to discover*" test has been problematic in cases on which we have worked: for example, is HMRC "*about to discover*" an arithmetical error in circumstances where the focus of discussions between HMRC and the taxpayer is on a technical legal issue on which the HMRC officers are consulting with HMRC Legal Services colleagues? This sort of question needlessly creates scope for disputes.

Question 3: With reference to the existing inaccuracy and failure to notify penalty ranges, what would you consider to be proportionate and appropriate penalty rates for both deliberate behaviour and repeated instances of deliberate behaviour? Which factors should be considered when applying these?

15. Our clients do not generally have experience of the “deliberate” error regime, and generally thought that it would be for HMRC to propose the level of penalty applied to deliberate behaviour.
16. In general, clients could understand the principle that HMRC would wish to have powers to uplift penalties for dealing with tax evasion. They had no particular objection to this and could see how it would assist HMRC in closing the tax gap – a matter in which they felt that everyone has an interest.
17. Our clients were concerned that any uplift in the amount of penalty for repeated inaccuracies must be limited to deliberate behaviour. They would not wish HMRC to think, in general, that uplifts can be justified by repeated inaccuracies. This is particularly important because many of our clients generate a significant number of filings, and the inputs are complicated by the sophisticated nature of their businesses. Such taxpayers would be unduly penalised if a regime in future penalised repeated inaccuracies *without* HMRC demonstrating that the taxpayer had intended to make those errors.
18. Clients also observed that the design of the tax system makes provision for dealing with errors that are perhaps more likely by the nature of the tax. For example, the VAT system allows taxpayers to correct modest errors made in one return on the following return. This shows that for certain taxes, where the inputs to the return are particularly complex, uplifts to penalties for repeated inaccuracies would be particularly inappropriate.
19. Some of our clients also felt that repeated deliberate errors might suggest evasion, and believed that HMRC should give greater consideration to using the resources of the Fraud Investigation Service, rather than simply increasing penalties.

Question 4: How could penalties for offshore non-compliance be simplified whilst still acting as an effective deterrent?

20. Our clients generally do not have experience of the offshore non-compliance regime, but tend to agree with HMRC that the justification for a different offshore penalty regime is no longer sustained in circumstances where cultural changes and increased information sharing make offshore non-compliance far less typical.

Question 5: How could HMRC simplify penalty suspension while retaining an effective prompt to taxpayers to address the source of the inaccuracy?

21. Our clients feel that the penalty suspension regime is an extremely important part of the system.
22. HMRC’s proposal to suspend certain penalties automatically would be welcomed. This practice should apply to careless errors, but there is simply less of a reason to ask HMRC to suspend penalties for deliberate errors. Clients considered that it would be counterintuitive for HMRC automatically to suspend penalties where the underlying conduct was particularly serious.
23. HMRC’s approach to suspension conditions will need careful consideration.

24. One client told us that they were offered suspension conditions that would seemingly have applied to every tax across every entity in their group, and while they were able to agree more effective suspension conditions with HMRC, this is a problem that may occur much more frequently if automatic penalty suspension is adopted. In general, clients feel that suspension conditions should be tied closely to the inaccuracy that led to the imposition of the penalty, and should be manageable.
25. Clients welcomed the suggestion in the consultation document that taxpayers would have greater responsibility for setting the appropriate suspension conditions: this was thought to be more likely to be effective in helping taxpayers to ensure future compliance, rather than 'jumping through hoops'.
26. Clients also mentioned that, for Large Business taxpayers, the Customer Compliance Manager has an important role in helping to agree sensible penalty conditions, and hoped that they would continue to be available for support in this.
27. Equally, we are aware that some of our clients have had difficulty agreeing penalty conditions where HMRC has considered the underlying error to be unlikely to be repeated, and HMRC has therefore felt unable to offer suspension. In similar circumstances, a criminal court considering whether to suspend a custodial sentence might well be *more* likely to suspend it, and our client did not understand why HMRC took a different approach.
28. By contrast, the adoption of 'cautions' raises a number of difficult issues. For example:
 - How would the decision whether to issue a caution be taken? Because a caution would reflect HMRC's decision not to issue a penalty, it would be an exercise of discretion that clients feared could lead to quite unpredictable results.
 - Equally, under what circumstances would a taxpayer that has already received one caution be eligible to receive another? If the proposal is that a taxpayer should only receive one caution, and thereafter always receive a penalty, then this change would undermine the purpose of the penalty suspension regime. If not, then how would HMRC administer the regime? It seems again liable to involve quite a substantial element of discretion.

Question 6: What do you see as the opportunities and challenges of this approach? How does it compare with potential simplification to existing penalties, as outlined in Chapter 3?

29. Clients generally felt that the existing penalty system is well known by businesses and their taxpayers, and that changing the system would lead to unwelcome uncertainty. Clients did not see the case for making large changes. By contrast, clients felt that there was meaningful work that could be done to improve the current system (as set out in the consultation document, and in this response).
30. Clients were concerned by HMRC's suggestion that these changes could lead to HMRC officers having greater discretion. Their principal concern about the penalty regime is its perceived lack of predictability. Allowing HMRC officers greater discretion in setting penalties was considered to be an undesirable change, and one that could well lead to more disputes if taxpayers felt that they were not being treated in the same way as others in a similar position.

31. HMRC's proposals are expressed at quite a high level of generality, and we would be keen to respond to a more concrete proposal (perhaps by way of a further consultation) if this is ultimately the preferred option.

Question 7: What is your view on HMRC's use of tougher non-financial sanctions to deter and respond to deliberate and repeated non-compliance and to promote future compliance?

32. Our clients in general would not be in scope for non-financial sanctions, and do not have any comments on this point.

Yours faithfully,

Simmons & Simmons LLP

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