

Association of Accounting Technicians response to the HMRC Consultation on Follower Notices & Penalties

Association of Accounting Technicians (AAT) welcomes the opportunity to provide a short response to the HMRC consultation on Follower Notices (FNs) and penalties.

The consultation document states that the House of Lords Economic Affairs Committee were critical of FNs and recommended that the penalties be abolished.

However, the main concerns about FNs were not the level of penalty but the failure to allow any form of meaningful appeal. As the Committee report highlighted, *“Taxpayers have no right of appeal against a notice, only against the underlying tax liability. The only protection afforded to the taxpayer, other than judicial review, is the opportunity to make representations to HMRC. The protection of oversight by the tax tribunal is missing.”*¹

AAT certainly agrees with the Committee that an HMRC determination with no right of appeal, save for costly judicial review, is unusual. It is also very difficult to disagree with the Committee conclusion that, *“All HMRC determinations and notices should be appealable to the tax tribunal. This is central to the protection of the taxpayer and the balance between taxpayer and tax authority.”*

The suggestion that allowing this would in some way frustrate HMRC, be unduly costly and lead to delay is not compelling.

Firstly, on grounds of cost HMRC can recover its costs if successful at the Upper tribunal and although unable to reclaim costs at first-tier tribunals, in all likelihood, if the case is as clear-cut as HMRC suggests, given it has already succeeded elsewhere, then these costs should be minimal.

It is also notable that where parties have had the finances necessary to seek a judicial review on follower notices, they have succeeded in defeating HMRC decisions. For example, two separate decisions in 2019, *R (Haworth) v HMRC* and *R (Locke) v HMRC*, both of which favoured the plaintiff over HMRC.

Reducing the penalty

AAT agrees with the basic principle of reducing the standard FN penalty.

Although the figure of 30% has been suggested because it is the same as the maximum penalty for a careless inaccuracy on a tax return, the FN is not a careless inaccuracy and so there should be no need to set the penalty at the same level.

AAT suggests that a more effective standard rate would probably be 25%.

It may only be a small difference of 5% but would mean that those who proceed with vexatious claims will have their penalty doubled – a simple, easy to understand concept that as an additional 25% rather than an additional 20% will act as a greater deterrent.

Conversely, this could be viewed as halving the penalty for those who comply, a simple and easy to understand incentive and a greater reward for not pursuing time and resource wasting claims.

AAT recommends HMRC consider looking at research into the behavioural impacts of fines and penalties on motoring offences from the Institute for Road Safety Research²; fines and penalties relating to child collection and school attendance³ and general financial penalty related research from the University of Cologne, University of

¹ House of Lords Economic Affairs Committee, *The Powers of HMRC: Treating Taxpayers Fairly*, December 2018: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconaf/242/242.pdf>

² The effect of severity and type of traffic penalties on car drivers' emotions, perceptions of fairness, and behavioural intentions, Institute for Road Safety Research, January 2013: https://www.researchgate.net/publication/260225976_The_effect_of_severity_and_type_of_traffic_penalties_on_car_drivers'_emotions_perceptions_of_fairness_and_behavioural_intentions

³ RSA, 2014: <https://www.thersa.org/blog/2014/01/the-problem-with-fines-is-that-they-can-turn-into-fees>

California and Carnegie Mellon University⁴, which shows that, “... individuals often use cognitive shortcuts to make their decisions, rather than relying on computations of expected utility” and that larger fines generally act as a greater deterrent.

In relation to the proposal to impose an additional fine for those who unreasonably continue their litigation, AAT instinctively believes that a further penalty would seem like a strong deterrent. However, more evidence than instinct is required. As a result, it is useful to note recent research and academic studies which suggest that lying and non-compliance decreases with the size of the fine, although it should be noted that this covered small-scale unethical behaviour rather than significant tax avoidance.⁵

Whilst AAT believes that further penalties are justified for vexatious and time wasting claims, it remains concerned that a small number of legitimate cases may wrongly fall into this category. This risk is further increased by the lack of any form of independent appeal process save for the extremely expensive process of judicial review.

AAT acknowledges that such disputes can sometimes waste the time and resources not just of HMRC but also of HM Courts & Tribunals Service but also recognises the need to balance the genuine rights of taxpayers and need for access to justice. As such, whilst the suggested criteria do not appear unreasonable, AAT would again like to highlight that it agrees with the House of Lords Economic Affairs Committee that all HMRC determinations and notices should be appealable to the tax tribunal.

Finally, given the current 50% penalty is reducible if the taxpayer co-operates with HMRC, it would appear reasonable to replicate this approach with regard to the proposed additional penalty, thus making the overall 50% charge reducible too. This should be the case irrespective of whether the 50% penalty is made up of a 25%+25% penalty as AAT suggests or the 30%+20% penalty that HMRC suggests.

About AAT

AAT is a professional accountancy body with approximately 50,000 full and fellow members and over 80,000 student and affiliate members worldwide. Of the full and fellow members, there are approximately 4,250 licensed accountants who provide accountancy and taxation services to over 400,000 small British businesses.

AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

Further information

If you have any queries, require any further information or would like to discuss any of the above points in more detail, please contact Phil Hall, AAT Head of Public Affairs & Public Policy:

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Thursday 7 January 2021



⁴ Do Fines Deter Unethical Behavior? The Effect of Systematically Varying the Size and Probability of Punishment, April 2018: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157387#:~:text=Uri%20Gneezy,-University%20of%20California&text=In%20all%20our%20experiments%2C%20lying,the%20size%20of%20the%20fine.&text=In%20all%20settings%2C%20changes%20in,altering%20the%20probability%20of%20punishment

⁵ Ibid.