

Draft legislation: The Penalties for Failure to Pay Tax (Assessments) Regulations 2024¹

Response by the Chartered Institute of Taxation and Low Incomes Tax Reform Group

1 Introduction

- 1.1 These draft regulations relate to the reformed penalty system for late payment of tax in Schedule 26 Finance Act 2021 and provide for the assessment of the second late payment penalty where the outstanding tax has not been paid in full towards the end of the two year assessment limit.
- 1.2 Currently, the legislation allows HMRC to assess the second late payment penalty once, when the amount of outstanding tax is paid in full, within a two year assessment time limit. The draft regulations allow HMRC to assess and charge the second late payment penalty once, where the outstanding tax has not been paid in full, towards the end of the two year time limit. The purpose of this change is to make sure that taxpayers will not be able to intentionally avoid a second late payment penalty by not paying their tax before the end of the two year time limit.

2 Our comments on the draft legislation

- 2.1 Para 8(2) Sch 26 FA 2021² states that, '*The amount of the penalty is calculated by applying the penalty rate, during the further penalty period³, to so much of the tax due as is from time to time unpaid*'. In addition, HMRC's guidance⁴ confirms that the policy is to charge the second late payment penalty up until whatever

¹ <https://www.gov.uk/government/consultations/draft-legislation-the-penalties-for-failure-to-pay-tax-assessments-regulations-2024>

² This paragraph explains that a second late payment penalty is payable if any tax is unpaid at the end of 30 days after the due date, and how it is calculated (4% per annum from the day after the last day of the 30 day period until the day the tax is paid in full). But if the taxpayer agrees a time to pay arrangement with HMRC, then no penalty is payable unless the person breaks that agreement.

³ The 'further penalty period' is the period (a) beginning with the day after the last day of the 30 day period, and (b) ending with the day on which the tax due is paid in full (para 8(4) Sch 26).

⁴ <https://www.gov.uk/government/publications/penalties-for-late-payment-and-interest-harmonisation/penalties-for-late-payment-and-interest-harmonisation>

date the tax it is paid, not just at the two year date – see under heading ‘Additional or second penalty’ where it says, *‘This additional penalty will stop accruing when the taxpayer pays the tax that is due’*.

- 2.2 The draft regulations allow an assessment of the second late payment penalty to be made before the expiry of the two year time limit set out in para 18 Sch 26 where the tax has not yet been paid and so the further penalty period has not ended. However, the penalty itself cannot be calculated at this point as the further penalty period must be known (ie HMRC need to know the date the tax has been paid – which is yet to occur where the tax remains unpaid) to be able to work out and charge the amount of the penalty itself.

Consequently, the draft regulations will still not permit HMRC to issue a penalty assessment at this stage. The legislation does not explicitly allow HMRC to estimate the further penalty period either. Whilst para 16(2) allows HMRC to make regulations to provide for the penalty to be assessed earlier, before the end of the penalty period, this provision does not change how the calculation of the penalty actually works (ie it is by reference to the whole penalty period). We suggest either para 16(2) or para 8 is revised to allow HMRC to estimate the penalty period or to explicitly assess the penalty based on part of the penalty period.

- 2.3 There is no provision in the draft regulations for HMRC to be able to assess an additional amount of the second late payment penalty, ie for the period from the date of an assessment under these draft regulations until the date the tax is actually paid in full (if that is after the two year assessment time limit set by date A). Indeed, doing so after the tax is paid is precluded by para 18 unless date B is after date A.

We suggest that existing para 17 Sch 26 FA 2021⁵ could be amended to allow HMRC to issue a supplementary assessment for the additional penalty when the tax is eventually paid if that occurs after the later of the current dates A and B as defined in para 18. If HMRC/Parliament do not want HMRC to assess the second penalty despite the tax remaining unpaid after the later of dates A and B then we suggest that the guidance referred to in the last sentence of 2.1 above is revised accordingly.

- 2.4 One of the conditions for HMRC being able to assess a second late payment penalty before the end of the further penalty period is that there is no time to pay (TTP) agreement in effect (draft regulation 2(2)(c)).

Where there is a TTP agreement in effect, but a taxpayer subsequently breaks the TTP after the two years assessment time limit, para 9(2) Sch 26 says that the penalty is payable as if the TTP never had effect – but by that point it would be too late for HMRC to assess it. This is because there would have been an effective TTP in place at the time that an assessment could be made under the draft regulations and so no assessment could be made at that point. It would also be too late to assess the penalty under the legislation as it exists at the moment.

This appears to mean that a taxpayer could avoid the second late payment penalty by agreeing a TTP before the ‘2 years minus 7 days’ point, and then break the TTP after the two year assessment time limit has passed. We doubt that this is what is intended.

We suggest that a new paragraph is needed to explain the effect of breaking a TTP agreement after the two year point because we think that para 9 (which covers the breaking of a TTP during the second penalty period) must still currently be read in light of the two year assessment period.

⁵ Para 17 currently allows HMRC to make a supplementary assessment in respect of a penalty only if an earlier assessment is based on an amount of tax which is an underestimate or insufficient (which would not be the case here). That supplementary assessment is currently still subject to the two year assessment time limit in para 16.

3 About the CIOT

- 3.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 3.2 The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties.
- 3.3 The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 3.4 Our members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.
- 3.5 Our stated objectives for the tax system include:
- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
 - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
 - Greater certainty, so businesses and individuals can plan ahead with confidence.
 - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
 - Responsive and competent tax administration, with a minimum of bureaucracy.

4 About LITRG

- 4.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those who are least able to pay for professional advice. We also produce free information, primarily via our website www.litrg.org.uk, to help make a difference to people’s understanding of the tax system.
- 4.2 LITRG works extensively with key stakeholders such as HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the tax system. LITRG also considers the welfare benefits system, and other related systems, to the extent that they interact with tax.

5 Acknowledgement of submission

- 5.1 We would be grateful if you could acknowledge safe receipt of this submission and ensure that the CIOT and LITRG are included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation and Low Incomes Tax Reform Group

6 June 2024