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Introduction

Having established that there are inaccuracies in a document, or an under-assessment, and the behaviour types which apply to those inaccuracies, the next stage in deciding the level of penalty due is to consider the disclosure of the inaccuracy or under-assessment. In particular, to consider

- whether it was unprompted or prompted
and
- the quality of the disclosure.

This chapter looks at the factors you need to consider to decide the type of disclosure, and to decide the range within which you'll set the penalty. It also looks at the factors which you will take into account when deciding the quality of the disclosure.

Study Objectives

After successfully studying this chapter, you will be able to

- identify the difference between an unprompted and a prompted disclosure
- state the range of penalties chargeable for each behaviour type
- list the factors to be taken into account in order to determine the quality of disclosure.

Study Advice

This is the third chapter and should take you around 2 hours to complete. You will need access to the Compliance Handbook (CH) and the Enquiry Manual.

You should also have completed Chapters 1 and 2 before working through this chapter.

3.1 How Disclosure Affects the Penalty

To establish whether a penalty is due, and decide the amount, you need to identify

- an inaccuracy in a document, or
- a failure to notify an underassessment of tax.

For each inaccuracy that you have found, you must decide on the behaviour that led to that inaccuracy. We considered the four types of behaviour that can give rise to an inaccuracy in Chapter 2.

You can't charge a penalty if the inaccuracy arose despite the customer taking reasonable care - but for all other behaviour types a penalty may be due.

The nature of the disclosure will determine the range within which you will set the penalty.

3.1.1 Penalty ranges

The amount of penalty you will charge will be based upon the Potential Lost Revenue (PLR) arising from the inaccuracy. How you calculate the PLR and the penalty percentage will be covered in Chapter 4.

The first step is to determine the range within which the penalty percentage will fall. As you will see from the tables on the following page, there are different ranges depending on whether the disclosure of the inaccuracy was unprompted or prompted. The minimum is lower for unprompted disclosures, to recognise that the customer has made a voluntary disclosure of the inaccuracy or under-assessment.

Inaccuracy penalty ranges

Customer Behaviour	Unprompted Disclosure	Prompted Disclosure
Reasonable care	No Penalty	No Penalty
Careless	0% - 30%	15% - 30%
Deliberate but not concealed	20% - 70%	35% - 70%
Deliberate and concealed	30% - 100%	50% - 100%
Inaccuracy attributable to another person	30% - 100%	50% - 100%

Under-assessment penalty ranges

	Unprompted Disclosure	Prompted disclosure
An understated assessment that is not notified to HMRC within 30 days	0% - 30%	15% - 30%

Exactly where the percentage falls within these ranges depends on the **quality** of the disclosure. The quality of the disclosure is covered at 3.5.

The behaviour which gave rise to the inaccuracy determines the maximum penalty which may be imposed.

Activity One

1. What is the maximum penalty percentage for careless behaviour?
2. What is the maximum penalty percentage for deliberate and concealed behaviour?
3. What is the maximum penalty percentage if an understated assessment is not notified within 30 days?

Response

- | |
|--|
| <ol style="list-style-type: none">1. 30 per cent.2. 100 per cent.3. 30 per cent. |
|--|
-

For each behaviour, the type of disclosure will determine the minimum that the penalty must not fall below.

Activity Two

1. What is the minimum penalty percentage for a prompted disclosure involving careless behaviour?
2. What is the minimum penalty percentage for an unprompted disclosure involving deliberate but not concealed behaviour?
3. What is the minimum penalty for the prompted disclosure of an inaccuracy caused by a third party?

Response

1. 15 per cent.
2. 20 per cent.
3. 50 per cent.

CH82410

The quality of the disclosure enables you to decide the point between the maximum and minimum at which you'll set the penalty.

CH450510

*Para 4 & Para 10
Sch 24 FA 2007*

So, to determine the penalty percentage to be applied, you have to decide on two things

- whether the disclosure was unprompted or prompted
and
- the quality of the disclosure

and you'll look at each of these in 3.2 and 3.5 respectively.

3.2 Types of Disclosure

Disclosure is either unprompted or prompted and, as you have already seen, the type of disclosure will, together with behaviour, determine the range within which the penalty will be set.

3.2.1 What is an unprompted disclosure?

CH82420

A disclosure is **unprompted** if it is made at a time when the person making it has no reason to believe that we have discovered or are about to discover the inaccuracy.

CH450520

S9 Sch 24 FA 2007

You must base your decision of whether a disclosure is prompted or unprompted, on fact. The standard intelligence package (SIP) from Risk and Intelligence Service (RIS) will tell you why the case was selected, and whether any disclosure or inaccuracy correction was made by the customer.

You are likely to consider that a disclosure is unprompted if no compliance checks are currently in progress for the person who is making the disclosure, or for another customer with whom they have a link.

It will not be possible or reasonable to identify and review all related parties, but you should be aware of the possibility of connections. As an example, a director has associations with their spouse, their company, co-directors/shareholders, forebears, siblings, children and business partners. There may also be wider links, such as with key employees or connected companies.

Example

During an Employer Compliance review the employer makes a disclosure that the basis of the transfer pricing calculation for Corporation Tax is wrong. This is unrelated to the subject under review, and so this is an unprompted disclosure.

CH82420
CH82422

Disclosure during a compliance check

When a compliance check is already underway, you will have to consider whether the disclosure has been made because that person believes that you will find the error anyway. You should look at the following areas to decide whether the disclosure is unprompted.

- To which taxes does the disclosure relate?
- Are these taxes likely to be covered by your compliance checks?
- Has the disclosure been made because it relates to a transaction with a person who is currently the subject of a separate compliance check?
- If the person had not told you about the error, could they expect you to be able to identify the error from the documents and particulars you are looking at as part of your compliance check?

Remember, the disclosure will only be unprompted if it is about something that you have not discovered or are thought not likely to be about to discover. An inaccuracy found as a result of a VAT pre-credibility check will, for instance, be regarded as a prompted disclosure.

3.2.2 What is a prompted disclosure?

If the disclosure doesn't meet the criteria to be regarded as **unprompted**, then you will treat it as being a **prompted** disclosure.

Example

During a Value Added Tax (VAT) assurance visit considering the credibility of Alphonse's sales records, he discloses that his sales have also been understated for income tax. This would be related to the subject under review, and so is a prompted disclosure.

Activity Three

Say whether, and why, you think the following disclosures were prompted or unprompted.

1. Jemima returned a capital gain which is the subject of a compliance check and she has been asked to provide a copy of the letter confirming the disposal proceeds. She discloses that she employs a nanny and that she has not registered for a domestics Pay As You Earn (PAYE) scheme.

2. During a VAT assurance visit you find that VAT has been incorrectly claimed on a company car. Alphonso, the company director, then discloses he had omitted the car benefit from his own Self Assessment (SA) tax return.

3. During an Employer Compliance review the company accountant makes a disclosure that the rate of VAT being applied to one of their sales products is wrong.

Response

1. This is an **unprompted** disclosure. The review is limited to capital gains. The payments to the nanny would not otherwise have been identified from the documents and information that have been requested.
2. This would be related to the subject under review and so is a **prompted** disclosure. Given that the officer is reviewing the treatment of the company car, cross-tax working would mean you would consider the income tax implications for the director of using a company vehicle. This would include whether the benefit of the car had been returned by the director or by the company on an employer's return.
3. An Employer Compliance review would not normally be involved with reviewing sales invoices so this disclosure is unrelated to the subject under review and wouldn't be within the scope of the compliance check, so it would be regarded an **unprompted** disclosure.

3.3 Informing the Customer

Your decision on whether a disclosure is prompted or unprompted should normally be factual and uncontroversial.

You should confirm your decision with the customer and their agent at the same time the behaviour is established. If necessary, you should explain how we distinguish between the two alternatives. If the customer disputes that their disclosure was prompted, and claims earlier contact with HMRC, you will need to check this.

CH82420

CH82422

CH434000

<p>Activity Four</p>	<p>You are carrying out a compliance check of Marilyn's self-assessment tax return and have found that property rental profits have not been returned.</p> <p>Marilyn tells you that after she had sent in her tax return she realised that this income had been omitted and she had then telephoned HMRC to provide details of the letting income. Her view is that, because of her earlier telephone call, this should be classed as an unprompted disclosure.</p> <p>You notice there is no mention of the telephone call in the RIS package, and there are no other indications of Marilyn having been in telephone contact with HMRC.</p> <p>What information should you obtain from Marilyn in order to check this and what should you tell her that you will do next?</p>
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Response

You should explain to Marilyn that you don't hold any information about an earlier telephone call. To follow this up you will need as much information from Marilyn as possible as soon as she mentions it. The information would include

- date of the call
- destination of the call (HMRC Office/Contact Centre/Hotline Tel No)
- name of the person she spoke with (if known)
- what information she provided in the call
- what advice was she given by the person she spoke to?

You should also make it clear that you will check what she has told you.

In addition, if the call was made to a Customer Contact Centre, you should also make it clear that comprehensive records of telephone calls to Customer Contact Centres are retained.

If the claim appears to be half-hearted or inherently implausible, challenge it and, if appropriate, invite a retraction.

Response

a) Petrol

Desmond has told you about using the company credit card to purchase fuel for his wife's car. Although Desmond has made an unprompted disclosure about the petrol purchases, he didn't tell you about the full amount of the inaccuracy, or help you to quantify it. You would take these facts into account when calculating the quality of the disclosure.

b) Letting Income

This relates to a different inaccuracy, and would be treated as a prompted disclosure.

You should treat any failings in the initial disclosure, or attempts by the customer to justify the partial disclosure, as part of the **quality** of the disclosure.

We'll move on to look at the quality of disclosure in more detail next.

3.5 Quality of Disclosure

S9 Sch 24 FA 2007

The more a person tells, helps or gives access to us, the more the penalty will be reduced for disclosure. We refer to this as the **quality** of the disclosure.

You should make sure that the customer is aware of this, once you have established that there is an inaccuracy and believe that a penalty may be due. You must always issue the Human Rights Act (HRA) message in factsheet CC/FS9 before you start to discuss penalties.

Once you have issued the HRA message, you should explain that co-operating with your enquiries not only minimises the potential penalty, but may also decrease their costs by shortening the enquiry.

To calculate the reduction for the disclosure, you need to consider the nature, extent and timing of three elements.

They are

CH82440

- telling us about it

CH82450

- giving us reasonable help

CH82460

- allowing us access to records.

We'll look at each of these in a bit more detail next.

3.5.1 Telling

CH82440

Telling includes

- admitting the document was inaccurate or that there was an under-assessment
- disclosing the inaccuracy in full (even though additional work may be required to quantify the inaccuracy in full)
- explaining how and why the inaccuracy arose
- giving assurance about the extent of the inaccuracy, for example, through supplying a certificate of full disclosure.

3.5.2 Helping

CH82450

Helping includes

- giving reasonable help in quantifying the inaccuracy or under-assessment
- positive assistance as opposed to passive acceptance or obstruction
- actively engaging in the work to accurately quantify the inaccuracies
- volunteering any information relevant to the disclosure
- attending meetings if requested.

3.5.3 Giving access

CH82460

Giving access includes the customer responding positively to your requests for information and documents and allowing access to

- their business and other records
and/or
- other relevant documents.

You need access to make sure that the inaccuracy or under-assessment is fully put right. Access is more than simply complying with requests for information. It includes explaining and, where appropriate, analysing records.

Where you do not need any input from the customer on a particular aspect, then you can give full credit for that element. For example, say Fred has omitted the pay and tax figures for a second employment from his 2009/10 SA return. You obtain the relevant figures from the P14 submitted by the employer. If this was the only risk, and you were able to establish the actual figures without having to ask Fred for his P60 certificate, you can give full credit for 'giving access'.

3.5.4 Weighting each element

CH82430

As a guide, you can weight these elements as follows.

S10 Sch 24 FA 2007

	Percentage
Telling	30%
Helping	40%
Giving access	30%

This breakdown is only a guide. You should consider in each case whether the overall penalty reflects the overall quality of disclosure.

In the previous error penalty legislation for direct taxes there were three penalty abatement elements for disclosure, co-operation and seriousness. These no longer apply.

CH82431

Refer to CH82431 for further guidance on how to determine the quality of disclosure.

3.5.5 Making your decision

CH 82470

You must look at how the customer has contributed to the three quality elements. This will include evidence from the compliance check, your subsequent correspondence and discussions with the customer.

You should then be in a position to decide by reference to the percentages given in the previous section what level of reductions should be applied for each of the three disclosure elements. Later, when you have to enter the penalty information into New Penalty Processing System (NPPS) or SEES Penalty Calculator, you will be prompted to enter individual figures for each of these three items.

You have to be able to justify the conclusions that you come to in arriving at the percentage reductions for disclosure. To do so, you will have to record all the facts of the case fully – right through to the decision that you've reached. You need to do this for internal quality control anyway, and you should always bear in mind that you may need to present and defend your conclusions at an appeal tribunal.

It won't normally be necessary to keep verbatim notes of any meeting – although recording any admissions made, or precise responses to key questions, may increase the credibility of the account.

VAT staff

You should record notes of the meeting in your officer's notebook. You should note the discussions in the audit report section in Electronic Folder (EF). Additionally, note and link any supporting documents (for example, invoices scanned into EF. These should be marked 'not to be weeded'.

Direct tax and Employer Compliance staff

You should write up notes as soon as possible after the meeting or visit. Record the question of penalties as a separate section in the account. If more than one officer is present, both officers should sign and date the note, and retain their manuscript notes within the case papers.

Review

This chapter has explained how to decide if the disclosure of the inaccuracy or under-assessment was unprompted.

It has also explained how disclosure, together with behaviour, determines the range within which you will eventually set the penalty.

You also looked at what you need to consider when making a decision about a disclosure which is made during the course of a compliance check.

We explained the quality of the disclosure, and how the three elements of telling, helping and giving access will assist in determining the final penalty.

We explained that 'like the decision on behaviour', you have to be able to justify your decisions on the type and quality of the disclosure, and that it is important that you record the facts leading to your views. If you hold any meetings you should keep notes accurately reflecting what was said.

Learning Check

1. Martha, who trades on the internet selling tennis racquets, has submitted her 2010/11 SA tax return showing a Capital Gain on the disposal of her rental property. A compliance check is carried out on the capital gain, and you write to Martha to ask her how she arrived at the valuations she used to calculate the gain. In her reply, she includes a further note that she has just discovered that she hadn't accounted for VAT on sales in 2010/11 she had made to customers in Greece (private individuals who are not VAT registered).

Is Martha's disclosure unprompted or prompted?

2. What is the minimum penalty that could be charged for the prompted disclosure of an inaccuracy that arose because of careless behaviour?

3. What are the names for the elements you take into account when considering the quality of the disclosure?

a	Giving access	<input type="checkbox"/>
b	Explaining	<input type="checkbox"/>
c	Helping	<input type="checkbox"/>
d	Delays	<input type="checkbox"/>
e	Telling	<input type="checkbox"/>
f	Seriousness	<input type="checkbox"/>

Learning Check - Answers

1. Martha, who trades on the internet selling tennis racquets, has submitted her 2010/11 SA tax return showing a Capital Gain on the disposal of her rental property. A compliance check is carried out on the capital gain, and you write to Martha to ask her how she arrived at the valuations she used to calculate the gain. In her reply, she includes a further note that she has just discovered that she hadn't accounted for VAT on sales in 2010/11 she had made to customers in Greece (private individuals who are not VAT registered).

Is Martha's disclosure unprompted or prompted ?

As your enquiries related only to the property valuation used for capital gains purposes, the disclosure of a VAT inaccuracy would be regarded as an unprompted disclosure. At the point that Martha has made her disclosure, she had no reason to believe that the VAT inaccuracy would have been identified by HMRC.

You looked at unprompted disclosure in sub-chapter 3.2.

2. What is the minimum penalty that could be charged for the prompted disclosure of an inaccuracy that arose because of careless behaviour?

The minimum penalty that could be charged is 15 per cent.

Penalty ranges are covered in sub-chapter 3.1.1.

3. What are the names for the elements you take into account when considering the quality of the disclosure?

a	Giving access	<input checked="" type="checkbox"/>
b	Explaining	<input type="checkbox"/>
c	Helping	<input checked="" type="checkbox"/>
d	Delays	<input type="checkbox"/>
e	Telling	<input checked="" type="checkbox"/>
f	Seriousness	<input type="checkbox"/>

You studied this in sub-chapter 3.5.

Before Moving On

If you have successfully completed the learning check, you will have achieved the study objectives, which are to

- identify the difference between an unprompted and a prompted disclosure
- state the range of penalties chargeable for each behaviour type
- list the factors to be taken into account in order to determine the quality of disclosure.

If you have not met any of the objectives, go back and reread the relevant part(s) of the chapter before moving on. If you are still having problems, make a note of them for discussion with your manager.

Chapter 4 will cover how to calculate the PLR and the penalty percentage.