

# FINANCE ACT 2009

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## EXPLANATORY NOTES

### INTRODUCTION

#### *Section 107 and Schedule 56: Penalty for Failure to Make Payments on Time*

#### Summary

1. [Section 107](#) and Schedule 56 create a new penalty regime for late payment of the following taxes: income tax, corporation tax (CT), Pay as you Earn (PAYE), National Insurance Contributions (NICs) the Construction Industry Scheme (CIS), stamp duty land tax (SDLT), stamp duty reserve tax (SDRT), inheritance tax (IHT), pension schemes and petroleum revenue tax. Taxpayers have a right of appeal against all penalties and no penalty can be charged if a taxpayer has a reasonable excuse for their failure. The Schedule provides that if a taxpayer enters into a time to pay arrangement with HM Revenue & Customs (HMRC), any late payment penalties that they would become liable to after the agreement is reached will be removed if the taxpayer meets the terms of the agreement. The section provides for the Schedule or parts of the Schedule to be brought into force by Treasury order.

#### Details of the Section

2. Subsection (3) allows different provisions of the Schedule to be brought into force at different times.
3. Subsection (8) provides that a statutory instrument, which contains an order under subsection (4), which includes provision to amend or repeal primary legislation, is subject to the negative procedure (meaning the instrument takes effect on a specified future date but is subject to annulment in pursuance of a resolution of the House of Commons).

#### Details of the Schedule

##### Penalty for failure to pay tax

4. Paragraph 1(1) introduces the Table setting out the amounts of tax to which the new penalty provisions apply and the date after which the penalty will be incurred. The Table defines the penalty date both for principal amounts of tax and amounts that might become due as the result of an assessment or determination of an amount of tax by HMRC, or by a correction to a return by HMRC or a taxpayer. It states that if a taxpayer fails to pay an amount of tax in column 3 of the Table by the date specified in column 4 of the Table, the taxpayer will be liable to a penalty under the Schedule.
5. Paragraph 1(3) states that a person may be liable to more than one penalty in the Schedule.

##### Amount of penalty for failure to pay annual or occasional amounts

6. Paragraph 3(1) defines the taxes to which this penalty model applies by referring to items in the Table.

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7. Paragraph 3(2) provides that a person is liable to a penalty of 5 per cent of the amount of tax unpaid. This penalty is incurred if a taxpayer fails to pay the tax in full by the date provided for in column 4 of the Table. This date is normally 30 days after the due date for the tax.
8. Paragraph 3(3) states that any person who has tax unpaid five months after the penalty date is liable to an additional penalty of 5 per cent of the remaining unpaid tax.
9. Paragraph 3(4) states that any person who has tax unpaid eleven months after the penalty date is liable to an additional penalty of 5 per cent of the remaining unpaid tax.
10. Paragraph 4(1) applies the provisions of this paragraph to CT, whether payable under the Quarterly Instalment Payments scheme or not. Separate provisions are required for CT as the penalty dates are different. The first penalty date for CT is the day after the filing date for the CT return rather than the day after the due date for the tax, which is usually three months earlier.
11. Paragraph 4(2) states that any person who has tax unpaid the day after the filing date for CT is liable to a penalty of 5 per cent of the amount unpaid.
12. Paragraph 4(3) states that any person who has tax unpaid three months after the penalty date is liable to an additional penalty of 5 per cent of the remaining unpaid tax.
13. Paragraph 4(4) states that any person who has tax unpaid nine months after the penalty date is liable to an additional penalty of 5 per cent of the remaining unpaid tax.

**Amount of penalty for failure to pay PAYE & CIS amounts**

14. Paragraph 5 applies paragraphs 6 to 8 (the penalty structure) to payments of tax under the PAYE or CIS regulations, except where HMRC has allowed or directed that the relevant period last six months (or more).
15. Paragraph 6(1) provides that a person is liable to a penalty of an amount determined by reference to the number of defaults of payments made of the same tax during the tax year. A default is defined in paragraph 6(2) as a failure to pay an amount of tax in full by the due date.
16. Paragraph 6(3) states that the first failure to pay an amount of tax due by its due date during a tax year does not count as a default.
17. Paragraph 6(4) provides that, where a person has one, two, or three defaults in a tax year, the taxpayer is liable to a penalty of 1 per cent of the total amount of those defaults.
18. Paragraph 6(5) provides that, where a person has four, five or six defaults in a tax year, a penalty of 2 per cent of the total of the defaults arises.
19. Paragraph 7 provides for a penalty of 5 per cent of the unpaid tax where the tax is unpaid six months after the penalty date.
20. Paragraph 8 provides for a penalty of an additional 5 per cent of the unpaid tax where the tax is unpaid 12 months after the penalty date.

**Special reduction**

21. Paragraph 9(1) provides for a reduction in penalty where there are special circumstances.

**Suspension of penalty during currency of agreement for deferred payment**

22. Paragraph 10(1) sets out the circumstances in which this paragraph will apply.
23. Paragraph 10(2) removes liability for penalties under this Schedule from the date a request for deferral is received until the end of the deferral period.
24. Paragraph 10(3) provides that if the taxpayer breaks the agreement (as defined in subparagraph 4) and HMRC serves a notice specifying to which penalties they would

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become liable, they become liable to that penalty from the date of the notice. This provision effectively enables HMRC on issue of a notice to reinstate a liability that has been removed under paragraph 10(2).

25. Paragraph 10(5) applies the paragraph if the agreement between HMRC and the taxpayer is varied. This means that if an agreement is extended, paragraph 10(2) applies to remove any liability to a penalty for the extended agreement period.

#### Assessment

26. Paragraph 11 sets out the mechanisms whereby HMRC can assess, notify and enforce penalties, which are to follow the same procedures as for assessments to tax.
27. Paragraphs 11(4) and (5) allow HMRC to make supplementary assessments where an earlier assessment was made by reference to an underestimate of the amount of tax or for PAYE and CIS penalties, if a taxpayer makes additional defaults in year.
28. Paragraph 12 sets the time limit by which an assessment of any penalty must be made.
29. Paragraph 12(1) states that the assessment must be made on or before the later of two dates. The first date is the last day of the period of two years beginning with the date specified in column 4 of the Table. The second date is the last day of the period of 12 months beginning with the end of the appeal period for the assessment of the amount of tax in respect of which the penalty is assessed, or if there is no such assessment the date on which the amount of tax is ascertained.

#### Appeal

30. Paragraph 13 provides appeal rights against decisions by HMRC to impose a penalty and of the amount of the penalty.
31. Paragraph 14 (2) states that sub-paragraph (1) does not operate to require a taxpayer to pay any penalty before an appeal against the assessment of the penalty is determined.
32. Paragraph 15 (3) provides that, if the tribunal substitutes its decision for HMRC's, then it may rely on paragraph 9 (special reduction) to the same extent as HMRC, or to a different extent to HMRC only if the tribunal thinks HMRC's decision in relation to paragraph 9 is flawed. Flawed is defined in paragraph 15(4) as meaning in light of the principles applicable in proceedings for judicial review.

#### Reasonable excuse

33. Paragraph 16(1) provides that no penalty arises in relation to any failure under this Schedule if the person satisfied HMRC or (on appeal) tribunal that there is a reasonable excuse for the failure.
34. Paragraph 16(2) contains provisions about what is precluded from being a reasonable excuse.

#### Background Note

35. These provisions bring in an aligned system of deterrents and safeguards for failing to comply with some tax payment obligations, with a view to incorporating the remaining tax payment obligations next year for the taxes and duties administered by HMRC. Implementation will be staged over the next few years, and the provisions will be brought into effect by Treasury Orders. Necessary repeals of and amendments to legislation will be given effect through the order when appropriate.
36. This measure was the subject of initial consultation in June 2008 and further consultation in November 2008, when draft legislation was also published. A response document together with a final Impact Assessment was published in April 2009.