

**Reprinted from  
British Tax Review  
Issue 4, 2021**

***Sweet & Maxwell***  
**5 Canada Square**  
**Canary Wharf**  
**London**  
**E14 5AQ**  
***(Law Publishers)***

To subscribe, please go to  
<http://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?recordid=338&productid=6614>.

Full text articles from the British Tax Review are also available via subscription to [www.westlaw.co.uk](http://www.westlaw.co.uk), or <https://www.checkpointworld.com>.

**SWEET & MAXWELL**

## Sections 116–120 and Schedules 24–29: penalties and interest

Association football star Alan Shearer is recorded as telling the *Newcastle Journal*: “there are not many times when I get nervous, but I do a little bit with penalties”.<sup>1</sup> It is unlikely that he had divined Schedules 24, 25, 26, 27, and 28 to the Finance Act 2021 (FA 2021) a decade before their introduction, but tax advisors might wonder.

Section 116 FA 2021, titled “Penalties for failure to make returns etc”, introduces Schedules 24 and 25. Section 117 FA 2021, titled “Penalties for failure to pay tax”, introduces Schedule 26. Section 118 FA 2021, titled “Penalties for failure to make returns etc or pay tax: consequential provision”, introduces Schedule 27. Section 119 FA 2021, titled “Follower notice penalties”, introduces Schedule 28. Section 120 FA 2021, titled “Late payment interest and repayment interest: VAT”, introduces Schedule 29. All of these Schedules, amounting to some 144 paragraphs, require close attention and a detailed read, beyond the scope of this note.

<sup>1</sup> Euan Reddie, *Alan Shearer: Portrait Of A Legend - Captain Fantastic* (John Blake, 2007).

## Penalties for failure to make returns

Schedule 24 FA 2021 follows HMRC consultations: *HMRC Penalties: a Discussion Document*, which closed on 11 May 2015<sup>2</sup>; *Making Tax Digital: Tax administration*, published on 15 August 2016<sup>3</sup>; and *Making Tax Digital — sanctions for late submission and late payment*, published on 20 March 2017,<sup>4</sup> and which appeared as clause 30 in the draft Finance Bill 2018–19. The new points-based system, which may be somewhat more intuitive for those with a driving licence,<sup>5</sup> is intended to encourage compliance by punishing persistent breaches without penalising the rare or occasional mistakes.<sup>6</sup>

Schedule 24 FA 2021 begins with a table that lists the groups of returns<sup>7</sup> subject to the penalty scheme by both tax: self-assessment income tax or capital gains tax (persons other than trustees or partnerships represented by number code “1”; trustees represented by “2”; partnerships represented by “3” and VAT represented by “4”), and by frequency: annual represented by a letter code A (column A); quarterly represented by B; and monthly represented by C. Digital reporting—Making Tax Digital (MTD) quarterly updates and end of period statements—falls under sub-groups in column letter B. As such, we are introduced to the new return group codes: from 1A to 4C:

Tax	Item number
Income tax or capital gains tax (persons other than trustees or partnerships)	1
Income tax or capital gains tax (trustees)	2
Income tax or corporation tax (partnerships)	3
Value added tax	4

Return(s) frequency	Column letter
Annual returns	A
Quarterly returns	B
Monthly returns	C

Paragraph 5 of Schedule 24 FA 2021 prescribes one penalty point for failing to submit a return on or before the due date. A person is not liable to more than one penalty point per month for each of the following groups, even if there is more than one failure to make a return in that group: 1) group 1A, 2A, or 3A; 2) group 4A, 4B, or 4C.<sup>8</sup> Additionally, a person will not be liable to a

<sup>2</sup> HMRC and the Rt Hon David Gauke, *HMRC Penalties: a Discussion Document* (published 2 February 2015; closed 11 May 2015).

<sup>3</sup> HMRC, *Making Tax Digital: Tax administration* (15 August 2016).

<sup>4</sup> HMRC, *Making Tax Digital — sanctions for late submission and late payment* (20 March 2017).

<sup>5</sup> Indeed, similar to a driving “speed awareness course”, a tax compliance awareness course to discharge penalty points was discussed in the consultations. See HMRC, *HMRC Penalties: a Discussion Document: Summary of Responses* (17 September 2015), para.2.56.

<sup>6</sup> *Finance Bill 2021: Explanatory Notes* (2021), p.275.

<sup>7</sup> Finance Act 2021 (FA 2021) Sch.24 para.2. Including digital (Making Tax Digital) quarterly updates.

<sup>8</sup> FA 2021 Sch.24 para.5(2). FA 2021 Sch.24 para.4 also sets out the specific provisions where a taxpayer has return obligations for multiple businesses, providing for a collated return-group total.

penalty point for a group of returns if they already have the maximum number of penalty points for that group of returns. The maximum number of penalty points for a group of returns depends on the column letter for that group:

Column letter	Maximum points
A (i.e. annual)	2
B (i.e. quarterly)	4
C (i.e. monthly)	5

When HMRC “award” a penalty point, they must notify the person. The time limit for awarding a point depends on the column letter (return frequency). HMRC may not award a penalty point after: 1) the later of date A, and (where it applies) date B; 2) for digital reporting, the later of date A and (where it applies) date C. Date A is the end of the period of X weeks from the day on which the failure occurred<sup>10</sup> where X is as follows<sup>11</sup>:

Column letter	X (weeks)
A (i.e. annual)	48
B (i.e. quarterly)	11
C (i.e. monthly)	2

Date B is the last day of the period of 12 months beginning with: 1) the end of the appeal period for the assessment of the liability to tax which would have been shown in the relevant return; or 2) if there is no such assessment, the date on which that liability is ascertained, or it is ascertained that the liability is nil. This replicates the provisions at Schedule 55 to the Finance Act 2009 (FA 2009) to extend the time limits to cater for cases where HMRC could not reasonably have been aware of a liability in time.<sup>12</sup> Date C applies where it was not reasonable to expect HMRC to be aware that the person was required to make the return(s) and is the last day of the period of 12 months beginning with the first day on which it was reasonable to expect HMRC to be aware that the person was required to make the return(s).

Paragraphs 9 to 13 of Schedule 24 FA 2021 contain the mechanism for taxpayers who move from one group of returns to a new group of returns by changing the submission frequency (i.e. column letter). If a person has extant penalty points under their old group, the points will transfer to the new group but with an adjustment found in a table in paragraph 10 of Schedule 24 FA 2021.

Old column letter	New column letter	Points adjustment
A (i.e. annual)	B (i.e. quarterly)	+2

<sup>9</sup> An odd choice of word in the writer’s opinion, found in FA 2021 Sch.24 para.6(2) and (3).

<sup>10</sup> Or, if the penalty point is to be awarded in respect of more than one failure in the same month or, as the case may be, the same calendar quarter, the day on which the latest of those failures occurred: FA 2021 Sch.24 para.6(4).

<sup>11</sup> FA 2021 Sch.24 para.6(5).

<sup>12</sup> *Finance Bill 2021: Explanatory Notes* (2021), p.269.

Old column letter	New column letter	Points adjustment
	C (i.e. monthly)	+3
B (i.e. quarterly)	A (i.e. annual)	-2
	C (i.e. monthly)	+1
C (i.e. monthly)	A (i.e. annual)	-3
	B (i.e. quarterly)	-1

If the adjustment leads to a negative, it is to be treated as having no points. If the adjustment leads to fewer points (but greater than zero), the points that remain are those that accrued most recently, with the others treated as expired. Similarly, if the adjustment leads to more points, the additional points are treated as having been awarded on the same day as the most recent failure for that group of returns.

VAT practitioners will note that paragraph 14 of Schedule 24 FA 2021 addresses a change of representative member of a group under section 43B of the Value Added Tax Act 1994 (VATA 1994). The penalty points are effectively transferred to the new representative member. For partnerships and trust settlements, there is a deemed single person treated as continuing in existence even if there is a change in the partnership or trustees. Every relevant partner or trustee will be jointly and severally liable for a penalty.

Paragraph 7 of Schedule 24 FA 2021 explains that individual penalty points will expire after two years unless the person has the maximum number of points for that group of returns. Paragraph 8 of Schedule 24 FA 2021 sets out the expiry of all penalty points for a group of returns, for which HMRC will notify the person. This occurs only when a person has made returns in the group in issue on time for a certain number of months (Y in the table below) depending on the column letter (frequency) and all returns due in the previous 24 months having been filed.

Column letter	Y (number of months)
A	24
B	12
C	6

Paragraph 13 of Schedule 24 FA 2021 applies the paragraph 8 expiry mechanism to the situation where a person moves groups with a points adjustment.

Paragraph 15 of Schedule 24 FA 2021 provides for liability to a financial penalty of £200 if, following a failure to submit a return on time, the awarding of a penalty point leaves the person with the maximum points (set out above under “Column letter: Maximum points”) or if a penalty point is awarded when the person is already at the maximum. A person will be liable to only one penalty per month in respect of digital reporting sub-groups of returns, and for those with multiple businesses mandated to digital reporting only one penalty will accrue per quarter per obligation after the penalty threshold has been reached.

Paragraph 16 of Schedule 24 FA 2021 provides that where HMRC assess a penalty, they must notify the person and state the failure or failures. The penalty must be paid within 30 days

beginning with the day on which notification of the penalty is issued. In the situation where HMRC award a penalty point which causes the person to reach the maximum and therefore be liable to a penalty, notice of an assessment of the penalty may not be issued before (but may be issued at the same time as) the notice of the award of the penalty point.

The time limits for assessing penalties are contained in paragraph 17 of Schedule 24 FA 2021 as either the later of: 1) the end of the period of two years beginning with the day on which the failure occurred,<sup>13</sup> or 2) the last day of the period of 12 months beginning with the end of the appeal period for the assessment of the liability to tax which would have been shown in the relevant return or, if there is no such assessment, the date on which that liability is ascertained. The appeal period does not include the possibility of out of time appeals but does allow for appeals which have been brought but not determined. In relation to digital reporting, the time limits are the later of: 1) the end of the period of two years beginning with the day on which the failure occurred, or 2) the last day of the period of 12 months beginning with the first day on which it was reasonable to expect HMRC to be aware that the person was required to make the return.<sup>14</sup>

Where HMRC decide to give the person a notice under section 8B or section 12AAA of the Taxes Management Act 1970 (TMA 1970) withdrawing a notice to submit a return, the notice may include a provision cancelling the liability to the penalty point or the penalty.

Paragraph 19 of Schedule 24 FA 2021 includes the “reasonable excuse” defence<sup>15</sup> whereby liability for a penalty point or penalty will not arise if the person satisfies HMRC (or the tax tribunal) that they had a reasonable excuse for the failure.

Decisions by HMRC on both penalty points and penalties can be appealed to the tribunal in the same way as an appeal against an assessment to the tax concerned. Although a person is not required to pay the penalty before an appeal against the assessment of the penalty is determined. Where the tribunal has cancelled a point or points, HMRC have 12 months from the tribunal’s decision to award points for failures that would have accrued but did not because the taxpayer already had the maximum number of points.<sup>16</sup>

Paragraph 18 of Schedule 24 FA 2021 confers on HMRC the powers to change the various thresholds and amounts by way of secondary legislation.

The new points-based regime, along with the new late payment regime discussed below, will replace the default surcharge for VAT for accounting periods beginning on or after 1 April 2022. This should provide some comfort to taxpayers in cases of very occasional and minor defaults by taxpayers, while reducing the number of surcharge-related appeals. For self-assessed income tax, for those taxpayers with business or property income over £10,000 per year (who are required to submit digital quarterly updates through MTD), the changes will come into effect for accounting periods beginning on or after 6 April 2023. For all other self-assessed income tax taxpayers the changes will come into effect for accounting periods beginning on or after 6 April 2024.

<sup>13</sup> Or the day of the latest failure, if the penalty is to be assessed in respect of more than one failure.

<sup>14</sup> And where it was not reasonable to expect HMRC to be aware that the person was required to make the return on the earlier date (under the two year period).

<sup>15</sup> As found in Finance Act 2009 Sch.55 para.23.

<sup>16</sup> See *Finance Bill 2021: Explanatory Notes* (2021), p.272. If a taxpayer has the maximum points, no further points are awarded. However, if the tribunal cancels points thus bringing the taxpayer below the maximum, HMRC have the opportunity to award points if the taxpayer defaulted in the interim.

HMRC's 15 August 2016 consultation *Making Tax Digital: Tax administration* stated that penalties should be "simple, fair and proportionate".<sup>17</sup> It is not immediately obvious that this qualifies as a simplification measure. The Low Incomes Tax Reform Group (LITRG) also raised an important query, asking whether there will be somewhere for people to find out their running points total: a database or an obligation on HMRC to inform a taxpayer.<sup>18</sup> It is also unclear how a taxpayer might ensure or enforce the expiry of points without having to wait to appeal a later award, which would be rather inefficient. Additionally, the time limits for awarding points and assessing penalties seem too long to conform with the aim of encouraging compliance. By way of example, 48 weeks is an extremely long time for HMRC to discover (and award a point for) a late annual return.

### Penalties for deliberately withholding information

Schedule 24 FA 2021 provides for penalties to be payable by a person who, by failing to make a return on or before the due date, deliberately withholds information which would enable or assist HMRC to assess the person's liability to tax. The returns to which the Schedule applies are:

- returns under sections 8, 8A, and 12AA(2)(a) or (3)(a) TMA 1970, and under regulations under paragraph 10 of Schedule A1 TMA 1970;
- accounts, statements or documents required under sections 8(1AB)(b), 8A(1AB)(b), and 12AA(2)(b) or (3)(b) TMA 1970.

Paragraph 4 of Schedule 25 FA 2021 outlines three categories of potentially withheld information, carried over from Schedule 55 FA 2009:

Category 1	It involves a domestic matter, or
	It involves an offshore matter concerning a category 1 territory
Category 2	It involves an offshore matter or an offshore transfer concerning a category 2 territory
Category 3	It involves an offshore matter or an offshore transfer concerning a category 3 territory

If the withholding of the information is deliberate and concealed,<sup>19</sup> the penalty is calculated by reference to the tax which would have been shown in the return in question as follows:

Withholding of category 1 information	100%
Withholding of category 2 information	150%

<sup>17</sup> HMRC, *Making Tax Digital: Tax administration* (15 August 2016), e.g. para.1.7.

<sup>18</sup> LITRG, *Finance (No. 2) Bill 2021 — Clauses 112 and 113; Schedules 23, 24 and 25 Penalties for failure to make returns, pay tax, etc., Briefing from the Low Incomes Tax Reform Group (LITRG)* (4 May 2021), <https://www.litrg.org.uk/sites/default/files/files/LITRG-Finance-bill-briefing-Clause-112-and-113-Schedules-23-24-25-Penalties-for-failure-to-make-returns.pdf> [Accessed 2 September 2021], para.3.6.

<sup>19</sup> i.e. if the person deliberately withholds the information and *does* make arrangements to conceal the fact that the information has been withheld. FA 2021 Sch.25 para.3(3) and (4).

Withholding of category 3 information	200%
If the % amount from the above calculation is less than £300	£300

If the withholding of the information is deliberate but not concealed,<sup>20</sup> the penalty is calculated as follows:

Withholding of category 1 information	70%
Withholding of category 2 information	105%
Withholding of category 3 information	140%
If the % amount from the above calculation is less than £300	£300

Many provisions in Schedule 25 FA 2021, including those concerning offshore transfers and reductions for disclosure, are transplants from Schedule 55 FA 2009. HMRC must reduce the standard percentage to one that reflects the quality of the disclosure made by a taxpayer, but the standard percentage may not be lower than is provided for in the table in paragraph 8 of Schedule 25 FA 2021, reproduced below, unless there are special circumstances.

Standard percentage	Minimum percentage for prompted disclosure	Minimum percentage for unprompted disclosure
70%	45%	30%
100%	60%	40%
105%	62.5%	40%
140%	80%	50%
150%	85%	55%
200%	110%	70%
[But in any event not below £300]		

A tax-geared penalty will also be reduced by the amount of any other penalty incurred by the person, the amount of which is determined by reference to the same liability to tax save for penalties for failure to pay tax under Schedule 26 FA 2021, penalties for late payment of tax under Schedule 56 FA 2009, and penalties where corrective action is not taken after a follower notice under Part 4 of the Finance Act 2014 (FA 2014).<sup>21</sup>

Where no return is made, HMRC may assess the penalty based on the liability to tax that would have been shown to the best of HMRC's information and belief, to be re-assessed if the person subsequently makes a return.<sup>22</sup> Where HMRC assess a penalty, they must notify the person and state the failure or failures. The penalty must be paid within 30 days beginning with the day

<sup>20</sup> i.e. if the person deliberately withholds the information but *does not* make arrangements to conceal the fact that the information has been withheld. FA 2021 Sch.25 para.3(5) and (6).

<sup>21</sup> FA 2021 Sch.25 para.10.

<sup>22</sup> FA 2021 Sch.25 para.11.



on which notification of the penalty is issued.<sup>23</sup> HMRC may, by way of a supplementary assessment, amend an assessment in respect of a penalty.<sup>24</sup>

The time limits for assessing penalties are contained in paragraph 14 of Schedule 25 FA 2021 as the later of: 1) the end of the period of two years beginning with the due date, or 2) the last day of the period of 12 months beginning with the end of the appeal period for the assessment of the liability to tax which would have been shown in the return or if there is no such assessment, the date on which that liability is ascertained. The appeal period does not include the possibility of out of time appeals but does allow for appeals which have been brought but not determined.

As in Schedule 24 FA 2021, if a notice to file a return is withdrawn HMRC may cancel the penalty liability,<sup>25</sup> and appeals against decisions can be brought to the tribunal as to the penalty amount or liability<sup>26</sup> without the need to pay beforehand. For appeals against the amount of the penalty, the tribunal may substitute it with a different amount that was within HMRC's powers to impose or apply the special circumstances reduction.<sup>27</sup>

Partnerships are specifically addressed in paragraph 20 of Schedule 25 FA 2021 by reference to representative partners, successors, and nominated partners. Penalties are limited to £300, charged to each partner, and an appeal from a representative partner will be treated as an appeal against the penalties charged to each and every relevant partner.

Paragraph 5 of Schedule 25 FA 2021 confers on the Treasury the powers to amend the percentages and information categories by way of regulations.

### Penalties for failure to pay tax

The introduction of a new two-charge penalty system follows HMRC consultations *Making Tax Digital: Tax administration*, published on 15 August 2016,<sup>28</sup> and *Making Tax Digital: interest harmonisation and sanctions for late payment*, published on 1 December 2017,<sup>29</sup> and clause 31 of the draft Finance Bill 2018–19. The model is intended to encourage early engagement with HMRC, either to pay or propose a time to pay agreement.<sup>30</sup>

Paragraph 1 of Schedule 26 FA 2021 contains a table with applicable tax liabilities and dates for payment. Only VAT and self-assessment income tax/capital gains tax are included within the scope of the new penalty model.

No penalty will be payable if the tax due is paid in full within 15 days of the specified date<sup>31</sup> or if a time to pay agreement is made (whether before or after the end of the 15 day period) as a result of proposals made by the person before the end of the 15 day period.<sup>32</sup>

<sup>23</sup> FA 2021 Sch.25 para.12.

<sup>24</sup> FA 2021 Sch.25 para.13. A supplementary assessment may be made after the time limit for which the assessment in question could have been made.

<sup>25</sup> FA 2021 Sch.25 para.16.

<sup>26</sup> FA 2021 Sch.25 para.17.

<sup>27</sup> FA 2021 Sch.25 paras 18 and 19.

<sup>28</sup> HMRC, *Making Tax Digital: Tax administration* (15 August 2016).

<sup>29</sup> HMRC, *Making Tax Digital: interest harmonisation and sanctions for late payment* (1 December 2017).

<sup>30</sup> *Finance Bill 2021: Explanatory Notes* (2021), p.279.

<sup>31</sup> The dates are found in column 3 of the table in FA 2021 Sch.26 para.1.

<sup>32</sup> FA 2021 Sch.26 para.4.

A first penalty becomes payable if the tax liability is not satisfied in full within 15 days of the specified date and a time to pay agreement is not made. The first penalty will be 2 per cent of the unpaid tax as at the end of the 15 day period, only if the tax is paid in full before 30 days of the specified date. If the tax remains unpaid after 30 days, the amount of penalty will be a further 2 per cent of the unpaid tax as at the end of the 30 day period—effectively 4 per cent—unless a time to pay agreement is made as a result of proposals made within the 16 to 30 day window.<sup>33</sup>

If one of the aforementioned time to pay agreements is breached, HMRC can give the person notice that the penalties will be payable as if the agreement had not been made.<sup>34</sup>

The second penalty becomes payable if any amount of the tax due is unpaid at the end of the 30 day period. Instead of a portion of the unpaid tax, this second penalty is a further 4 per cent per annum beginning from the day after the 30 day period (day 31), on a daily basis (on the *remaining* tax liability) ending when the tax is paid in full; essentially, it is a penalty interest rate. The penalty will not apply if a time to pay agreement is reached and will be disapplied from the day on which the person makes proposals that lead to the agreement. If the time to pay agreement is breached, HMRC can give the person notice that the penalties will be payable as if the agreement had not been made.<sup>35</sup>

As stated in paragraph 10(6) of Schedule 26 FA 2021, time to pay agreements can be varied at any time by further agreement with HMRC without falling foul of the above.

Schedule 26 FA 2021 includes paragraphs, similar to the Schedules referred to above as one might expect, concerning: a reasonable excuse defence,<sup>36</sup> a special circumstances reduction,<sup>37</sup> time limits for assessments,<sup>38</sup> and appeals to the tribunal.<sup>39</sup>

HMRC must notify the taxpayer of assessed penalties and state the failure to pay the tax, the amount of the penalty and the calculation and period. The penalty must be paid within 30 days beginning with the day on which notification of the penalty is issued. HMRC may amend<sup>40</sup> or supplement<sup>41</sup> an assessment in respect of a penalty.

The time limits for assessing penalties are contained in paragraph 18 of Schedule 26 FA 2021 as the later of: 1) the end of the period of two years beginning with the specified date,<sup>42</sup> or 2) 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 that amount is ascertained. The appeal period does not include the possibility of out of time appeals but does allow for appeals which have been brought but not determined.

<sup>33</sup> FA 2021 Sch.26 paras 5 and 6.

<sup>34</sup> FA 2021 Sch.26 para.7.

<sup>35</sup> FA 2021 Sch.26 paras 8 and 9.

<sup>36</sup> FA 2021 Sch.26 para.12.

<sup>37</sup> FA 2021 Sch.26 para.13.

<sup>38</sup> FA 2021 Sch.26 para.18.

<sup>39</sup> FA 2021 Sch.26 paras 19–21.

<sup>40</sup> If an assessment in respect of a penalty is based on an amount of tax due or payable that is found by HMRC to be excessive.

<sup>41</sup> If an earlier assessment is based on an amount of tax due and payable that is found by HMRC to be an underestimate or insufficient.

<sup>42</sup> In column 3 of the table in FA 2021 Sch.26 para.1: the last date on which payment may be made without incurring a penalty.

Appeals against decisions can be brought before the tribunal as to the penalty amount or liability without the need to pay beforehand.

Paragraphs 11 and 22 of Schedule 26 FA 2021 confer on HMRC the powers to amend the day limits and percentages by way of regulations.

In conclusion, Schedule 26 FA 2021 introduces a new two-tiered penalty model for self-assessment income tax and VAT; the intention is to extend the regime to other taxes in the future. Together with the late submission penalty system, for VAT purposes, from 1 April 2022, this means taxpayers can bid farewell to the default surcharge regime. They can also seemingly bid farewell to the special arrangement concession for small businesses with turnovers under £150,000 whereby they do not automatically fall under the default surcharge regime and are sent a letter offering help instead of a surcharge liability notice.<sup>43</sup>

Some discomfort has been expressed in relation to the potentially harsh and disproportionate consequences of breaching a time to pay agreement, especially when the majority of instalments have been met.<sup>44</sup> The discomfort is exacerbated by the lack of certainty over how HMRC should exercise their discretion concerning time to pay agreements and the potential (practical) difficulties in contacting HMRC within the 15 day period. LITRG suggested doubling the 15 and 30 day periods.<sup>45</sup> It is also unclear whether HMRC have to assess the taxpayer for a penalty for breach of a time to pay agreement: the wording of paragraph 7(2) of Schedule 26 FA 2021 says: “If HMRC give the person notice that a penalty is payable”<sup>46</sup> but the explanatory notes state: “If the agreement is breached HMRC *must* give the person notice that a penalty is payable”.<sup>47</sup>

In *Hortus Blackheath Ltd v HMRC* the tribunal explained that “a payment in default by one day attracts the same penalty as a payment 100 days late”.<sup>48</sup> Under the new regime, that is certainly not the case.

### **Penalties for failure to make returns etc or pay tax: consequential provision**

Schedule 27 FA 2021 contains the consequential amendments to existing legislation flowing from the Schedules referred to above (Schedules 24 to 26 FA 2021) and requires close reading. By way of examples, paragraph 16 of Schedule 27 amends VATA 1994 by omitting sections 59 to 59B (default surcharge), paragraphs 24 to 26 of Schedule 27 introduce new sections 83FA and 83FB VATA 1994 concerning reviews by HMRC of penalties and points for failing to make returns.

<sup>43</sup> See HMRC, *Default surcharge (VAT Notice 700/50)* (published 1 September 2017; last updated 4 August 2021), <https://www.gov.uk/guidance/vat-default-surcharge-notice-70050> [Accessed 8 September 2021], para.4.2.

<sup>44</sup> See Association of Taxation Technicians, *Finance Bill 2021: Representation from the Association of Taxation Technicians (ATT), Clause 113 and Schedule 25: Penalties for failure to pay tax* (10 April 2021), <https://www.att.org.uk/sites/default/files/FB2021%20ATT%20c113%20Penalties%20FINAL.pdf> [Accessed 2 September 2021]; and LITRG, *Finance (No. 2) Bill 2021 — Clauses 112 and 113; Schedules 23, 24 and 25 Penalties for failure to make returns, pay tax, etc., Briefing from the Low Incomes Tax Reform Group (LITRG)* (4 May 2021).

<sup>45</sup> LITRG, *Finance (No. 2) Bill 2021 — Clauses 112 and 113; Schedules 23, 24 and 25 Penalties for failure to make returns, pay tax, etc., Briefing from the Low Incomes Tax Reform Group (LITRG)* (4 May 2021).

<sup>46</sup> FA 2021 Sch.26 para.7(2), emphasis added.

<sup>47</sup> *Finance Bill 2021: Explanatory Notes* (2021), p.277, emphasis added.

<sup>48</sup> *Hortus Blackheath Ltd v HMRC* [2017] UKFTT 90 (TC) at [5].

### Follower notice penalties

Schedule 28 FA 2021 introduces changes to the follower notice penalty regime for failing to take corrective action in relation to failed tax advantages/arrangements following litigation by a third party. This follows a report by, and discussions before, the House of Lords Economic Affairs Committee on providing judicial oversight of the follower notice regime.<sup>49</sup> It also follows an HMRC consultation published on 16 December 2020, titled *Follower Notices and Penalties*, for which five responses were received expressing dissatisfaction with the regime generally but supporting a reduction in the penalties.<sup>50</sup>

Amending Part 4 FA 2014, paragraph 3 of Schedule 28 FA 2021 reduces the amount of a section 208 FA 2014 penalty from 50 per cent of the denied advantage to 30 per cent.

Paragraph 2 of Schedule 28 FA 2021 inserts section 208A FA 2014 titled “additional penalty for unreasonable tax appeal”. This section provides that a person is liable to a penalty if the person or their representatives are found to have acted unreasonably in bringing or in conducting an appeal in relation to a return or claim that is subject to a follower notice. The term “acted unreasonably” is limited to the scenarios in section 208A(5) and (6) FA 2014 such as: the proceedings being struck out without reinstatement or appeal within the appeal period,<sup>51</sup> or upon the tribunal making a declaration (following an application by HMRC) that bringing of an appeal or conduct thereof amounts to acting unreasonably, again without an in-time appeal.

Pursuant to paragraph 3 of Schedule 28 FA 2021, the penalty under new section 208A FA 2014 is 20 per cent of the value of the denied advantage. When HMRC assess a section 208A penalty, they must notify the person and state the tax period in respect of which the penalty is assessed. An assessment of a penalty must be made within 90 days of the day after the period for which an appeal against a strike out or declaration of unreasonableness can be brought. The penalty must be paid or appealed<sup>52</sup> (liability or amount) to the tribunal within 30 days of notification pursuant to new section 214A FA 2014.<sup>53</sup>

The consequential amendments ensure that the new provisions apply to partnerships and follower notices in National Insurance contributions cases.

In conclusion, anyone who receives a follower notice must decide whether to give up the tax advantage they have asserted or continue their dispute with HMRC and risk a penalty<sup>54</sup> of 30 per cent, now reduced from 50 per cent, if they are ultimately unsuccessful. However, the 50 per cent will effectively be maintained by the additional 20 per cent if the bringing of an appeal is found to be unreasonable, either by the tribunal striking out the proceedings or making a declaration.

<sup>49</sup> HMRC, *Follower Notices and Penalties: Summary of responses* (3 March 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/965908/Follower\\_Notices\\_and\\_Penalties\\_-\\_Summary\\_of\\_responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965908/Follower_Notices_and_Penalties_-_Summary_of_responses.pdf) [Accessed 2 September 2021].

<sup>50</sup> HMRC, *Follower Notices and Penalties: Consultation* (16 December 2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944647/Follower\\_Notices\\_and\\_Penalties\\_-\\_consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944647/Follower_Notices_and_Penalties_-_consultation.pdf) [Accessed 2 September 2021].

<sup>51</sup> Ignoring the possibility of an out of time appeal (Finance Act 2014 (FA 2014) s.208A(10)(a)).

<sup>52</sup> The grounds for appeal on liability for the penalty are limited to those found in FA 2014 s.214A(3).

<sup>53</sup> FA 2021 Sch.28 para.4.

<sup>54</sup> *Finance Bill 2021: Explanatory Notes* (2021), p.286.

### Late payment interest and repayment interest: VAT

Schedule 29 FA 2021 amends Schedules 54 and 54A FA 2009, following the consultation of 15 August 2016, titled *Making Tax Digital: Tax administration*,<sup>55</sup> and the consultation of 1 December 2017, titled *Making Tax Digital: interest harmonisation and sanctions for late payment*,<sup>56</sup> and Schedule 14 to the draft Finance Bill 2018–19.

Paragraph 3(1) of Schedule 29 FA 2021 introduces a new paragraph 12C into Schedule 54 FA 2009 stating that in relation to VAT payments on account under section 28 VATA 1994, in the case of a repayment when the total amount of payments on account exceeds the amount of VAT payable in respect of that accounting period, the repayment interest date is the date on which the VAT return is due.

A new Part 2A of Schedule 54 FA 2009 included paragraphs 12E and 12F which provided for no interest on VAT credits when HMRC had a “reasonable inquiry” relating to a return or when HMRC were correcting errors or omissions in a return. However, this section was abandoned<sup>57</sup> and now paragraph 12E alone provides that a VAT credit does not attract interest for any period where 1) a previous VAT return is outstanding or 2) HMRC have given notice requiring the production of evidence or giving of security under Schedule 11 VATA 1994, beginning from the date on which notice was given and ending on the date of compliance.

Amending Schedule 54A FA 2009, paragraph 4 of Schedule 29 FA 2021 provides for repayment interest that ought not to have been paid to be recovered as if it were late payment interest, where repayment interest was paid but should not have been paid. In addition, during a “common period” where 1) an overdue VAT payment attracting late payment interest is due and payable, and 2) an amount of credit with repayment interest is payable to the person, the two are effectively set-off such that only the residual sum (either the overdue payment or credit) will attract interest (late payment or repayment, respectively).

There were several articles online referring to the removal of the 5 per cent repayment supplement found in section 79 VATA 1994, expressing concern that this was happening “below the radar”.<sup>58</sup> At the time of writing the writer is unaware of any such amendment to VATA 1994 in FA 2021, although section 120(5) and section 120(6) FA 2021 provide a broad power for the Treasury to make regulations consequential on Schedule 29 FA 2021 including those amending and repealing provisions of Acts or subordinate legislation.

**Max Schofield\***

<sup>55</sup> HMRC, *Making Tax Digital: Tax administration* (15 August 2016).

<sup>56</sup> HMRC, *Making Tax Digital: interest harmonisation and sanctions for late payment* (1 December 2017).

<sup>57</sup> See House of Commons, Public Bill Committee, Finance (No.2) Bill, Notices of Amendments given up to and including Thursday 22 April 2021.

<sup>58</sup> See the note from the Chartered Institute of Taxation (CIOT), “VAT repayment: interest change welcome but concerns remain” (7 May 2021), <https://www.tax.org.uk/vat-repayment-interest-change-welcome-but-concerns-remain> [Accessed 3 September 2021].

\* Barrister at 3PB Barristers, London.