

TAX COLLECTION AND MANAGEMENT (WALES) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5 - Penalties

Sections 118-121 – Penalty for failure to make tax return

147. **Section 118** provides that the penalty amount for a person who fails to make a tax return on or before the filing date (as defined by section 40) is £100.
148. **Section 119** provides that the penalty amount for a person who continues to fail to make a tax return after 6 months after the filing date is the greater of 5% of the devolved tax owed and £300.
149. **Section 120** provides for a further penalty where the failure to make a tax return continues for more than 12 months after the filing date. In these circumstances, the penalty is the greater of 5% of devolved tax owed and £300. If this failure is accompanied by a deliberate withholding of information which would enable or assist the WRA to assess the person's liability, subsection (2) provides for an increased penalty which is the greater of 100% of the devolved tax owed and £300.
150. **Section 121** provides the WRA with the power to reduce a penalty for failure to make a tax return where a person discloses information to the WRA which has been previously withheld by the failure to submit a tax return. Subsection (2) sets out three distinct elements, each of which may allow WRA to make a reduction: admission – telling WRA that information has been withheld; taking active steps – giving WRA reasonable help in assessing the amount of devolved tax unpaid as a result of the information being withheld; and access – allowing WRA access to the records to check the extent of any liability. Any reductions applied may reflect whether or not the disclosure was prompted or unprompted (i.e. whether or not the person has reason to believe that WRA is or is about to discover the information) and the quality (e.g. timing, nature and extent) of the information disclosed.

Sections 122-123 – Penalty for failure to pay tax

151. **Section 122** makes a person liable to a penalty where they fail to pay an amount of devolved tax on or before a certain date. Tax specific legislation will specify the date on which the amount must be paid, and the penalty applied.
152. **Section 123** provides for a person who has failed to pay tax by the due date to make a request to WRA to have the payment deferred. WRA can then decide whether or not to agree to the deferral of payment for a specified period as well as specifying any conditions of that deferral. If payment is deferred, any penalty the person might have incurred during the specified period for failing to pay tax is not applied. If the person breaks the agreement (either by failing to pay the tax due when the deferral period ends or failing to comply with any condition of that deferral), and WRA issue a notice to the

person, the person becomes liable for any penalty to which the person would have been liable if the suspension had not been in place. If the deferral agreement is further varied the agreement applies until the end of the new agreement.

Section 124-128 – Penalties under Chapter 2: general

153. **Section 124** sets out how certain penalties should interact. Where a person is liable to one or more penalties under section 118 to 120, subsection (1) provides that the total amount of those penalties must not exceed the total amount of devolved tax. Subsection (2) provides that where a person is liable to a penalty under Chapter 2 and any other penalty arising in relation to a devolved tax liability (which is determined by the same devolved tax liability) the amount of the penalty under Chapter 2 is to be reduced by the amount of that other devolved tax penalty.
154. **Section 125** provides that the WRA may, in special circumstances, reduce a penalty that has been applied due to either a failure to make a tax return or a failure to pay tax on or before the due date. The penalty can be remitted, suspended, or reduced following a WRA agreement to compromise with the person liable to the penalty. The special circumstances under which the penalty may be reduced do not include the person's ability to pay or by the fact that a potential loss of revenue from one person is balanced by a potential over-payment by another.
155. **Section 126** provides that if a person satisfies WRA (or, on appeal, the tribunal), that there is reasonable excuse on the person's behalf for a failure to either make a return or make a payment, then the person is not liable to pay a penalty arising from that failure. The section also clarifies some circumstances in which a reasonable excuse does or does not apply.
156. Where a person is liable to a penalty resulting from this Chapter, Section 127 requires the WRA to assess the penalty and notify the person of the penalty and how it was assessed. The details of the assessment of the penalty by the WRA are also set out in the section. Section 128 requires the WRA to assess penalties within specified time limits.

Sections 129-132 – Penalties for inaccuracies in documents

157. **Section 129** provides that a person is liable to a penalty where they submit certain documents to WRA which contain an inaccuracy, subject to two conditions being met. The first condition is that the inaccuracy amounts or leads to either an understatement of the tax liability, a false or inflated statement of a loss or a false or inflated claim for relief or repayment of tax. The second condition is that in the WRA's judgement the inaccuracy is either deliberate or careless on the part of the person submitting the document (who may be the taxpayer or someone else acting for the taxpayer or who is required to give a document to WRA, for example following an information notice issued under Part 4). A penalty is payable for each error. The documents caught by this penalty will be specified in tax specific legislation.
158. **Section 130** specifies the penalty amount for a deliberate and for a careless inaccuracy, which is calculated as a percentage of the "potential lost revenue" as defined in section 134.
159. **Section 131** empowers the WRA, to suspend all or part of a penalty to which a person is liable to under section 129 as a result of submitting a document to the WRA containing an error and which is due to carelessness. When exercising this power, WRA must issue a notice to the person liable to the penalty, which must specify what part of the penalty is being suspended, and set a period of suspension not exceeding two years and the conditions of suspension with which the person must comply. WRA may suspend all or part of a penalty only if compliance with a condition of suspension would help the person to avoid liability to further penalties incurred for careless inaccuracy. On the expiry of the period of suspension, the suspended penalty (all or part) is cancelled if WRA is satisfied that the conditions are met, otherwise the suspended period (all or part)

becomes payable. A suspended penalty becomes payable where the person becomes liable for another devolved tax penalty during the period of a suspension.

160. **Section 132** provides that a person (A) is liable to a penalty where another person (B) submits a document to WRA containing an inaccuracy, and that inaccuracy is attributable to A either deliberately supplying B with false information or deliberately withholding information from them with the intention of creating an inaccuracy. Where this happens and there is either an understatement in the tax liability or a false or inflated claim for loss or repayment of tax, A is liable to pay a penalty which is 100% of the “potential lost revenue”. For example a taxpayer who deliberately gives an inaccurate document to his or her agent would be caught by this penalty when the agent then submits the inaccurate document to WRA on the taxpayer’s behalf. The agent may also be liable under section 129 and whether the agent acted deliberately or carelessly would depend on the facts of the case.

Section 133 – Penalty for failure to notify under-assessment or under-determination

161. This section provides that a penalty is payable by a person where an assessment issued by the WRA (as defined under section 56) understates the tax liability and the person has failed to take reasonable steps to inform the WRA of that fact within 30 days of receiving the under-assessment. The WRA must consider whether the person knew, or should have known, about the under-assessment and what steps it would have been reasonable to take to notify the WRA. References to a WRA assessment include a WRA determination (as defined under section 52). The penalty amount payable is 30% of the potential lost revenue. Potential lost revenue is defined in section 134.

Sections 134-138 – Potential lost revenue

162. Some penalties are determined as a percentage of the “potential lost revenue”, which is defined by sections 135 to 138.
163. **Section 135** provides the “normal rule” for the calculation of potential lost revenue as the additional amount payable (either to or from WRA) in respect of tax as a result of correcting an inaccuracy or under-assessment.
164. Where a person is liable to a penalty under section 129 for more than one inaccuracy, section 136 provides that if a calculation of potential lost revenue depends on the order in which inaccuracies are corrected then careless inaccuracies are to be corrected before deliberate inaccuracies. In calculating potential lost revenue, account is to be taken of any overstatement in a document given by the same person in the same tax period.
165. When calculating potential lost revenue in respect of a document given by or on behalf of a person, no account will be taken of a potential overpayment by another person except where specifically allowed for in any enactment. The section also provides the meaning of understatement and overstatement.
166. **Section 137** provides that where an inaccuracy has the result of a loss being recorded wholly for the purpose of reducing the amount of devolved tax payable then the normal rule for calculating potential lost revenue (provided by section 135) will apply. Subsection (2) provides that where an inaccuracy has the result of a loss being recorded partially for the purpose of reducing the amount of tax payable then potential lost revenue will be calculated: a) with reference to the part of the loss used to reduce the amount of tax payable; and b) 10% of the loss that has not been used to reduce the amount of tax payable. This applies where no loss would have been recorded apart from the inaccuracy and also to where a different loss would have been recorded because of the inaccuracy. Where the nature of the loss, or the person’s circumstances, means there is no reasonable prospect of the loss being used to reduce a tax liability of any person, there will be no penalty.

167. **Section 138** provides that where an inaccuracy results in an amount of tax being declared later than it should have been, the potential lost revenue is 5% of the delayed tax for each year of the delay. If the delay is less than one year then the potential lost revenue is a percentage equivalent to 5% per year for each separate period of delay. This section does not apply to cases where the inaccuracy gives rise to a loss wrongly recorded or quantified (see section 137).

Section 139-141 – Penalties under Chapter 3: general

168. **Section 139** provides for WRA to be able to reduce a penalty under this Chapter. This applies only where a person discloses information to WRA about an inaccuracy, a supply of false information, the withholding of information, or a failure to disclose an under-assessment which is relevant to a person's liability to a devolved tax. Any reductions applied may reflect whether or not the disclosure was unprompted (where the person has no reason to believe that WRA is or is about to discover the information) and also the quality (timing, nature and extent) of the information disclosed.
169. **Section 140** provides that WRA may in special circumstances reduce a penalty that has been applied due to sections 129, 132 or 133. The penalty can be suspended, remitted entirely or reduced following WRA agreeing a compromise with the taxpayer in relation to the penalty proceedings. The special circumstances under which the penalty may be reduced cannot be related to the person's ability to pay or by the fact that a potential loss of revenue from one person is balanced by a potential over-payment by another person.
170. **Section 141** provides that where a person becomes liable for a penalty due to sections 129, 132 or 133, WRA must assess the penalty, notify the person that a penalty has been incurred, and state in the notice the period or transaction against which the penalty is assessed. Subsection (3) and (4) sets out the time limits for the assessment of penalties under sections 129, 132 or 133.

Section 142 - Interpretation

171. This section defines various expressions used in this Chapter, including — “giving a document to WRA”, “making a tax return”, “a loss” and “action”.

Sections 143-145 – Penalty for failure to keep and preserve records in connection with tax returns and claims

172. **Section 143** provides for a penalty of a maximum of £3,000 for failure to keep and preserve records in compliance with section 38 or 69, with the exception that no penalty is incurred if other documentary evidence can show the same information. It will be for WRA to decide the level of penalty (up to the £3,000 maximum) in each case.
173. **Section 144** provides for a person not being liable to a penalty under section 143 if the person satisfies WRA (or, on appeal, the tribunal) that there is a reasonable excuse for the failure. The section defines some circumstances which would not be accepted as a reasonable excuse.
174. **Section 145** requires the WRA to assess the penalty and issue a notice to the liable person within a specified time period.

Sections 146-153 – Penalties relating to investigations

175. **Section 146** provides that a person is liable to a penalty of £300 where that person:
- (i). fails to comply with an information notice (as defined in section 83);
 - ((ii). deliberately obstructs the WRA in the course of an inspection approved by the tribunal;

*These notes refer to the Tax Collection and Management (Wales)
Act 2016 (c.6) which received Royal Assent on 25 April 2016*

- (iii). deliberately obstructs WRA in the course of exercising powers under section 113(3); or
 - (iv). fails to comply with a reasonable request for assistance under section 113(5).
- 176. Subsection (3) provides that failing to comply with an information notice includes concealing, destroying or disposing of a document even where this would be an offence under section 114 or 115. If a person was convicted under those sections section 155 prevents the person from incurring a penalty for the same act but the penalty is available as a sanction if no criminal conviction is pursued.
- 177. [Section 147](#) provides that a person is liable to a further daily penalty of up to £60 for each subsequent day the failure or obstruction continues after notice of that penalty has been issued by WRA. A person is not liable to a daily penalty where the person fails to respond to a notice issued by WRA under section 93 which requires the contact details for debtors. Subsection (2)(b) prevents a daily penalty from accruing while a review or appeal is taking place.
- 178. [Section 148](#) provides that a person is not liable to a penalty under section 146 or 147 if the WRA allows them further limited time to correct the failure and the person then does so. Section 149 also provides for a person not being liable to a penalty under section 146 or 147 if the person satisfies WRA (or, on appeal the tribunal) that there is reasonable excuse. The section defines some circumstances which would not be accepted as reasonable excuse.
- 179. Where a person has been liable to the daily default penalty under section 147 for more than 30 days and the failure or obstruction continues, section 150 provides for the WRA to make an application to the tribunal for an increase in the daily penalty. Before making an application, WRA must tell the person responsible for the failure or obstruction that an application may be made. On hearing the application, the tribunal may approve an increased amount up to a maximum of £1,000 for each applicable day and must have regard to factors including the likely cost of complying with the notice and the benefits to the person or anyone else arising from the non-compliance. If the tribunal approves the request, the WRA must issue a notice to the person and state the day when the increased daily penalty would apply.
- 180. [Section 151](#) makes provision that, where certain criteria apply, a person can be made liable for an additional penalty whose amount is decided by the Upper Tribunal. The criteria are that: a person is liable to a penalty under section 146; the failure or obstruction continues; the WRA believes that the amount of tax the person has paid or is likely to pay is significantly less than it would have been if they had complied; the WRA makes an application to the Upper Tribunal for an additional penalty to be imposed; and the Upper Tribunal decides it is appropriate to do so.
- 181. In deciding the amount of the penalty, the Upper Tribunal must factor in the amount of tax which has not been, or is not likely to be, paid by the person. Any additional penalty imposed by a decision of the Upper Tribunal against this section is additional to the fixed and daily penalties already applied as a result of a continued failure or obstruction.
- 182. [Section 152](#) provides that in certain circumstances a person is liable to a penalty of up to £3,000 if, in the course of complying with an information notice, they submit a document which contains an inaccuracy. The circumstances are: if the error is due to careless or deliberate behaviour; if the person is aware of the inaccuracy at the time of submitting the document but fails to tell the WRA; or if the person discovers the error after submitting the document, but fails to take reasonable steps to inform the WRA. Where there is more than one inaccuracy in a document, a penalty is payable for each inaccuracy. It will be for WRA to decide the level of penalty (up to the £3,000 maximum) in each case.

183. Where a person becomes liable for a penalty under this Chapter, section 153 requires the WRA to assess the penalty and then notify the person of this. The assessment of a penalty under section 146 or 147 must be made within 12 months of the person becoming liable to the penalty, or, where there is a right to appeal against an information notice, 12 months from the end of the appeal period or conclusion of an appeal. Where a person becomes liable to a penalty under section 150, WRA must undertake an assessment of the penalty every 7 days until the end of the failure that gives rise to the penalty. The assessment of a penalty under section 151 must be made within 12 months of the Upper Tribunal's decision. An assessment of a penalty under section 152 must be made within 12 months on the date that the error first came to the attention of WRA and within six years of the date on which the person became liable to the penalty.

Section 154 – Payment of penalties

184. A penalty under Part 5 must be paid within 30 days of WRA issuing the penalty notice to the person, unless there is a review or appeal in which case section 182 applies, although only in relation to any disputed amount of penalty.

Sections 155-156 – Supplementary

185. [Section 155](#) provides that a person is not liable to pay any penalty outlined in the Act if the person has already been convicted of an offence relating to the matter which triggered the penalty.
186. [Section 156](#) gives the Welsh Ministers a regulation making power to specify the amounts of penalties and the procedure for assessing penalties under Part 5 of the Act.