



TC02279

Appeal number: TC/2012/06377

Income tax – penalty for late payments of monthly PAYE and NICs – whether payments allocated to the correct tax month – whether PAYE is a debt due from the employer - common law authorities on the allocation of payments - whether HMRC should have allocated the payments in a manner more favourable to the company – whether the company had a reasonable excuse for late payment – appeal dismissed and penalty confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AJM MANSELL LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: ANNE REDSTON (Presiding Member)
JAMES MIDGLEY**

Sitting in public at 45, Bedford Square, London on 23 August 2012

The Appellant was not represented.

Karen Weare of HM Revenue & Customs Appeals and Reviews Unit represented the Respondents.

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DECISION

1. This was the appeal by AJM Mansell Limited (“the company”) against a penalty of £2,144.97 for late payment of monthly Pay As You Earn (“PAYE”) and Class 1 employees’ National Insurance Contributions (“NICs”) during the year to 5 April 2011¹.
2. The Tribunal decided that the appeal was dismissed and confirmed the penalty.

The issues in the case

3. The dates and amounts of the PAYE payments made were not in dispute. The issues in the case were:
 - (1) whether the payments had been correctly allocated to tax months (“the First Issue”);
 - (2) whether HMRC had any obligation to allocate the payments in a way which was more favourable to the company, and/or to advise the company that a different method of allocation would be more favourable (“the Second Issue”); and
 - (3) whether the company had a reasonable excuse for late payment (“the Third Issue”).

The parties’ attendance at the hearing

4. Mrs Weare attended the hearing to put HMRC’s submissions to the Tribunal. No representative was present for the company.
5. Pinsent Masons LLP (“Pinsent Masons”), a firm of solicitors acting *pro bono* as agent for the company, sent a letter by email to the Tribunal at 17.29 pm on 21 August 2012, shortly before the hearing date of 23 August. The letter said that no representative from Pinsent Masons was able to attend the hearing. It also contained written submissions to the Tribunal on the company’s behalf.
6. Attached to that email was an undated letter from Mr Hiten Patel, director of the company. He apologised for being unable to attend in person and provided further submissions.
7. The Tribunal considered the position in the light of Rule 33 the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”).
8. The Tribunal was satisfied that both Pinsent Masons and the company had been notified of the hearing. Neither Pinsent Masons nor Mr Patel asked for the hearing to be postponed. We noted the very full submissions made in the two letters sent to the Tribunal very shortly before the hearing, and taking the foregoing into account, decided that it was in the interests of justice to proceed.

¹ References in this decision notice to PAYE should be read as including employee Class 1 NICs, unless the context otherwise requires.

The legislation

9. Penalties for late payment of monthly PAYE came into effect from 6 April 2010. The relevant legislation is at Finance Act 2009, Schedule 56 (“Schedule 56”). The structure of the regime is as follows:

- (1) if payments of PAYE and employees’ NIC are late for one month in a tax year, there is no penalty;
- (2) if two to four months’ payments are late, the penalty is 1% of the total PAYE and NICs for the tax year;
- (3) if five to seven months’ payments are late, the penalty rises to 2%;
- (4) if eight to ten months’ payments are late, the penalty rises further to 3%;
- (5) if eleven or twelve months’ payments are late, the penalty is 4%.

10. However, following the case of *Agar v R&C Commrs* [2011] UKFTT 773 (TC), HMRC have accepted that the legislation does not allow a penalty to be charged for a late payment in month 12.

11. The provisions of Schedule 56, so far as relevant to this decision are set out in the Appendix.

12. The Social Security Contributions Regulations 2001 (SI 2001/1004), Regulation 67A states that Schedule 56 applies to Class 1 employee NICs.

The evidence

13. The Tribunal was provided with the correspondence between the parties.

14. Mr Patel also provided:

- (1) a letter dated 7 August 2012 from the NHS Prescription Service; and
- (2) two (undated) newspaper articles, one of which referred to inaccuracies in payments made to pharmacies by the Department of Health (“DoH”), and the other to pharmacies being forced out of business “by severe cashflow problems.”

15. HMRC supplied:

- (1) Calculation schedules of the company’s 2010-11 and 2011-12 PAYE and NICs by tax month showing the number of days on which HMRC considered that the payments had been made late.
- (2) Computer printouts of the company’s PAYE and National Insurance Contributions for the periods 2007-08 through to 2011-12.
- (3) Copies of computer print outs headed “Action History” which included notes of telephone calls between HMRC and representatives of and for the company as well as other communications and actions.
- (4) Template examples of: the HMRC Notice requiring payment (P1010(d)); the Late payment penalty warning letter and the Penalty Notice for late PAYE payment.
- (5) A computer printout recording the issue of a penalty default letter to the company.
- (6) Extracts from HMRC’s online guidance relating to the payment of PAYE.

16. On the basis of that evidence we find the following facts.

The facts

17. The company runs a pharmacy and derives the majority of its income from the Department of Health (“DoH”). Some of the payments made by the DoH are estimated and are later corrected; some payments are made late. Mr Patel said, and we accept as a fact that “for some years the DoH has been consistently late in making payments” to the company.

18. The legislation on late payment penalties for in-year PAYE was introduced from 6 April 2010. In the months leading up to its introduction, HMRC sought to publicise the changes via the employer CD-Rom, several issues of Employer Bulletin, on their website and via other channels.

19. On 28 May 2010, as no PAYE had been received for the tax year 2010-11, HMRC issued a penalty warning letter to the company; this was followed on 9 June 2010 by a form P101 (a demand for payment based on an estimate of the amount due) for the first tax month, namely 6 April to 5 May 2010.

20. On 9 June 2010 PAYE of £5,369.26 was paid. On 24 June 2010 HMRC called a director of the company to chase payment for the second tax month, 6 May to 5 June 2010. The director said he was driving and could not answer the call, and asked HMRC not to call again that evening as he would be watching football. HMRC warned him of legal action. On the following day the director called HMRC and said that the PAYE was late because it had been overlooked. HMRC warned him of legal action and penalties.

21. On 25 June 2010 the director promised payment and was again warned of legal action and penalties. On 28 June a payment of £5,271.76 was made.

22. On 24 and 28 July 2010 HMRC tried again to speak to the director on the telephone but were unable to make contact; they made a further call on 28 July 2010 and left a message for the director, asking him to call back the following day. On 29 July 2010 HMRC issued a P101 for an estimated sum. On 30 July 2010 the director called HMRC and said that the PAYE was late due to cashflow. HMRC warned him about penalties. On 5 August 2010 a sum of £5,486.09 was paid by the company to HMRC.

23. On 27 August 2010 a further P101 was issued and on 1 September 2010 HMRC again warned the company about penalties. On 6 September 2010 PAYE of £5,316.08 was paid.

24. There were further warnings of legal action on 30 September and 26 October 2010. On 7 December 2010 HMRC moved responsibility for collection to its “field force” which (we were told by Mrs Weare) visits premises to collect the sums due.

25. Estimated assessments (P101s) were issued on 30 September 2010, 2 November 2010, 24 November 2010, 24 December 2010, 25 January 2011, 24 February 2011 and 28 March 2011.

26. Further payments were made to HMRC on 6 October 2010, 1 November 2010, 8 December 2010, 6 January 2011, 7 February 2011, 7 March 2011 and 6 April 2011.

27. On 26 March 2011, HMRC spoke to the company's agent² and was told that the payment for month 11 was late because it had been overlooked. The agent was warned that the company faced legal action and penalties.

28. On 21 July 2011 the company were issued with a penalty notice based on 12 defaults of which the first was not penalised because of the statutory exception.

29. The penalty was appealed on the company's behalf by McGrigors LLP³, who requested an HMRC review.

30. The review decision was issued on 15 May 2012. It reduced the penalty to take account of the *Agar* decision referred to above.

31. On 14 June 2012 Pinsent Masons appealed to the Tribunal on the company's behalf.

The First and Second Issues: submissions on behalf of the company

32. Both Mr Patel and Pinsent Masons submitted that HMRC had allocated the payments to the previous tax month, whereas they could have been allocated to the current tax month. Pinsent Masons said:

“During the period for which HMRC has charged a penalty, at no time did any delay extend past the date upon which the next PAYE payment was due, so that in each month of 2010-11 a payment was made in advance of the due date of the PAYE due that month.”

33. Mr Patel said:

“every month we make a payment to HMRC prior to the date on which the monthly PAYE was due. As our payroll costs are stable, these payments were by and large broadly the same. HMRC has treated us as being in default each month only because it has allocated each payment to the PAYE due for the previous month.”

34. Their argument can be best understood by considering an example. Month 1 ended on 5 May 2010 and the due date for paying the PAYE was 22 May 2010. Month 2 ended on 5 June 2010, and the month 2 payment was due on 22 June 2010

35. The PAYE payment made on 9 June 2010 was allocated to month 1 (the previous month), so it was 18 days late. Pinsent Masons and Mr Patel say that had the 9 June payment been allocated to month 2 instead of month 1, it would have been paid well before the due date of 22 June, and as a result, no penalty would have been charged for month 2.

36. Had the same pattern been followed throughout the year, so that instead of the company's payments being allocated to the earlier tax month they were allocated to the following tax month⁴, the company would have only had one late payment (Month 1). As a single late payment does not trigger a penalty, the company would have escaped the penal provisions contained in Schedule 56.

² Mrs Weare was not able to confirm whether “the agent” referred to in the HMRC telephone conversation notes was the current agent.

³ McGrigors LLP subsequently merged with Pinsent Masons.

⁴ The phraseology used by the parties for the following tax month is “the current tax month” and this has been adopted for the purposes of this decision notice.

37. Instead, what happened was, in the words of Mr Patel:

“the inevitable effect of the way HMRC allocated our payments was to increase the number of defaults that we were regarded as having in the period and so in turn increase to the maximum the penalty we have been charged for all of the months.”

38. Mr Patel also submitted that HMRC made:

“no effort to bring this cumulative effect to my attention...I now understand that had we asked HMRC at the time they would have allocated our payments to the PAYE due for the month in which we made the payment.”

39. He asks HMRC to “reconsider whether its approach was fair.”

40. Pinsent Masons say that HMRC’s debt management office accepted, on the telephone, that “HMRC would have allocated the payments to each current month had the company requested this.”

The First and Second Issues: submissions on behalf of HMRC

41. Mrs Weir said that when PAYE is paid, it is the employer who allocates the payment to a particular tax month. She drew the attention of the Tribunal to HMRC’s online guidance, headed “Use the correct Accounts Office reference number.” This advises employers to use their unique 13 character reference.

42. Under the heading ‘Your Accounts Office reference number for payments for a future or previous month or quarter, or a previous year’ the guidance reads:

“If you send your payment to HMRC earlier or later than they expect it you will need to tell them the year and month your payment relates to so that they can correctly allocate it to the period you are paying. You still need to use your 13 character reference number but with extra information added.”

43. The extra information is a four digit reference number which is provided in schedular form, with a different four digit number for each tax month of the year. The guidance says that failure to follow this procedure (so as to allocate a payment to the current tax month) means that the payment will automatically be allocated to the previous tax month.

44. Mrs Weare said that there was no evidence that the company had used this procedure to allocate payments to the current tax month rather than the previous tax month. Neither was there any sign, until the submissions made after the end of the tax year, that the company wanted to allocate its PAYE to the current tax month rather than the previous tax month.

45. In summary, she said that the allocation had been made by the company and not by HMRC, and it was not for HMRC to reallocate the payments, even if the result would have been to reduce the penalties.

The First Issue: the decision of the Tribunal

46. The Tribunal notes that neither party referred to legal provisions in support of their case, and we have therefore not had the benefit of submissions on the issues considered below.

The common law

47. In *The Mecca* [1897] AC 286, Lord Macnaghten said (at pages 293–294)

“When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor...it has long been held and it is now quite settled that the creditor has the right of election ‘up to the very last moment’, and he is not bound to declare his intention in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain.”

48. That this remains the position has been confirmed in more recent cases, see for example *Abbey National v Commrs* [2005] EWHC 1187 at [28] and *Sycamore plc and Maple Limited v Fir (Inspector of Taxes)* [1997] STC (SCD) 1 at [77].

49. A different rule applies when the debtor has a “running account” with the creditor, such as a bank account. In that situation a payment is allocated to the earliest debt, see *Clayton’s case* [1816] 1 Mer 572 at 608.

Application to PAYE

50. In simple terms, PAYE is deducted from an employee’s earnings and constitutes all or part of the tax due on those earnings. PAYE does not meet the employer’s own tax liability. The Tribunal therefore first considered whether the employer is a “debtor” for the PAYE.

51. The Income Tax (PAYE) Regulations 2003, at Regulation 68, state that the employer “must pay” to HMRC “the total amount of tax which the employer was liable to deduct from relevant payments made by the employer”, net of any amounts which the employer has to repay to the individual “in the tax period”, which is normally a month. There is thus a statutory obligation on employers to pay the PAYE to HMRC.

52. The Oxford English Dictionary’s primary meaning of a debt is:

“that which is owed or due; anything (as money, goods, or service) which one person is under obligation to pay or render to another.”

53. Given the existence of the statutory obligation on employers to pay over the PAYE to HMRC, we find that the PAYE is a debt due to HMRC and that the employer is a debtor.

54. Furthermore, as set out above, the employer must pay over the PAYE calculated on a “tax period” basis. We thus find that each month’s PAYE was a separate debt and there was no “running account”. As a result the rule in *The Mecca* applies.

55. For completeness, we note that were a “running account” to exist, the rule in *Clayton’s case* means that the PAYE payments would automatically be allocated to reduce the earliest debt first; the company would have no right of allocation.

Application to NICs

56. As set out earlier in this decision notice, Schedule 56 also applies to late paid Class 1 NICs. These are the liability of the earner (SSCBA s 6(4)(a)) but Schedule 1, para 3(1) of that Act says:

“Where earnings are paid to an employed earner and in respect of that payment liability arises for primary and secondary Class 1 contributions, the secondary

contributor shall...be liable in the first instance to pay...the earner's primary contribution...on behalf of and to the exclusion of the earner..."

57. The statutory liability means that Class 1 NICs are a debt due from the employer to HMRC (the creditor).

58. NICs are due on an "earnings period" basis, usually a month or a week⁵. The amounts of NIC owed by the employer constitute separate debts and there is no NICs "running account" with HMRC⁶.

Application to this case

59. On the basis of the foregoing, the common law allows the company to appropriate its PAYE and NICs payments in any way it chooses, as long as it does so before the money changes hands. We note that HMRC's guidance and their debt management office appear to have accepted that this is the correct position.

60. However, on the evidence, no allocation was made by the company. There was no use of the code numbers (as set out in the HMRC guidance) so as to attach the payments to a month other than the preceding one. At no time during the many conversations between Mr Patel, the agent and HMRC which took place in the tax year, was there any suggestion that the PAYE payments had been allocated to current months. As Mrs Weare says, the issue was only raised in submissions made after the end of the tax year. We thus find as a fact that there was no allocation to the current tax month.

61. We have also considered whether the company allocated its payments to the previous tax month.

62. Although Mr Patel says that "As our payroll costs are stable, these payments were by and large broadly the same", the payments actually varied from £4,658.71 (paid on 6 April 2011) to £7,180.94 (paid on 7 February 2011).

63. On the evidence provided, the Tribunal infers that these varying amounts were calculated based on employee's earnings for the previous month, as required by the PAYE regulations, and that the company made the payments using the normal PAYE payment processes. We thus find as a fact that it allocated its payments to the debt arising for the previous tax month.

64. As a result the payments were made late, and the company does not succeed on the First Issue.

The Second Issue: whether HMRC had an obligation to allocate differently and/or to advise the company to allocate in a more favourable manner

Obligation to allocate differently?

65. Mr Patel says HMRC should have helped the company to avoid the penalties, either by allocating them to current months, or by explaining the consequences of the company's actions so that the company could avail itself of this allocation option.

66. On the basis of our analysis above, it was the company which allocated the payments to the previous month. HMRC has no power to reallocate, see *The Mecca* above. HMRC are

⁵ Social Security (Contributions) Regulations (SI 2001/1003), Regs 3-9

⁶ Again, if we were to be wrong in this, *Clayton's Case* would apply.

therefore simply unable, under the common law, to act in the way Mr Patel and Pinsent Masons are suggesting they should have acted.

Fairness

67. Mr Patel also asks HMRC to “reconsider whether its approach was fair.”

68. The Upper Tribunal is currently considering⁷ whether or not the First-tier Tribunal has jurisdiction over how HMRC carries out its general duties, and in particular, whether it has any oversight over the fairness of HMRC’s approach, in the absence of specific legislative provisions giving it a judicial review function. We have proceeded on the assumption that this Tribunal does have jurisdiction.

69. It is clear that under the alternative “current month” allocation procedure the company would be in default for Month 1. It cannot be part of the duty of a public body to advise employers not to comply with their legal obligation for one month, and instead allocate payments to the PAYE debts of a later month, in order that the company can avoid a penalty. We entirely reject the submission that HMRC acted unfairly

70. We thus dismiss the company’s arguments on the Second Issue.

The Third Issue: reasonable excuse – submissions for the company

71. Mr Patel said that the company had a reasonable excuse because “the margins of the business are very tight” and the DoH’s consistent late payments “have resulted in serious cash flow difficulties for us...and are the reason that during 2010 and 2011 I had difficulty in paying HMRC.”

72. He provided the letter dated 7 August 2012 as evidence of the late DoH payments. The letter refers to a total credit of £815 for the four months ending April 2012. He also supplied the two newspaper articles, one of which referred to inaccuracies in DoH payments to pharmacies, and the other to pharmacies being forced out of business “by severe cashflow problems.”

73. Mr Patel says that because of the DoH issues “it has been necessary to increase the overall level of borrowings and at the present time the business has an overdraft of some £100,000. Much of this has been made necessary to cope with inconsistent payments.” The following paragraph refers to the company’s cashflow difficulties being compounded “by constraints on our borrowing by the bank in the wake of the financial crisis.”

74. Pinsent Masons say that:

“due to the consistent failure of one government department to pay our client within a reasonable period of time and to do so accurately, our client is left unable to make PAYE payments on time to HMRC another government department.”

75. They also submit that the company is “constrained from being able to borrow funds” in the current economic climate, and that “it is beyond doubt that our client makes the PAYE payments as soon as he receives payment”. They refer to the Business Payment Support service but say this is, in their experience “geared more towards business that are having a one-off difficulty in making payment.”

⁷ In *R&C Commrs v Hok* [2011] UKFTT 433 (TC).

The Third Issue: reasonable excuse – submissions for HMRC

76. Mrs Weare said that the legislation precludes insufficiency of funds from being a reasonable excuse “unless attributable to events outside the taxpayer’s control.” She said that the picture here was of a business which had a long-standing problem and that a prudent taxpayer would have anticipated difficulties and made arrangements so that it could pay its PAYE on time. If no external funding was possible, then the company could have contacted HMRC to get a Time to Pay (“TTP”) agreement. She disagreed with Pinsent Masons that this was available only for one-off situations.

77. Mrs Weare was also critical of the quality of the company’s evidence. She said that there were no bank statements, no accounts, no cashflow figures. The articles merely described generic problems in the industry, and the letter from the DoH was for the period January to April 2012, long after the tax year in question. Furthermore it only referred to an adjustment of £815, or around £200 a month, when the monthly PAYE and NICs due each month were between £4,659 and £7,181.

78. She said that from October 2012, the company has not made a single late payment of PAYE, but has not provided any evidence that it has obtained external funding, or that the DoH has improved its dealings with pharmacists. She suggested that the reason for the improved payment record is that the company is now aware of the penalty system and has reorganised its finances to ensure that its PAYE is paid on time.

79. In conclusion, she submitted that the company had failed to show that the insufficiency of funds was so exceptional that it should constitute a reasonable excuse, and asked the Tribunal to confirm the penalty.

The Third Issue: reasonable excuse – the Tribunal’s decision

80. Our starting point is the legislation. Insufficiency of funds is not a reasonable excuse unless it was attributable to “events outside the company’s control”. Simply because a problem is long-standing does not of itself mean that it falls outside this exception. Having one main supplier who pays erratically and often incorrectly could be a reasonable excuse. It is, however, for the company to put forward the evidence to support its reasonable excuse defence.

81. We agree with Mrs Weare that the evidence provided is weak. It is not for the Tribunal to say what evidence would have been appropriate, but we note that the company has not even provided any support for the director’s assertion that a cashflow problem existed in this company (rather than generically in the industry), let alone any details of the extent of that problem or its impact on a single one of the late payments of PAYE.

82. Moreover, Mr Patel’s own evidence (which the Tribunal accepted) was that the DoH had been “consistently late in making payments” for “some years”. This, without more, suggests that the catch-up payments from earlier years would substitute for the missing payments in current years.

83. We also note that when HMRC spoke to the company director and agent during the year, cashflow was given as the reason for the late payment on only two occasions. Twice the payment was simply “overlooked” and on three occasions, the director simply said he would make arrangements for payment.

84. We thus do not accept, on the evidence, that there was an “insufficiency of funds” attributable to events outside the company’s control. We therefore find that there was no reasonable excuse for the late payments

The overall decision

85. As set out above, the Tribunal rejects the company’s arguments that the payment either was, or should have been, allocated so as to eliminate the penalty. We also reject the company’s reasonable excuse defence.

86. As a result, we dismiss the appeal and confirm the penalty in the amount of £2,144.97.

87. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE REDSTON
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 25 September 2012

FINANCE ACT 2009, SCHEDULE 56
PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME

Penalty for failure to pay tax

- 1 (1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.
- (2) Paragraphs 3 to 8 set out—
- (a) the circumstances in which a penalty is payable, and
- (b) subject to paragraph 9, the amount of the penalty.
- (3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.
- (4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE Regulations	The date determined by or under PAYE regulations as the date by which the amount must be paid
3-24		

2 – 4

Amount of penalty: PAYE and CIS amounts

- 5 (1) Paragraphs 6 to 8 apply in the case of a payment of tax falling within item 2 or 4 in the Table.
- (2) ...
- 6 (1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to—
- (a) the number of defaults that P has made during the tax year (see sub-paragraphs (2) and (3)), and
- (b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).
- (2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full on or before the date on which it becomes due and payable—

- (a) a payment under PAYE regulations;
 - (b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004)...
- (3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.
- (4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the tax comprised in the total of those defaults.
- (5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of the tax comprised in the total of those defaults.
- (6) If P makes 7, 8 or 9 defaults during the tax year, the amount of the penalty is 3% of the amount of the tax comprised in the total of those defaults.
- (7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of the tax comprised in the total of those defaults.
- (8) For the purposes of this paragraph—
- (a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;
 - (b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.

7-10

Assessment

- 11 (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—
- (a) assess the penalty,
 - (b) notify P, and
 - (c) state in the notice the period in respect of which the penalty is assessed.
- (2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.
- (3) An assessment of a penalty under any paragraph of this Schedule—
- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
 - (b) may be enforced as if it were an assessment to tax, and
 - (c) may be combined with an assessment to tax.
- (4)-(5)

12-15

Reasonable excuse

- 16 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
- (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
- (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.