



TC05858

Appeal number: TC/2015/06435

*INCOME TAX – accelerated payment notice – penalty – whether
“reasonable excuse” for not making accelerated partner payment on time –
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KANESH RAJANI

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

**Sitting in public at The Royal Courts of Justice, Strand, London on 25 April
2017**

Keyur Doshi of Macalvins Limited for the appellant

Sophie Rhind, Officer HM Revenue & Customs, for the Respondents

DECISION

1. Dr Rajani is appealing against a penalty that HMRC imposed for late payment of an accelerated payment specified in an accelerated payment notice (“APN”) dated 30 January 2015. He argues that he had a reasonable excuse for the failure.

2. A number of the facts relevant to Dr Rajani’s appeal arose in relation to the appeal of his brother, Mr Pankaj Rajani, against a penalty for late payment of an accelerated payment due under an APN relating to the same scheme. Dr Rajani’s and Mr Rajani’s appeals were not heard together. However, to shorten this decision, where relevant I will refer to factual findings that I made in his brother’s appeal.

Evidence

3. For Dr Rajani, I had evidence from:

(1) Dr Rajani himself, who gave evidence relevant to his own conduct in relation to the APN and his understanding of the position at relevant times;

(2) Mr Andrew Lever, an employee of Macalvins Limited (“Macalvins”) who was the accountant to both Dr Rajani and Mr Rajani.

(3) Ms Vasanti Maru, an employee of Macalvins.

4. For HMRC, I had witness evidence from Simon Nixon.

5. As I have noted in my decision on Mr Rajani’s appeal, all witnesses gave their evidence honestly and no-one suggested differently. However, I was presented with diametrically different accounts of an averred phone call of 17 April 2015 and I therefore have to choose between this evidence to an extent.

6. I also had evidence in the form of an agreed bundle of documents.

Facts

7. The facts set out at [8] to [22] were either determined by me or were agreed.

8. Dr Rajani is a medical doctor with little expertise himself on tax matters. He obtains tax advice from Macalvins and his brother, Pankaj Rajani, is the owner, or part owner, of the shares in Macalvins.

9. Mr Doshi confirmed that Dr Rajani accepted all of the following points:

(1) That he received a valid APN (relating to his participation in the “SIG” film scheme) shortly after 30 January 2015. That APN stipulated that a payment of £71,860.92 was due by 6 May 2015.

(2) All of the £71,860.92 remained outstanding as of 6 May 2015. (Dr Rajani paid £69,000 on 15 July 2015 by redeeming certificates of tax deposit (“CTDs”) and paid the balance of £2,860.92 in cash on the same date.)

10. The APN sent to Dr Rajani included the following paragraphs:

Payment due on or before:

6 May 2015

(Payment may be due on a later date if representations are made under section 222 of the Finance Act 2014).

5

...

Penalties for not paying on time

If you do not pay in full and on time, you will be liable to penalties. Any such penalties would be payable in addition to the amount due. If you do not pay in full:

10

- on or before the date it is due, you will be liable to a penalty equal to 5% of the amount you still owe

...

What if you have problems paying

15

If you think you will have problems paying the amount due, please phone us straightaway on the number shown at the top of this notice.

What to do if you disagree with this notice

20

You cannot appeal to us against this notice, or to a tribunal or court. However, under Section 222 of the Finance Act 2014, you can make representations to us objecting to the notice and/or the amount of the accelerated payment...

If you want to make representations, you need to write to use to let us know what they are. You need to make sure that we receive your letter no later than 6 May 2015.

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11. When Dr Rajani received his APN, the APN provisions were relatively young, having been introduced only in Finance Act 2014. As a professional practice, who had to advise its clients who received APNs, Macalvins educated itself both on the effect of the new APN legislation and what they saw as its practical implications. At weekly meetings of Macalvins directors around this time, APNs were frequently on the agenda. In the course of its conversations with its own clients, other professional advisers and in its dealings with HMRC on its clients' tax affairs, Macalvins formed the view that it was relatively straightforward for a taxpayer receiving an APN to agree with HMRC that the amount claimed could be paid by instalments.

35

12. Dr Rajani bought CTDs to the value of £69,000 in 2013. Macalvins was aware that he held these. The CTDs embody an arrangement under which a taxpayer can deposit funds with either the Treasury or HMRC on account of possible future tax obligations. Until they have been allocated to a specific tax liability, a taxpayer can require HMRC to repay CTDs that he holds. Therefore, when he received the APN, Dr Rajani had resources that would enable him to pay £69,000 of the amount demanded if he chose. However, Dr Rajani did not (at least initially) want to cash in his CTDs to meet the accelerated payment demanded as he was not certain whether he would need the CTDs to meet other tax obligations. In particular, he was due to pay an instalment of his income tax liability in July 2015 and he thought that there might

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be some increased tax obligations arising as a consequence of his purchase of a medical practice that might need to be paid then.

13. Because he did not want to cash in his CTDS and because he understood from Macalvins that it would be relatively straightforward to agree a payment plan with HMRC, he asked Mr Lever to write to HMRC to request a payment plan (although the APN stated that, if a taxpayer had difficulties paying, he or she should telephone HMRC on a number given on the APN). Accordingly, on 2 April 2015, Mr Lever wrote to the Counter Avoidance Unit at HMRC in the following terms¹:

We refer to your letter dated 23 January 2015².

10 Our client is unable to make the payment and requests a payment plan.

Please let us know if this is acceptable and what the terms of this would be.

14. HMRC did not reply to that letter with a letter of their own. However, HMRC's case is that, on 17 April 2015, at 12.10 pm, Mr Simon Nixon of HMRC called an unspecified employee at Macalvins. Mr Nixon made a note of that conversation as follows³:

20 I telephoned the agent re their letter of 02/04/15 and advised agent that, in order to consider any payment arrangement, I would need to consider why client cannot pay the amount owed? Whether he had any savings he could use to settle amount owed and what he was proposing to pay... Agent said client looking to pay as much as he can afford each month, and agent will discuss further and get back to us. ... I gave agent our hunt group number and he will come back to us in due course.

25 15. Mr Nixon's evidence is that he had an identical conversation with the same Macalvins staff member about the tax affairs of both Dr Rajani and Mr Rajani. Mr Lever's evidence was that he had no such telephone call.

16. In my decision on Mr Rajani's appeal I have explained why I concluded on balance that there was no conversation on 17 April 2015 between Mr Nixon and a member of Macalvins' staff relating to Mr Rajani's APN. For substantially the same reasons, I have concluded that there was no conversation relating to Dr Rajani's APN either. For completeness, I will note that I do not consider it was possible that Mr Nixon had a discussion of Dr Rajani's APN, but not of Mr Rajani's APN. Mr Nixon was clear in his evidence that he thought he dealt with both Dr Rajani and Mr Rajani's APNs during the same telephone conversation (and that is why the notes of the calls were the same). Therefore, there was either a conversation about both brothers'

¹ This letter was in virtually identical terms to the letter sent on behalf of his brother.

² This was the date of a precursor letter, warning that an APN was about to be issued, not the date of the APN itself.

³ The text of this note was identical (including typographical errors) to the note relied on in connection with Mr Pankaj Rajani's appeal.

APNs, or there was a conversation about neither APN. I have concluded that there was a conversation about neither.

17. On 18 May 2015, after the 6 May deadline set out in the APN, Macalvins sent a further letter to HMRC's Counter Avoidance Team as follows:

5 We refer to our letter dated 2 April 2015 in reply to your letter of 30 January 2015.

Please note that our client is unable to make the payment and requests a payment plan.

Please let us know if you would accept payment over 12 months.

10 18. On 26 May 2015, having received a reminder that the due date for payment had now passed, Dr Rajani himself wrote to HMRC. He enclosed a copy of Macalvins' letter of 2 April 2015 and asked HMRC to consider the payment plan that had been requested since "this is such a large sum of money that is difficult to raise as one amount".

15 19. On 29 May 2015, HMRC replied to the letter of 18 May 2015 stating that, since the deadline for payment had passed, the Counter Avoidance Team would not agree a payment plan. Instead, Mr Lever was advised to contact the Debt Management team and a telephone contact number was given.

20 20. On 4 June 2015, Mr Lever wrote to HMRC's Accelerated Payments Team 1 asking them to reconsider this decision because he had written two letters before the deadline asking for a payment plan. I suspect that, in writing this letter, Mr Lever misunderstood HMRC's letter of 29 May 2015: that letter was not refusing a payment plan altogether; rather it was saying that a payment plan had to be agreed with a different HMRC team.

25 21. Dr Rajani and HMRC never agreed a payment plan and other relevant matters can be summarised shortly:

(1) On 23 June 2015, Dr Rajani was issued a late payment penalty for £3,593.04 (5% of the accelerated payment of £71,860.92 that was due).

30 (2) On 29 June 2015, Dr Rajani himself wrote to HMRC explaining that he was still waiting for a response to his proposal for a payment plan. He said that he was finding HMRC's approach intimidating and distressing and asked for the penalty to be cancelled and for discussions on a payment plan to proceed.

(3) Macalvins appealed against the penalty to HMRC on 1 July 2015.

35 (4) On 15 July 2015, Dr Rajani paid the accelerated payment due by redeeming £69,000 of CTDs and paying the balance of £2,860.92.

(5) HMRC rejected Dr Rajani's appeal in a letter dated 5 August 2015 that set out their "view of the matter".

(6) Dr Rajani requested a review and, by letter dated 30 September 2015, HMRC upheld their conclusion on review.

(7) On 20 October 2015, Dr Rajani made an in-time appeal to the Tribunal.

22. On 13 November 2015, HMRC wrote to Dr Rajani enclosing a revised penalty notice for £143.04. HMRC considered that, since Dr Rajani had paid £69,000 of the accelerated payment with certificates of tax deposit that he had purchased before that payment fell due, the Government had the use of £69,000 and therefore, only £2,860 of the accelerated payment was outstanding on the due date. Subsequently, HMRC concluded that this concession was wrongly made but they have not sought to increase the penalty back to £3,593.04. I do not need to decide in this appeal whether the penalty should be charged by reference to £69,000 or the lesser sum of £2,860 as HMRC are not seeking a penalty at the higher amount.

Relevant statutory provisions

23. Relevant statutory provisions are included in the Appendix to this decision.

Discussion

The preconditions for a penalty to be payable

24. The parties were agreed that Dr Rajani had received a valid APN. They had different views, however, as to when the accelerated payment was due. Mr Doshi argued that Dr Rajani had made representations under s222 of Finance Act 2014 against the APN and, in those circumstances, the due date for payment of the accelerated payment could not be earlier than 30 days after HMRC responded to those representations (by virtue of s223 of Finance Act 2014).

25. I do not consider that Dr Rajani made any such representations because Section 222 of Finance Act 2014 provides that representations can be made only on specified grounds. The only ground that could potentially be relevant in this appeal is that the taxpayer objects to the amount specified in the notice. Macalvins' letters requesting a payment plan did not do this: they did not suggest that HMRC had calculated the accelerated payment wrongly, but stated only that Dr Rajani would have difficulties paying the amount claimed.

26. In those circumstances, HMRC correctly determined that the due date for payment was 6 May 2015. Since it was common ground that the amount of accelerated payment outstanding at that date was £2,860.92, a penalty of £143.04 (5% of £2,860.92) was due (subject to the possible defences considered below).

Paragraph 10 of Schedule 56 of Finance Act 2009

27. If Dr Rajani had agreed a payment plan with HMRC, paragraph 10 might apply. It seems to me that, to rely on paragraph 10, Dr Rajani would not need to have agreed a payment plan by 6 May 2015. Rather, given that Dr Rajani clearly requested a payment plan on 2 April 2015, if HMRC and Dr Rajani had agreed the terms of a payment plan, whether before or after 6 May 2015 (and Dr Rajani continued to comply with it), he would be protected from any late payment penalties arising after 2 April 2015 during the currency of such a plan.

28. However, HMRC have asserted that no payment plan was ever agreed. Dr Rajani has not suggested otherwise or advanced any evidence to suggest that a payment plan was ever agreed. In those circumstances, paragraph 10 does not afford a defence.

5 ***Reasonable excuse***

29. Dr Rajani's principal argument throughout has been that he had a reasonable excuse for failing to pay on time. In essence, he argues that he had a genuine and reasonable belief that negotiations were ongoing with HMRC as to the possibility of a payment plan. In those circumstances, he said it was reasonable for him not to pay
10 until those discussions had concluded. He emphasised that, at the relevant times, it was a prevalent view among tax practitioners that HMRC would in practice agree to accept accelerated payments by instalments if a request to that effect was made. Therefore, by proceeding on the basis that he did, he argues that he was following a generally adopted approach, which further tended to suggest that it was reasonable.

15 30. Dr Rajani knew from the date that he received the APN that he had £69,000 of CTDs that, in principle, could be used to pay the accelerated payment due. He was pressed in cross-examination as to why he was seeking a payment plan when he had such a large liquid sum that he had himself earmarked to meet tax obligations. However, his evidence in this area was lacking in specifics: he spoke in general terms
20 about other possible tax obligations that he might have, but he did not say that the £69,000 of CTDs was needed to fund other actual tax obligations that he had. Nor did he say that, when he decided to use his CTDs to pay the accelerated payment, the result was that he was short of assets to pay other obligations. In the circumstances, I am not satisfied that the £69,000 of CTDs were needed to meet other tax obligations

25 31. In addition, Dr Rajani's approach to the CTDs suggested that he was not giving sufficient weight to the fact that the amount specified in the APN would (unless representations were made) become a debt lawfully due on 6 May 2015. He said that he "needed dialogue" with HMRC so that he could understand the totality of his tax obligations before making a decision on the CTDs. However, in the APN, HMRC had
30 articulated their position clearly: unless Dr Rajani successfully made representations, £71,860.92 would fall due on 6 May 2015. Since Dr Rajani chose not to make any representations, he should have proceeded on the basis that this sum would indeed be lawfully due on 6 May 2015. He should, therefore, have asked his professional advisers to provide him with a realistic estimate of his all upcoming tax obligations.
35 He should then have considered whether he had sufficient assets (including the CTDs) to meet those obligations and, if he did not, have sought to agree a payment plan. Dr Rajani did not take these steps: in the first instance he simply assumed that some sort of payment plan would be granted (with minimal disclosure of his financial situation) and that he would be able to retain his CTDs. Indeed, the CTDs were not mentioned at
40 all in any of the correspondence from Dr Rajani or Macalvins on the subject of a payment plan.

32. I am not, therefore, satisfied that it was reasonable of Dr Rajani to seek a payment plan in the first place. In those circumstances, a genuine belief that discussions on a payment plan were proceeding cannot be a reasonable excuse.

33. Even if it had been reasonable to seek a payment plan, the steps that Dr Rajani and Macalvins took to agree one were not such as would be taken by a reasonable taxpayer faced with a lawful demand for £71,860.92 that would fall due on 6 May 2015. For example:

5 (1) Dr Rajani and Macalvins ignored HMRC's request, on the face of the APN, to telephone if Dr Rajani had difficulties paying. Had they telephoned, it is reasonable to suppose that Dr Rajani would have learned at a much earlier stage that HMRC would need some details of income and expenditure before they would agree to a payment plan. Dr Rajani would also have realised that his
10 £69,000 of CTDs would be relevant to their consideration of a payment plan and that he should not simply proceed on the basis that he would be able to retain those.

(2) Secondly, Dr Rajani said in his evidence that he did not realise that 6 May 2015 was a deadline. Yet the APN had made it clear that, in the absence of any
15 representations, if payment was not made by 6 May 2015, penalties would be due. He should, therefore, have realised that 6 May 2015 was an important date. If he had done so, he should have chased HMRC (by telephone, as they had requested) for a response to the suggestion of a payment plan. Instead, when they received no response to the letter of 2 April 2015, Dr Rajani and Macalvins
20 sent chasing letters on 18 May and 26 May 2015, by which time the deadline for payment had already expired.

34. Moreover, even if it were appropriate to seek to negotiate a payment plan by exchange of correspondence, I do not consider that Macalvins' letter of 2 April 2015 was a reasonable way of initiating discussions on a payment plan. Effectively that
25 letter asked HMRC to make an opening offer as to the period over which the accelerated payment would be paid. Yet, HMRC had already articulated their approach which was that, unless representations were made, the sum of £71,860.92 would be lawfully due on 6 May 2015. If Dr Rajani wanted to make a counter-proposal, the onus was on him to articulate it. Put shortly, it was Dr Rajani who faced the prospect
30 of owing HMRC a large sum of money and it was for him to make the running if he was seeking more generous payment terms.

35. During the hearing, Dr Rajani explained his frustration at the process he had gone through. Given that the letter of 2 April 2015 went unanswered, Dr Rajani made it quite clear that he felt that HMRC were unresponsive and that the decision to issue
35 a penalty was high-handed in circumstances where, as Dr Rajani thought, discussions on a payment plan were ongoing. I can understand why Dr Rajani feels that way given that he received no response to his letter of 2 April 2015. However, when he explained his frustrations, he was in essence making complaints about HMRC's administration and how they exercised their discretion in relation to the question of a
40 payment plan on which I simply have no power to adjudicate. All I have power to do is to decide whether the penalty is due. For the reasons set out above, I have concluded that Dr Rajani had no reasonable excuse and that, accordingly, the penalty is due

Special circumstances

36. HMRC have considered that no “special reduction” should be made to the penalty and have given reasons for that view in their review letter dated 15 December 2015. Dr Rajani has not made any argument to the effect that HMRC’s conclusion in this respect is “flawed” in the sense set out in paragraph 15 of Schedule 56 of Finance Act 2009. I am not, therefore, satisfied that HMRC’s decision was “flawed” and I therefore have no power to alter their conclusion on this issue.

Conclusion and application for permission to appeal

37. My conclusion is that HMRC’s decision to charge the penalty is upheld.

38. 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.

**JONATHAN RICHARDS
TRIBUNAL JUDGE**

RELEASE DATE: 11 MAY 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

Statutory provisions dealing with APNs

1. The circumstances in which an APN may be issued are set out in s219 of Finance Act 2014.
2. Section 220 of Finance Act 2014 specifies the content of an APN, such as that issued to Dr Rajani, which is issued under s219(2)(a). Perhaps most significantly, it must state the amount of “understated tax” which must then be paid as an “accelerated payment” within the time limit specified in s223 of Finance Act 2014.
3. Section 222 of Finance Act 2014 entitles a person receiving an APN to make representations to HMRC objecting to the APN. Any such representations must be in writing and made within 90 days of the date the notice was given. HMRC are obliged to consider any representations that are made.
4. There is no statutory right of appeal to this Tribunal against HMRC’s decision to issue an APN. As will be seen, however, there is an appeal to this Tribunal against a penalty that is imposed in consequence of a taxpayer’s failure (or alleged failure) to make an accelerated payment.
5. Section 226 of Finance Act 2014 imposes a penalty for failure to comply with an APN and provides, so far as material, as follows:

226 Penalty for failure to pay accelerated payment

(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).

(2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.

(3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

...

(5) “The penalty day” means the day immediately following the end of the payment period.

...

(7) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax.

Statutory provisions relating to an appeal against the penalty

6. Section 226(7) of Finance Act 2014 therefore applies certain provisions of Schedule 56 of Finance Act 2009 (“Schedule 56”) to penalties charged under that section. Paragraph 13 of Schedule 56 confers a right of appeal to this Tribunal.
5 Therefore, while there is no appeal to the Tribunal against the APN itself, there is a right of appeal against a penalty that is imposed for failure to make an accelerated payment. The scope of the right of appeal is set out as follows:

13 Appeal

- 10 (1) P may appeal against a decision of HMRC that a penalty is payable by P.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

7. Paragraph 16 of Schedule 56 sets out a defence of “reasonable excuse” as follows:

16 Reasonable excuse

- 15 (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.
- 20 (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,
25 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.

30 8. Paragraph 9 of Schedule 56 deals with “special circumstances” as follows:

9 Special reduction

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
- 35 (2) In sub-paragraph (1) “special circumstances” does not include—
- (a) ability to pay, or
- (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
- 40 (a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

9. Paragraph 10 of Schedule 56 provides for penalties to be suspended while “time to pay arrangements” are in place as follows:

10 Suspension of penalty during currency of agreement for deferred payment

(1) This paragraph applies if—

(a) P fails to pay an amount of tax when it becomes due and payable,

(b) P makes a request to HMRC that payment of the amount of tax be deferred, and

(c) HMRC agrees that payment of that amount may be deferred for a period (“the deferral period”).

(2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty...

10. Paragraph 15 of Schedule 56 sets out the scope of the Tribunal’s jurisdiction on an appeal as follows:

15

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

11.