



TC05859

Appeal number: TC/2016/00244

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PANKAJ 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. Mr Rajani is appealing against a penalty that HMRC imposed for late payment of an accelerated payment specified in an accelerated payment notice (“APN”) dated 13 February 2015. He argues that he had a reasonable excuse for that failure.

Evidence

2. The main area of factual dispute was whether or not a telephone conversation took place on 17 April 2015 between Mr Simon Nixon of HMRC and a member of staff at Mr Rajani’s tax advisers, Macalvins Limited (“Macalvins”).
3. For Mr Rajani, I had evidence from:
- (1) Mr 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, who gave evidence primarily to the effect that no telephone conversation took place with Mr Nixon and who also addressed other matters relevant to Mr Rajani’s tax compliance position.
 - (3) Ms Vasanti Maru, an employee of Macalvins, who gave evidence as to Macalvins’ procedure for logging and directing telephone calls, in support of Mr Rajani’s contention that no call on 17 April 2015 ever took place.
4. For HMRC, Mr Nixon gave evidence that a telephone call did take place on 17 April 2015 and the contents of that call.
5. I have no doubt that all witnesses gave their evidence honestly and no-one suggested differently. However, I was presented with diametrically different accounts of the averred phone call of 17 April 2015 and I therefore have to choose between this evidence. I have concluded that Mr Nixon was mistaken in his belief that he spoke to an employee of Macalvins for reasons that follow, but in reaching that conclusion I am not suggesting at all that Mr Nixon was lying in his evidence.

Facts

6. The facts set out at [7] to [25] were either determined by me or were agreed.
7. Mr Rajani is a qualified chartered accountant. He is the owner, or part owner, of the shares in Macalvins and he also has the senior role of director focusing on corporate finance and mergers and acquisitions. Other directors at Macalvins focus on tax matters and Mr Rajani is not, therefore, a tax expert.
8. Mr Doshi confirmed that Mr 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 13 February 2015. That APN stipulated that a payment of £82,550.37 was due by 19 May 2015.¹

(2) All of the £82,550.37 remained outstanding as of 19 May 2015.

5 9. The APN sent to Mr Rajani included the following paragraphs:

Payment due on or before:

19 May 2015

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

10 ...

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:

15 - 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

20 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

25 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 us to let us know what they are. You need to make sure that we receive your letter no later than 19 May 2015.

30 10. Mr Lever has been responsible for preparing Mr Rajani’s tax returns for some 15 years. There are obvious confidentiality issues surrounding Mr Rajani’s personal financial information being available to employees of Macalvins generally (not least given Mr Rajani’s senior role in that practice). Therefore, only Mr Lever has access to records relating to Mr Rajani’s tax affairs. If Mr Lever is away on holiday, it would be possible for other staff to be given access if necessary. However, in practice, that is
35 not necessary and, when Mr Lever is away, Mr Rajani’s tax affairs tend to wait until he is back.

¹ Mr Rajani does not accept that this figure has been calculated correctly and argues that HMRC have calculated that figure on the basis that some £41,538 of losses should be treated as disallowed, whereas those losses did not relate to the SIG film scheme. However, he accepted that the Tribunal had no jurisdiction to interfere with the amount specified in the APN.

11. When Mr Rajani received his APN, the APN provisions were relatively recent, 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. Mr Rajani, as a senior member of Macalvins, was aware that this was a generally held view.

12. Therefore, after Mr Rajani received the APN, in March or early April, 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 terms:

We refer to your letter dated 30 January 2015².

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.

13. 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 follows:

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.

14. Mr Nixon's evidence is that, during the same telephone conversation, he discussed the tax affairs of Mr Rajani's brother, Dr Kanesh Rajani who had also received an APN and on whose behalf Mr Nixon had sent an identical letter on 2 April 2015. The telephone notes of those conversations were therefore identical. Mr Lever's evidence was that he had no such telephone call. His usual practice was to make a note of any important conversation with HMRC. He had searched his files and found no such note.

15. Such a fundamental factual dispute is very difficult to resolve especially since both Mr Lever and Mr Nixon both clearly believed their versions of events and there

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.

was no suggestion in cross-examination that either was lying. I have taken into account, among others, the following points when making my decision on the facts:

5 (1) Mr Nixon did not record the name of the person he spoke to at Macalvins. That raises the possibility that he spoke to a Macalvins employee other than Mr Lever who forgot about the conversation and did not report back either to Mr Rajani or Mr Lever. However, that seems unlikely given that Mr Lever's timesheet referred to at (3) below indicates that he was in the office on 17 April 2015 and I have accepted Ms Maru's evidence that the reception staff at Macalvins were well aware that Mr Lever dealt with Mr Rajani's tax affairs and so would have put any call relating to Mr Rajani through to Mr Lever. 10 Moreover, Mr Nixon's evidence was that, before speaking to an agent about a taxpayer's affairs, he would ask certain security questions. Given the restricted access to Mr Rajani's financial information, I consider that only Mr Lever would be able to answer these questions.

15 (2) It is possible that Mr Nixon spoke to Mr Lever and Mr Lever simply forgot about the conversation and never made a note of it. However, Mr Rajani referred to Mr Lever as a "safe pair of hands" who had been dealing with his tax returns for 15 years. Ms Maru's evidence was that whenever she asked Mr Lever a question, his first instinct was to pick up a pen and start making notes. 20 My own impression of Mr Lever from his evidence was that he was conscientious and studious: he thought about his answers before giving them and did not rush. Based on all that evidence, I do not consider him to be the kind of person who would overlook an important telephone conversation with HMRC about his boss's tax affairs.

25 (3) Mr Lever produced his timesheet for 17 April 2015 as evidence. That included a reference to spending 2 units of time (12 minutes) on Mr Rajani's affairs on 17 April 2015. However, the narrative on his timesheet read "Discuss Tax Credits reminder ltr & amend" which would not be an accurate description of a telephone call with HMRC about the APN. Moreover, his evidence that he recorded his time in "real time" as the day progressed (rather than waiting to the end of the day) was not challenged and suggests that his time recording was likely to be accurate and that he did not, therefore, have any other conversation 30 about Mr Rajani's tax affairs that day.

35 (4) Mr Lever accepted in cross-examination that he sometimes had telephone calls without making a note of them. However, given that Mr Rajani was Mr Lever's boss, there would have been a particular incentive for Mr Lever to report back to Mr Rajani if he had had a telephone conversation about his tax affairs, and generally to deal with those affairs to the highest standard.

40 (5) Mr Nixon's telephone note refers to a letter of 2 April 2015 and Mr Lever wrote a letter on the same date. However, Mr Nixon's evidence was that the relevant team at HMRC took turns to open post and make telephone calls as necessary in response to that post. It was evidently Mr Nixon's turn to open the post on 17 April 2015 and, when he was doing so, he would have been opening a number of letters sent at or around the same time. So, it is possible that he was 45 dealing with a number of letters, all dated 2 April 2015, that day.

5 (6) Mr Nixon's record of the telephone call records that it related to "Mr K K Rajani". It also includes the reference that Mr Nixon used in his letter of 2 April 2015. That certainly suggests that Mr Nixon was indeed speaking to someone about Mr Rajani's APN. However, Mr Nixon did not record the precise name of the person he was speaking to (although he did record that it was someone at Macalvins). He said that he would typically make his phone note after the call ended. Given the way he made his notes, it is possible that he could have recorded details on his phone note incorrectly. For example, he could have had a conversation with tax agent other than Macalvins along the lines set out in his phone note, but, when making his telephone note afterwards mistakenly copied in details of Dr and Mr Rajani from Mr Lever's letter that he had open in front of him having opened the post that day.

15 16. Having weighed up the evidence, I have concluded that it is more likely than not that Mr Nixon made a mistake when he made a note of his telephone call. I have concluded that he did have a telephone conversation along the lines outlined in the note, but that it was with a different agent and, when Mr Nixon made a note of that call, he mistakenly wrote down that the conversation had been with someone at Macalvins. I have therefore concluded that no telephone conversation took place between HMRC and Macalvins on 17 April 2015.

20 17. On 7 May 2015, Mr Lever telephoned Ms Ann Dangerfield of HMRC. During that telephone conversation Mr Lever explained his view that HMRC had calculated the amount due under the APN wrongly as they had effectively disallowed £41,538 of losses that had nothing to do with the SIG film scheme. Ms Dangerfield agreed to look into the position and call back. She called back the same day but Mr Lever had left the office as he was unwell and she did not get to speak to him.

30 18. On 11 May 2015, Mr Lever and Ms Dangerfield spoke again over the telephone. From the notes of that conversation, I have concluded that Mr Lever explained that some of the loss that the SIG film scheme had generated had been set of "sideways" against total income for the 2009-10 tax year and had not been carried back against a previous year's profits. In those circumstances, Mr Lever did not think that the loss should be taken into account in determining the amount of an accelerated payment. He faxed Ms Dangerfield a copy of amendments to Mr Rajani's tax return. The cover fax did not include any submissions as to why the amount specified on the APN was calculated incorrectly: it just attached the tax return amendment and asked Ms Dangerfield to confirm receipt.

35 19. On 18 May 2015, the day before payment was due under the APN, Macalvins sent a further letter to HMRC's Counter Avoidance Team as follows:

40 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.

20. 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.
- 5 21. 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
10 different HMRC team.
22. On 15 June 2015, Mr Lever called the Accelerated Payments Team to request a payment plan. He was advised to contact the Debt Management Team and the note records that Mr Lever was "not too pleased" about this.
- 15 23. Between 15 June and 17 June 2015, Macalvins contacted HMRC's Debt Management Team and Macalvins agreed to submit details of Mr Rajani's income and expenses so that a payment plan could be agreed. Macalvins did submit details of Mr Rajani's income and expenses, but no payment plan was ever agreed. At one point the parties appeared close to agreeing a payment plan (with HMRC indicating that they might accept payment over 8 months, but Macalvins holding out for payment
20 over 10 months).
24. In a letter of complaint dated 14 July 2015, Macalvins suggested that, on 13 Macalvins called HMRC to "take the 8 month option", but were told that that option was no longer available and HMRC required payment in full immediately. Neither party gave any detailed evidence as to the negotiations on the payment plan. Mr Doshi
25 did not argue in his submissions that a payment plan was entered into such as to found a defence to the penalty under paragraph 10 of Schedule 56 of Finance Act 2009. I cannot be satisfied that Macalvins were entitled on 13 July 2015 "accept" an offer of an 8 month payment plan not least because Macalvins' own letter of 14 July 2015 suggests that they made a counter-offer of a 10-month payment plan. I have
30 concluded on the evidence before me that no payment plan was ever agreed.
25. The remaining relevant events can be set out briefly:
- (1) On 19 June 2015, Mr Rajani was issued the late payment penalty that is the subject of this appeal.
 - (2) Macalvins appealed against that penalty to HMRC on 30 June 2015.
 - 35 (3) On 7 July 2015, Mr Rajani was sent a letter threatening enforcement proceedings in relation to the accelerated payment of £82,550.37.
 - (4) On 31 July 2015, Mr Rajani paid part of the accelerated payment by cashing in a certificate of tax deposit to the value of £14,000.
 - 40 (5) HMRC rejected Mr Rajani's appeal in a letter dated 19 October 2015 that set out their "view of the matter".

(6) Mr Rajani requested a review and, by letter dated 15 December 2015, HMRC upheld their conclusion on review.

(7) On 11 January 2016, Mr Rajani made an in-time appeal to the Tribunal.

Relevant statutory provisions

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

Discussion

The preconditions for a penalty to be payable

10 27. The parties were agreed that Mr Rajani had received a valid APN. They had different views, however, as to when the accelerated payment was due. Mr Doshi argued that Mr 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(5) of Finance Act 2014).

15 28. I do not consider that Mr Rajani made any such representations for the following reasons:

20 (1) Section 222 of Finance Act 2014 provides that representations can be made only on specified grounds. One ground 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 Mr Rajani would have difficulties paying the amount claimed.

(2) Mr Lever did have telephone conversations with HMRC suggesting that they had calculated the accelerated payment wrongly. However, those were not representations under s222 of Finance Act 2014 as they were not in writing.

25 (3) Mr Lever did fax HMRC a copy of an amendment to Mr Rajani's return (in support of his arguments referred to at (2)) above. However, that was not a representation under s222 (as it did not contain any reasons); rather it amounted simply to the provision of information to HMRC to facilitate the oral discussions.

30 29. In those circumstances, HMRC correctly determined that the due date for payment was 19 May 2015. Since it was common ground that Mr Rajani had not paid any of the £82,550.37 by that date, subject to the issues considered in the remainder of this decision, a penalty of £4,127.51 (5% of £82,550.37) was due.

Paragraph 10 of Schedule 56 of Finance Act 2009

35 30. If Mr Rajani had agreed a payment plan with HMRC, paragraph 10 might apply. It seems to me that, to rely on paragraph 10, Mr Rajani would not need to have agreed a payment plan by 19 May 2015 (or indeed before 19 June 2015 when the penalty was issued). Rather, given that Mr Rajani clearly requested a payment plan on 2 April 2015, if HMRC and Mr Rajani had agreed the terms of a payment plan under which
40 payment could be deferred until after 19 June 2015, there would be a defence to the

penalty charged under paragraph 10 of Schedule 56 of Finance Act 2009 (provided that Mr Rajani continued to adhere to that agreement). Therefore, if Mr Rajani had agreed a payment plan in July 2015, even though that was after the penalty was issued, it may be that the penalty would not be due by virtue of paragraph 10 of Schedule 56 of Finance Act 2009. However, for reasons set out at [23], I have found that no payment plan was ever agreed. In those circumstances, paragraph 10 does not afford a defence.

Reasonable excuse

31. Mr 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 both as to the possibility of a payment plan and as to the amount of accelerated payment due. In those circumstances, he said it was reasonable for him not to pay until those discussions had concluded. He emphasised that, at the relevant times, it was a prevalent view among tax practitioners that HMRC would 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 was following a generally adopted approach, which Mr Doshi argued was reasonable.

32. Mr Doshi's clear and lucid advocacy has made me pause for thought, particularly given that I have found that there was no telephone conversation with HMRC on 17 April 2015 and so that Macalvins' letter of 2 April 2015 went unanswered. However, on balance I have concluded that Mr Rajani does not have a reasonable excuse.

33. The approach that Mr Rajani followed did not give sufficient weight to the fact that an accelerated payment specified in an APN is an amount that is lawfully due to HMRC on the specified due date and not a starting point for negotiation. HMRC are not obliged to agree a payment plan, although no doubt they have a duty under public law to consider fairly requests that taxpayers have made. It is therefore appropriate for HMRC to specify a procedure that taxpayers in financial difficulties must follow if they wish to HMRC to consider a payment plan.

34. In those circumstances, if Mr Rajani wished to request HMRC to consider their discretionary power to agree a payment plan, he should have followed the procedure that HMRC specified. Macalvins and Mr Rajani failed to do so. They ignored HMRC's request, on the face of the APN, to telephone if Mr Rajani had difficulties paying. Had they telephoned, it is reasonable to suppose that they would have learned at a much earlier stage that HMRC needed some details of income and expenditure before they agreed to a payment plan.

35. 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 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 £82,550.37

would be lawfully due on 19 May 2015. If Mr Rajani wanted to make a counter-proposal, the onus was on him to articulate it. Put shortly, it was Mr Rajani who faced the prospect 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.

5 36. Mr Rajani is entitled to feel aggrieved that HMRC did not reply to Macalvins' letter of 2 April 2015. However, particularly given his background in corporate finance, he should have realised that 19 May 2015 was a "hard" deadline as, on that date, a legal obligation to pay a large sum of money would be crystallised. The APN itself warned that penalties would be charged if payment was not made on time. Even
10 though HMRC should have replied to the letter of 2 April 2015, Mr Rajani should have done more to chase up progress on the proposed payment plan. It was not reasonable to let that deadline expire and simply assume that some sort of accommodation with HMRC would ultimately be reached.

15 37. A similar point goes for Mr Rajani's argument that he thought that telephone discussions on the amount of the APN were ongoing. I do not doubt that he genuinely held that view. However, it was not a reasonable view since the APN made it clear that, if he wished to challenge the amount claimed, he needed to make written representations. Moreover, Mr Rajani was professionally advised and Macalvins should have realised that telephone discussions about an APN could not amount to
20 "representations" which delayed the due date for payment.

38. In concluding that Mr Rajani had no "reasonable excuse", I am not saying that HMRC are beyond criticism. They should have replied to the letter of 2 April 2015. There is some suggestion in Macalvins' letter of 14 July 2015 referred to at [23] that they may have been high-handed in their discussions on a payment plan (although I
25 have not heard HMRC's version of events and cannot be sure that this is correct). However, I have no power to reduce or waive penalties simply because of criticisms about HMRC's administration and therefore a number of aspects of HMRC's behaviour to which Mr Rajani objects are simply outside my jurisdiction.

Special circumstances

30 39. 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. Mr 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
35 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

40. My conclusion is that HMRC's decision to charge the penalty is upheld.

41. 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
40 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.

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JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 11 MAY 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

Statutory provisions dealing with APNs

- 5 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 Mr 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.
- 10 3. Section 222 of Finance Act 2014 entitles a person receiving an APN to make representations to HMRC objecting to the APN. Representations can be made only on the limited grounds set out in s222(2). 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.
- 15 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.
- 20 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).
- 25 (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.
- 30 ...
- (5) “The penalty day” means the day immediately following the end of the payment period.
- ...
- 35 (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

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(1) This paragraph applies if—

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

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(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”).

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(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:

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(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—

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(a) affirm HMRC's decision, or

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

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(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.

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(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)).