



TC06602

Appeal number: TC/2018/01091

INCOME TAX – *Accelerated Payment Notice - penalty for late payment - whether reasonable excuse*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RICHARD LEE

Appellant

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 42U on 3
July 2018**

The Appellant in person

Mr Matt Beattie, Officer of the Respondent, for the Respondents

DECISION

Introduction

1. This case is an appeal against a penalty issued by HMRC for late payment of an Accelerated Payment Notice. The penalty is in the sum of £7,071.64.
2. It is for HMRC to establish that the penalty is due and if in principle it is, the penalty will not be payable if the Appellant can show he had a reasonable excuse for the late payment. In each case, the burden of proof is to the usual civil standard of the balance of probabilities.
3. I had before me a bundle of documents. Mr Lee's accountant, Mr Dominic Arnold was present and was asked to give oral evidence, although Mr Lee presented his own case, for reasons which will become apparent.

The Law

4. Accelerated Payment Notices (APNs) were introduced by Finance Act 2014 (and references to section numbers below refer to that Act unless otherwise specified) as part of the Government's anti-tax avoidance strategy. They require a taxpayer who has engaged in certain schemes to pay the amount of the alleged "tax advantage" before it has been determined whether or not the tax is due. There is no appeal against an APN although the taxpayer may make representations on specified grounds. If the taxpayer does not pay the amount required by the APN in time, he will incur a penalty, which increases the greater the delay. The penalty is not due if the taxpayer has a reasonable excuse for the late payment and may be reduced if HMRC consider there are "special circumstances".
5. Section 219 sets out the conditions which must be met before HMRC can issue an APN.

"219 Circumstances in which an accelerated payment notice may be given

- (1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C are met.
- (2) Condition A is that—
 - (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
 - (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been—
 - (i) determined by the tribunal or court to which it is addressed, or
 - (ii) abandoned or otherwise disposed of.
- (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").
- (4) Condition C is that one or more of the following requirements are met—
 - (a) HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a follower notice under Chapter 2—
 - (i) in relation to the same return or claim or, as the case may be, appeal, and
 - (ii) by reason of the same tax advantage and the chosen arrangements;

- (b) the chosen arrangements are DOTAS arrangements;
 - (c) a GAAR counteraction notice has been given in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel which considered the matter under paragraph 10 of [Schedule 43](#) to FA 2013 was as set out in paragraph 11(3)(b) of that Schedule (entering into tax arrangements not reasonable course of action etc);...
6. The right to make representations is set out in section 222 and the consequences of an APN and the time limits for payment are set out in section 223.

“223 Effect of notice given while tax enquiry is in progress[: accelerated payment]

- [(1) This section applies where—
 - (a) an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress) (and not withdrawn), and
 - (b) an amount is stated in the notice in accordance with section 220(2)(b).]
 - (2) P must make a payment (“the accelerated payment”) to HMRC of [that amount].
 - (3) The accelerated payment is to be treated as a payment on account of the understated tax (see section 220).
 - (4) The accelerated payment must be made before the end of the payment period.
 - (5) “The payment period” means—
 - (a) if P made no representations under section 222, the period of 90 days beginning with the day on which the accelerated payment notice is given, and
 - (b) if P made such representations, whichever of the following periods ends later—
 - (i) the 90 day period mentioned in paragraph (a);
 - (ii) the period of 30 days beginning with the day on which P is notified under section 222 of HMRC's determination....”
7. Section 226 imposes penalties for non-payment and incorporates the procedural and appeal rules in schedule 56 Finance Act 2009 (“schedule 56”).

“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.
- (4) If any amount of the accelerated payment is unpaid after the end of the period of 11 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.
- (6) Where section 223(6) (accelerated payment payable by instalments when it relates to inheritance tax payable by instalments) applies to require an amount of the accelerated payment to be paid before a later time than the end of the payment period, references in subsections (2) and (5) to the end of that period are to be read, in relation to that amount, as references to that later time.

- (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.”
8. Paragraph 10 of schedule 56 provides for HMRC and the taxpayer to agree “Time to Pay” “TTP” arrangements

“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,
 - (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.
- (3) But if—
- (a) P breaks the agreement (see sub-paragraph (4)), and
 - (b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from sub-paragraph (2),
- P becomes liable, at the date of the notice, to that penalty.
- (4) P breaks an agreement if—
- (a) P fails to pay the amount of tax in question when the deferral period ends, or
 - (b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.
- (5) If the agreement mentioned in sub-paragraph (1)(c) is varied at any time by a further agreement between P and HMRC, this paragraph applies from that time to the agreement as varied.”
9. The effect of a TTP arrangement is that the penalty is suspended whilst the arrangement is in force and will not be payable if the taxpayer makes payment in accordance with its terms.
10. It is clear from the wording of paragraph 10(2) of schedule 56 that the *request* for deferral must be made before the date when the penalty would otherwise become due, but there will be no penalty provided the agreement is actually entered into even if the agreement takes place after the due date for the penalty, as will often be the case. This was confirmed in the case of *Chapman v HMRC* [2017] UKFTT 0800 (TC), where Judge Hellier said:

“50.

It is clear from the lack of temporal order of the conditions in subsection (1) that the effect of these provisions is that so long as the request is made before the penalty date it matters not whether HMRC's agreement is given before or after that date....

53.

In my opinion for the relief to apply, the request must identify a particular amount and HMRC must agree to that amount being deferred. There is no requirement that

the period of the deferral agreed by HMRC or any other conditions attached to the arrangement need to be requested by a taxpayer before it can be said that for the purposes of this section he has made a request to which the relief given by the section applies. This construction provides a practical system. If P asks for the moon in relation to an amount and HMRC agree only to something more terrestrial, then P can take the benefit of that agreement (even if its terms are not those P suggested) or not, and if he does not may find himself liable to a penalty.

54.

But before a period in which paragraph 10 can begin to provide freedom from a penalty there must be a "request" to HMRC in relation to an amount, and the request must be for that amount to be deferred. Only once a request satisfying those conditions has been identified can the protection afforded by paragraph 10 start to apply.

55.

Thus in relation to the second penalty paragraph 10 will provide protection to Mr Chapman only if such a request was made before 29 May 2016 (and HMRC agreed that the specified amount could be paid after the due date: this last condition being satisfied in relation to the 29 May 2016 penalty date, for on 14 September 2016 HMRC agreed to the deferral of the outstanding amount of the AP on conditions)."

11. Paragraph 16 of schedule 56 sets out the defence of "reasonable excuse".

"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.*

[(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment—

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.]

(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."

12. The concept of "reasonable excuse" has been the subject of many cases. HMRC in some instances, persist in asserting that there will only be a reasonable excuse if there is an "unexpected or unusual event". This was the approach taken by the decision maker in Mr Lee's case. In her 13 October 2017 "view of the matter" letter, Ms Sharp said "HMRC's view is that a reasonable excuse will only apply when an unexpected or unusual event, either unforeseeable or beyond your control, has prevented you from paying the tax by the due date". That is not the correct test.

13. Mrs Barber, who carried out the statutory review requested by the Appellant, applied the correct test in her review letter of 8 January 2018 when she said “Whether a person has a reasonable excuse depends on the particular circumstances in which the failure occurred, as well as the particular circumstances and abilities of the person who has failed in their obligation. The test is to consider what a reasonable person who wanted to meet their tax obligations would have done in the same circumstances and decide if the action of that person met that standard.”
14. Whether there is a reasonable excuse is always fact specific and specific to the particular taxpayer.
15. The test was explained in *Barrett v The Commissioner for Her Majesty’s Customs and Excise* [2015] UKFTT 0329 (TC) by Judge Berner as follows:

“The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance....

The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual’s conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.”

The facts

16. Mr Lee participated in a number of tax mitigation arrangements which involved investing in Enterprise Zones. Amongst others, he had participated in three Enterprise Zone Syndicate tax avoidance schemes relating to three Enterprise Zones; Cobalt Data Development Centre, Cobalt Building 30 and Cobalt 7 & 8. The present appeal concerns the Cobalt 7 & 8 scheme.
17. On 27 October 2009, HMRC opened an enquiry into Mr Lee’s 2007-8 tax return. This was extended on 12 January 2010 to include Mr Lee’s participation in the Cobalt 7 & 8 scheme and the enquiry remains open.
18. On 2 September 2016, HMRC issued an APN to Mr Lee in connection with the Cobalt 7 & 8 scheme in the amount of £137,506.97. HMRC submitted (and it was not contested) that the conditions for issuing an APN in section 219 were satisfied. There was an open tax enquiry into Mr Lee’s tax return. His return was made on the basis that there was a tax advantage from his use of the Cobalt

7 & 8 scheme and that scheme was within the Disclosure of Tax Avoidance Schemes (“DOTAS”) rules and had been allocated a DOTAS number.

19. HMRC had provided Mr Lee with information about the penalties for non-payment of the APN both before and at the time the notice was issued.
20. On 5 December 2016, the Appellant made representations that the amount of the APN was incorrect. On 12 April 2017 HMRC responded to those representations and concluded that the correct amount was different and increased the APN to £141,432.97.
21. As Mr Lee had made representations, the “payment period” for the purposes of section 223(5)(b)(ii) was 30 days from the date HMRC notified the Appellant of their decision on his representations. In this case, the payment period expired on 18 May 2017. Under section 226, if any of the APN is unpaid after the end of the payment period ie 18 May 2017, he is liable for a penalty of 5% of the amount unpaid.
22. As mentioned, Mr Lee had participated in three “Cobalt” schemes and had gone through a similar process of receiving APNs, making representations and receiving decisions in relation to the other two schemes. The payment periods in respect of both the other schemes expired on 2 June 2017.
23. Mr Lee had other liabilities besides those arising from the Enterprise Zone schemes and Mr Arnold was already in a dialogue with HMRC’s Debt Management Team. They had general conversations about the fact that Mr Lee would need to request TTP arrangements in relation to the Cobalt schemes, but no formal request was made initially.
24. On 22 April 2017, Mr Lee emailed Mr Arnold to inform him that the representations on the Cobalt 7 & 8 scheme had been rejected. He attached copies of the rejection and highlighted that the payment was due in 30 days. Mr Arnold responded on 24 April saying he would include it in his discussions with the Debt Management Team. Mr Lee sent a chasing email on 29 April to which Mr Arnold responded on 2 May saying that the Debt Management Team had told him they would not be involved unless payment was not made by the due date and that he should contact the Client Relationship Manager (“CRM”) to discuss a TTP arrangement. Mr Arnold himself pointed out in that response, that it was important that the TTP request was made before the due date so that, assuming HMRC ultimately agreed TTP, there would be no penalty. Mr Arnold therefore suggested that “I raise this now with Bianca Sharp [the CRM]”. Mr Lee asked him to do so, on the same day, and asked Mr Arnold to report her response.
25. Mr Lee and Mr Arnold spoke on the telephone during the week ending 12 May 2017 when they discussed the need to agree TTP for all the Enterprise Zone schemes and the respective due dates were discussed. Mr Arnold confirmed he would contact the CRM in good time before the due dates.

26. Mr Lee chased Mr Arnold by email on 22 May and 24 May to find out the outcome of Mr Arnold's efforts. Mr Arnold acknowledged the emails and said he would get back to Mr Lee.
27. On 25 May, Mr Arnold telephoned Ms Sharp in relation to a number of Mr Lee's tax matters. My bundle contained HMRC's record of that conversation. It said:

“DA explained that his call was in respect of the Cobalt PPNs (sic) [presumably APNs] and requesting a payment arrangement. BS confirmed that Cobalt 2008-Cobalt 7 & 8 Enterprise Zone Syndicate was due on 18 May and was unpaid and had therefore been passed to Debt Management. BS explained that she could consider a payment arrangement for the two becoming due on 2 June 2017...”
28. My bundle did not contain copies of the emails between Mr Lee and Mr Arnold, but Mr Arnold gave evidence confirming Mr Lee's chronology. I found both Mr Lee and Mr Arnold straightforward and honest and I accept their account of events.
29. Mr Arnold frankly admitted that, despite the earlier exchanges with Mr Lee, he thought the due date for all the Cobalt schemes was 2 June 2017 and he overlooked the fact that the Cobalt 7 & 8 APN was due to be paid on 18 May. It was his error that led to the TTP request being submitted late.
30. TTP arrangements were subsequently put in place for all three of the Cobalt schemes. No penalties were therefore payable in respect of the two APNs with payment dates of 2 June 2017. Mr Lee informed us that all the APN's have been paid in accordance with the agreements and he obtained a substantial loan in order to ensure that he could meet his obligations to pay off a total of £336,353.85 on the three schemes.
31. The penalty notice in the amount of £7071.64 was issued on 10 August 2017 and the Appellant's representative appealed the notice on 12 September 2017. Following the decision, request for review and review decision, the Appellant's representative appealed the review decision of 8 January 2018 on 7 February 2018.

Discussion

32. The Appellant does not contest that the penalty is in principle due and payable, but he contends that he has a reasonable excuse for the late payment of the penalty in respect of the Cobalt 7 & 8 scheme.
33. Although there is a statutory prohibition on reliance on another person being a reasonable excuse, that is subject to the important proviso, “unless P [the taxpayer] took reasonable care to avoid the failure”.
34. A taxpayer who simply hands everything over to his accountant and says “get on with it” does not generally have a reasonable excuse if the accountant fails to

so so. That is not the case here. Mr Lee informed Mr Arnold when he received the APN notice and highlighted the deadline. There were subsequent emails and telephone conversations during which the due dates were discussed and Mr Arnold assured Mr Lee that the TTP requests, for all the schemes would be dealt with in good time before the deadlines. Mr Arnold made a mistake. He believed that all the APNs had the same payment date of 2 June 2017. He acted in good time on that basis. In fact, the APN in question had a payment date of 18 May 2017 and when TTP was formally requested on 25 May 2017, that APN was already due and payable and so even though a TTP agreement was ultimately entered into, the penalty had already been incurred.

35. In my view, Mr Lee did all he could to avoid the late payment. His accountant was already in discussions with the Debt Management Team as Mr Lee was not going to be able to pay all his liabilities at once and it was known that he would need time to pay. He did not just leave it to his accountant to deal with, but followed the notice up on a number of occasions and he was assured that it would all be dealt with in time. Mr Lee took reasonable care to avoid the failure.
36. The fact that he kept to the terms of the agreement, even to the extent of taking out a loan to make sure he could make the payments suggests he is someone who takes his tax obligations seriously.
37. Having regard to all the circumstances of the case and to Mr Lee's particular circumstances, I conclude that Mr Lee acted as an objectively reasonable taxpayer, in his situation, would have done in these circumstances. In short, Mr Lee had a reasonable excuse for the late payment of the APN relating to Cobalt 7 & 8.

Conclusion

38. For the reasons set out above, I have concluded that the penalty for late payment of the APN relating to the Cobalt 7 & 8 scheme was due and payable, but that Mr Lee had a reasonable excuse for the failure to pay it on time.
39. Accordingly, I allow the appeal and cancel the penalty.

40. 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.

**MARILYN MCKEEVER
TRIBUNAL JUDGE**

RELEASE DATE: 17 July 2018