

Draft Provisions for Finance Bill 2018-19
Clause 31 and Schedule 13
Penalties for failure to pay tax
Response from Association of Taxation Technicians (ATT)

I. Outline

In this note, we set out in section II our main concern in relation to draft Schedule 13 (the penalty consequences of breached time to pay agreements) before commenting briefly in section III on two other aspects of the Schedule and concluding in section IV with some observations on the availability of time to pay agreements.

II. Penalty consequences of breached time to pay agreements

A. [Schedule 13 penalty provisions summarised](#)

1. The Schedule proposes that a late payment penalty should arise where a person
 - a) fails to make full payment of a relevant tax by the statutory due date **and**
 - b) within the 15 days following that date (“the 15-day period”):
 - (i) **neither** makes full payment,
 - (ii) **nor** makes a proposal to HMRC for paying the tax due which results in a time to pay (TTP) agreement.
2. Where a TTP agreement does result from a person’s proposal made **within** the 15-day period **and** the person adheres to the terms of that agreement, no penalty arises under the Schedule.
3. Where a person makes a proposal to HMRC **after** the 15-day period but **within** the 30 day period following the statutory due date for the tax liability (“the 30-day period”) – so in the period starting on day 16 and ending on day 30 – **and** a TTP agreement results from that proposal **and** the person adheres to the terms of that agreement, the penalty is confined to Amount A (the first part of a two-legged First Penalty) which is a (presently unspecified) percentage of the tax unpaid at the end of the 15-day period.
4. The same Amount A penalty applies if no proposal for a TTP agreement is made but the **whole** of the amount unpaid at the end of the 15-day period is paid before the end of the 30-day period.
5. Where a person makes a proposal to HMRC **after** the 30-day period **and** a TTP agreement results from that proposal **and** the person adheres to the terms of that agreement, the penalty that may be assessed comprises three elements:
 - a) Amount A (as in 3 above) - a percentage of the tax unpaid at the end of the 15-day period **plus**
 - b) Amount B (the second part of the First Penalty) - a (presently unspecified) percentage of the tax unpaid at the end of the 30-day period **plus**
 - c) An interest-based Second Penalty charged on the balance unpaid at the end of the 30-day period for the period between Day 31 and the date when the proposal for a TTP agreement was made.

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6. Where a person makes no proposal for a TTP agreement and there is an amount unpaid at the end of the 30-day period, the penalty that may be assessed comprises the same three elements as in 5 above but the interest-based Second Penalty applies to so much of the amount that was unpaid at the end of the 30-day period as is from time to time unpaid.
7. Where a TTP agreement is breached, the Schedule proposes that penalties should be charged as if the TTP agreement had not existed. There has been no prior consultation on the penalty consequences of a breach of a TTP agreement.

B. Penalty consequences of breached TTP agreements

1. As can be seen from section A above, the Schedule 13 provisions are designed to promote early engagement with HMRC whenever a tax liability cannot be paid in full. They do this by introducing a graded range of sanctions running from a complete avoidance of any penalty where the initial proposal is put to HMRC within the 15-day period to a three-pronged penalty where no proposal is made before the expiry of the 30-day period. Conceptually, we can see the sense in this.
2. We can also understand the importance of protecting the Exchequer from abuse of the provisions and the need for the Schedule to provide appropriate deterrence. Our concern is the extremely drastic nature of the provisions which deem a breached TTP agreement not to have existed.
3. As currently drafted, the deemed non-existence of a TTP agreement, in the event of its breach, means that what at the time was a person's reasonable course of action (waiting until the agreed payment date prescribed by the TTP agreement before making a tax payment) is retrospectively re-characterised as equivalent to the actions of a person who took little or no interest in complying with their tax payment obligations.
4. The way in which the breach provisions operate means, paradoxically, that the further that a person has got in complying with the instalment terms of a TTP agreement, the greater can be the unexpected consequences for them of a breach. As a simple example of this, if a TTP agreement provides for payment of a tax liability in six equal monthly instalments starting with an initial instalment payable during the 15-day period and the taxpayer duly makes the first five instalment payments on (or before) the TTP agreed dates but then fails (without reasonable excuse) to make the final (month 6) payment, the following penalty position results:
 - a) No penalty on the Instalment One (as it was paid within the 15-day period);
 - b) Both Amount A and Amount B First Penalties on the whole of the amount unpaid at the end of the 30-day period (ie the future Instalments Two to Six under the TTP agreement, despite the fact that the first four of them had been paid in accordance with the TTP agreement);

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- c) The interest-based (Second Penalty) on instalments Two to Six for the period from Day 31 until the date of payment of Instalment Two;
 - d) The interest-based penalty on instalments Three to Six for the period from the date of payment of Instalment Two until the date of payment of Instalment Three;
 - e) The interest-based penalty on instalments Four to Six for the period from the date of payment of Instalment Three until the date of payment of Instalment Four;
 - f) The interest-based penalty on instalments Five and Six for the period from the date of payment of Instalment Four until the date of payment of Instalment Five; and
 - g) The interest-based penalty on instalment Six for the period from the date of payment of Instalment Five until the delayed date of payment of Instalment Six.
5. In the above example, where the person was complying with the terms of the TTP agreement up to and including the payment of Instalment Five, the penalty consequences as set out in section B.4 above seem disproportionate.
6. The above example also brings out the point that the compliance with the terms of the TTP agreement up to and including (at least) the time of the payment of Instalment Five was reasonable behaviour. Having agreed terms for payment of the tax liability (and done so at a commendably early stage), it was wholly reasonable and proper for the person to adhere to the terms of the TTP agreement. We think that this provides the basis for the person to assert (under paragraph 13 of the Schedule) that they had a reasonable excuse for not making the payment(s) of tax on any earlier date(s) than prescribed in the TTP agreement. We draw support for this observation from the decision of the First Tier tribunal (Malcolm Gammie QC and David Williams) in the case of [Thomas James \[2013\] UKFTT 109 \(TC\)](#) paragraph 53 of which reads:
- “Did Mr James have a reasonable excuse for non-payment throughout the period of dispute? We consider that he did. Up to 30 June 2011 the tax remained outstanding because HMRC had entered into the TTP agreement and it does not seem to us that HMRC can subsequently say that Mr James did not have a reasonable excuse for the tax remaining unpaid during the currency of the agreement.”*
7. We note that paragraph 16(1) of the Schedule states “Where a person is liable for a penalty under this Schedule HMRC may assess the penalty”. The use of the word ‘may’ indicates a discretion on the part of HMRC as to whether or not to assess a penalty in any particular situation and the reference to ‘a penalty under this Schedule’ (where the schedule in question provides separately for two distinct penalties) appears to provide scope for HMRC to assess one, both or neither but we cannot see that these provisions give either HMRC or the tribunal any flexibility as to the basis of calculation of any penalty that is to be charged. This, we conclude, makes it essential for the Schedule

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provisions to be designed to produce a penalty liability that is always appropriate in the particular circumstances.

C. Suggested amendments to the breach provisions

In order to address the points identified in section B above, we think that the Schedule 13 provisions should be amended in the following respects:

1. No penalty should become payable in relation to any payment made in accordance with a TTP agreement (“the agreed time payment”) as a result of any breach of the prescribed payment terms which occurred *after* the agreed time payment. This significantly addresses the proportionality point (B.4 and 5 above) and also overcomes the reasonable excuse point referred to in section B.6 above.
2. In relation to the failure to make a payment in accordance with the TTP terms which causes the breach and any amount due to be paid at a later date under the TTP agreement, we do not think that the breach should cause a First Penalty to be due if it would not have been due by virtue of the TTP agreement. That overcomes the reasonable excuse point in relation to the First Penalty.
3. The position is less straightforward in relation to the Second Penalty, partly because the proposal that resulted in the TTP agreement might not have been made before the end of the 30-day period. For simplicity, we suggest that the Second Penalty in relation to the payment failure which occasions the breach and any amount that would have been paid later under the TTP agreement should be calculated from Day 31 until eventual payment.
4. As a possible alternative to points 2 and 3 above, the amount due but unpaid (the payment failure which caused the breach) and any amount which would have been due for payment later under the terms of the TTP agreement could be treated as never having been included within the terms of the TTP agreement so that a penalty should be incurred on those amounts as if they (in isolation) were amounts unpaid at the statutory due date in respect of which no TTP agreement had been made.
5. To overcome the risk of a reasonable excuse assertion in the context of point 3 or point 4 above, consideration might be given to including an express wording in the TTP agreement which recognised that reliance on the TTP agreement could only constitute a reasonable excuse in respect of any amount of tax that was paid both in accordance with the terms of the TTP agreement and in advance of any breach of the agreement. That would, in our opinion, provide a reasonable balance between recognising that it was reasonable not to pay an amount before the prescribed date under the TTP agreement provided that it was subsequently paid on or before that date and providing an appropriately strong sanction against breaching the agreement.

III. Other provisions of Schedule 13.

A. Paragraph 7

Matters identified

1. We welcome the clear recognition in sub-paragraph 7(1) and (2) that satisfaction of the 15 and 30-day time to pay conditions is determined by reference to the day on which proposals for paying the tax due was made by the person.
2. We assume that the reference in both 7(1) and (2) to proposals made “by the person” extend automatically to any proposal made on behalf of the person. We think that follows as a matter of law in the case of a formally authorised agent. The position might, however, be less clear where the initial proposals were made for example by a spouse, civil partner, relative or friend of the person. That could well arise where the person with the tax liability was on holiday or away on business.
3. We note that paragraph 7 of the Explanatory Note (in a reference to draft paragraph 5 of the Schedule) states (with emphasis supplied) that no penalty applies *if proposals are made to HMRC within that time period that lead to a time to pay agreement (TTP) within a reasonable period*. We cannot see any basis in the draft legislation for the addition of the phrase “within a reasonable period”. The key thing, as draft paragraph 7 makes clear, is that the agreement is made as a result of proposals made in the relevant time period. What is required is a causal connection between the proposals and the agreement.
4. We are concerned that the 15-day deadline will put significant pressures on HMRC resources at peak times such as the first half of February every year. The significance of the timing of TTP proposals makes it imperative that HMRC are able in every case to log accurately the date of a taxpayer’s first approach to HMRC with TTP proposals.

Suggested remedy

5. We think that it will be helpful if the Explanatory Note that is published with Finance Bill 2018-19 and any subsequent departmental guidance could make it clear that:
 - a) Proposals for the purposes of paragraph 7 can be made either by or on behalf of a person; and
 - b) There is no express requirement within the legislation for proposals to result in a TTP agreement within any specified period.
6. In order to meet the expected high volume of TTP proposals at peak times:
 - a) we urge HMRC to ensure the availability of an appropriate level of adequately trained staff;
 - b) we recommend that early consideration is given to the feasibility of a ‘ticketing’ system whereby taxpayers who apply with proposals for a TTP agreement but

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whose calls cannot be taken because of the high volume are given a TTP-specific call reference number which clearly identifies the date of the initial contact; and

- c) we recommend for the longer term that consideration is given to the possibility of automating the agreement to digitally-submitted proposals meeting defined criteria.

B. Paragraph 12

Matter identified

1. We note that paragraphs 12(c) and (d) provide respectively that the Commissioners may by regulation increase or reduce the percentages for Amounts A and B. The related Consultation of 1 December 2017 proceeded on the basis that the percentage for the over-15 day tax-gearred penalty would be half that of the (alternative) over-30 day tax-gearred penalty. Translated into Amounts A and B, it was easy to assume that the percentages for both parts of the paragraph 6 penalty would be and remain identical.
2. Whilst we can see that any change to the number of days made in accordance with paragraphs 12(a) and (b) which resulted in the higher number of days being more or less than exactly double the lower number of days might require an adjustment in the relationship between the percentages specified in paragraphs 6(4) and (5), it would be odd if the percentage specified in paragraph 6(4) meant that it was a tougher sanction against late payment than the equivalent percentage specified in paragraph 6(5).

Suggested remedy

3. Consideration might be given to amending paragraph 12 to ensure either that the two percentages were kept in alignment or that the paragraph 6(4) percentage (if expressed as an interest rate) was never higher than the equivalent percentage for paragraph 6(5).

IV. Observations on the availability of time to pay agreements

1. In a discussion with HMRC during the related Consultation which ran from 1 December 2017, we mentioned that there appeared to be some inconsistencies within HMRC in the handling of requests for TTP agreements. We mentioned as an example the relevance placed by some, but not all, HMRC officers on whether or not the taxpayer in question had previously been granted the benefit of a TTP agreement.
2. We think that the heightened significance given to TTP agreements by the Schedule 13 proposals makes it essential to ensure clarity in the departmental guidance and consistency in the application of that guidance.

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3. We note from the HMRC Policy Paper published on 6 July 2018 (see [Interest harmonisation and sanctions for late payment](#)) that:
“New late payment penalties are expected to commence for VAT on 1 April 2020. A timetable for implementation for ITSA and Corporation Tax will be announced in due course.”
4. We hope that it will be possible in the period between now and 1 April 2020 for:
 - Departmental guidance on TTP agreements to be revised as necessary;
 - Appropriate training to be given both to HMRC officers who deal with TTP requests and HMRC officers who will have responsibility for assessing and reviewing late payment penalties; and
 - Appropriate departmental publicity to be prepared for taxpayers and their advisers. This Association would be pleased to review drafts of any such publicity and related guidance.

Association of Taxation Technicians

30 August 2018