

Finance Bill 2021

Representation from the Association of Taxation Technicians (ATT)

Clause 113 and Schedule 25: Penalties for failure to pay tax

Executive summary

Clause 113 together with Schedule 25 (“the Schedule”) introduces new penalty provisions which will replace those which currently apply where a person fails to make payment of tax by its due date.

We focus our comments on the provisions concerning the breach by a person of a time to pay (“TTP”) agreement (paragraphs 7 and 9 of the Schedule) and matters requiring clarification.

We are concerned that where a person pays one instalment late under a TTP agreement they are treated as if the TTP agreement had never existed. This produces disproportionately high penalties and undermines the central principle of the new penalty regime which is to “encourage customers to pay their tax on time or make contact to discuss solutions to resolve the situation”. (*Explanatory Note paragraph 24 on page 279*).

The areas requiring clarification include whether HMRC have discretion on notifying a penalty where a breach of a TTP agreement is slight or a taxpayer has a reasonable excuse, and the need for clear and easily accessible guidance on TTP agreements so that taxpayers can understand their potential relevance to particular situations.

1. Background

- 1.1. The concept of a common tiered structure of penalties for failure to pay tax on the due date which takes into account adherence to the agreed terms of a TTP plan was the subject of consultation between January 2017 and the publication in July 2018 (as part of the Draft provisions for Finance Bill) of relevant draft legislation (“the 2018 draft provisions”).
- 1.2. ATT and others submitted comments to HMRC on those draft provisions at the time but no legislation was brought forward until the inclusion of the proposals in the current Finance Bill.
- 1.3. We commented at that time that there had been no consultation on the consequences of a breach of a TTP agreement and expressed concern that, as drafted, those consequences would be at their most severe where the taxpayer had adhered most consistently to their TTP agreement.
- 1.4. The provisions in the Bill relating to the breach of a TTP agreement are unchanged from those in the 2018 draft provisions.
- 1.5. The penalty provisions relating to failure to pay tax on its due date are separate from the imposition of an interest charge for late payment. Late payment *interest* is charged automatically (currently at 2.6% per annum) from the due date until the date of payment. By contrast, a *penalty* for failure to pay on the due date requires assessment by HMRC. Under both the existing system and that proposed by the Bill, a failure to pay penalty only arises if full payment is delayed by more than a set number of days after the due date. The

new provisions reduce that number of days from 30 to 15 but that is partly compensated by other features of the proposed system. We do not comment in this note on wider aspects of the differences between the existing and proposed systems.

1.6. The system of penalties for failure to pay tax as contained in the Schedule is intended to be phased in as follows¹:

- for VAT taxpayers, from periods starting on or after 1 April 2022
- for taxpayers in Income Tax Self-Assessment (ITSA) who are required to submit digital quarterly updates through Making Tax Digital for ITSA, from accounting periods beginning on or after 6 April 2023
- for all other ITSA taxpayers, from accounting periods beginning on or after 6 April 2024.

2. Example of how the proposed penalty provisions apply where a TTP agreement is breached

2.1. In this example, we assume that:

- A taxpayer, “P”, has a tax liability of £6,000
- P contacts HMRC within 15 days of the due date for payment of the tax
- P agrees to the terms of a TTP agreement under which P agrees to make:
 - an initial payment (within that same 15 days) of £500, and
 - eleven monthly payments each of £500 starting one month from that initial payment
- P makes the initial payment and nine of the monthly instalments all in accordance with the TTP agreement
- P then fails to make the tenth instalment on time.

2.2. Our understanding of the consequences of the above scenario is as follows:

2.2.1. Because P contacted HMRC within 15 days of the due date for payment of the tax, P is not liable (at that time) to any First Penalty under paragraph 5 in respect of any part of the tax that remained unpaid throughout the 30-day period (see paragraphs 4(a) and 6(1));

2.2.2. Because a TTP agreement was in effect before the expiry of the 30-day period, P is not liable (at the time of payment) to a Second Penalty under paragraph 8 in respect of any of the subsequent payments made in accordance with the TTP plan which in this case applies up to and including the ninth of the eleven monthly instalments;

2.2.3. Had P successfully made the final two monthly instalment payments on time, P would have no liability at all to any Second Penalty;

2.2.4. Because P failed to make the tenth monthly instalment in accordance with the TTP plan, any First Penalty and any Second Penalty notified to P by HMRC must be

¹ [HMRC Policy Paper](#) Penalties for late payment and interest harmonisation (3 March 2021)

calculated as if the TTP condition had never been met (paragraph 7) and as if the TTP agreement had never had effect (paragraph 9)²;

2.2.5. The First Penalty under paragraph 5(3)(b) is the sum of “amount A” and “amount B”, each of which is 2% of the amount unpaid respectively at the end of the 15th and 30th day after the due date. As only the initial payment of £500 had been made within 30 days from the due date, the First Penalty is [2% + 2% =] 4% of £5,500 = £220;

2.2.6. The Second Penalty under paragraph 8 is calculated as a penalty rate of interest at 4% per annum³ from the day after the last day of the 30-day period (which began from the due date) until each instalment payment as follows:

Monthly Instalment	Balance £	Days	Interest	£
1	5500	15	4%	9.04
2	5000	31	4%	16.99
3	4500	30	4%	14.79
4	4000	31	4%	13.59
5	3500	30	4%	11.51
6	3000	31	4%	10.19
7	2500	31	4%	8.49
8	2000	30	4%	6.58
9	1500	31	4%	5.10
10	1000	30	4%	3.29
			Total	99.56

2.2.7. The (rounded) sum of the First and Second penalties in this example is £320. That level of penalty appears to arise even if the tenth monthly instalment was paid only a few days after its instalment date under the TTP plan.

2.2.8. A penalty of £320 for paying £500 a few days later than under the TTP plan appears disproportionate. We completely understand that the penalty consequences of failing to comply with a TTP agreement need to be sufficiently robust to encourage ongoing and complete compliance with the terms of the agreement and deter abuse of the facility but we think that the consequences of breach require reconsideration.

2.2.9. Without some amendment, we think that the consequences of a breached TTP plan will increase the likelihood of a taxpayer asserting either that there was a reasonable excuse for their failure to meet an agreed instalment payment (see paragraph 12 of the Schedule) or that special circumstances meant that it was right for HMRC to reduce the penalty (see paragraph 13 of the Schedule). Responding to either such assertion would require the commitment of resources by HMRC and potentially the Tribunal Service – thereby imposing a cost on the Exchequer. That strengthens the case for reconsideration of the consequences of breaching a TTP agreement.

² See section 4.3 below as to whether HMRC have any discretion as to giving notice of a penalty.

³ The 4% penalty interest charged by the Second Penalty is in addition to the normal interest which is automatically charged on late paid tax (see section 1.5 above).

3. Possible amendment to the consequences of a breach of a TTP agreement

- 3.1. There are a number of ways in which the consequences of a breach of a TTP plan might be made more proportionate. The provisions in relation to either the First or the Second Penalty (see paragraphs 5 and 8) could be amended in the context of a breach. It is, however, vital to keep the provisions as straightforward and understandable as possible and to ensure that the incentive to comply fully with the TTP plan which is provided by exposure to the Second Penalty (the 4% penalty rate of interest on late paid tax) is not diminished.
- 3.2. With that in mind, we offer for consideration the suggestion that:
 - 3.2.1. The Second Penalty consequences of a breach should not be amended, but that
 - 3.2.2. If the 15-day time to pay condition had initially been met, the First Penalty should on the occasion of a breach be confined to amount B (see paragraph 5(5)). That would mean that the First Penalty would be 2% rather than 4% of the tax unpaid at the end of the 30-day period.

Amendment

Schedule 25, page 265, line 7, at end insert – “(3) But, where the 15 day time to pay condition is met, the penalty payable under paragraph 5 is confined to Amount B.”

Explanatory statement

This amendment would ensure that taxpayers who enter into a time to pay arrangement with HMRC within 15 days of their tax being due are not subject to disproportionately high penalties where they fail to meet the terms of that agreement.

- 3.3. The above amendment would give the taxpayer credit for having made early contact with HMRC in order to arrange a TTP plan. It would also preserve the distinction between such prompt action (which the new system is intended to promote) and tardier taxpayer action.

4. Requirement for clarity on operational aspects

- 4.1. We have identified operational aspects of the proposed system which currently lack clarity. We think that they need to be addressed before its phased introduction from 1 April 2022 (see section 1.6 above). We detail the points below.
- 4.2. Paragraph 10(4) of the Schedule defines a TTP agreement as “an agreement between HMRC and a person that payment of an amount of tax due (the “deferred amount”) may be deferred for a period (the “deferred period”).” There are no statutory provisions setting out the principles which determine how HMRC should exercise its discretion in deciding whether or not it is appropriate to make a TTP agreement with a taxpayer. This probably reflects both the origin of TTP as a matter of sensible and pragmatic departmental practice and the inevitable difficulty in defining criteria that would address all possible circumstances. It does however mean that a taxpayer cannot have any certainty that their circumstances are likely to mean that a TTP agreement can be achieved. We think that

there should be clear and easily accessible guidance on TTP agreements so that taxpayers can understand their potential relevance to particular situations.

- 4.3. Paragraphs 7(2) and 9(2) of the Schedule both start with the words: “If HMRC give the person notice that a penalty is payable under paragraph”. This wording strongly suggests that HMRC have an element of discretion. That seems very appropriate as it could sensibly cater for the situation where an instalment payment under a TTP plan was made only very slightly late or the payment was of an amount only slightly less than agreed. That reading of the two paragraphs is, however, undermined by the related *Explanatory Note* which in each case states (with our emphasis added): “If the agreement is breached HMRC *must* give the person a notice that a penalty is payable under this paragraph.” This wording does not seem to recognise that HMRC have any discretion in the matter. We think that there is an urgent need for clarity on whether HMRC have discretion on notifying a penalty by reason of any breach of a TTP agreement.
- 4.4. Paragraph 10(6) recognises the possibility of a TTP agreement being varied by further agreement between the person and HMRC. That is obviously a sensible and necessary provision but there is no indication of how or in what circumstances such further agreement might arise. It is important that a taxpayer who otherwise risks becoming in breach of a TTP agreement understands what action they need to take and when in order to initiate consideration of a further agreement.
- 4.5. Paragraph 12 of the Schedule states that liability for a penalty does not arise in respect of a failure to make a payment if the person had a reasonable excuse for the failure. The application of the reasonable excuse provision to the situation of a breach of a TTP plan is unclear. Is the existence of a reasonable excuse only relevant to the non-payment of the particular instalment which constituted the breach of the TTP which triggers the penalty or is wider consideration of reasonable excuse possible? In this connection, we note 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.”

In the context of either or both of the First and Second Penalty, could a taxpayer assert that they had a reasonable excuse for not having paid the outstanding tax by the relevant date because they had up until immediately before the instalment which they failed to make been paying under the terms of their TTP agreement?

Whilst the intention of paragraphs 7 and 9 appears to be to evaporate the TTP agreement with retrospective result, paragraph 12 does not appear to recognise any limitation in the application of reasonable excuse.

- 4.6. One specific situation which the Schedule does not address is where a taxpayer might have had a reasonable excuse for failure to pay at the time of the due date for payment of the tax. That excuse might have continued for a period (see paragraph 12(2)(c) of the Schedule) which ended either within the 30-day period or after the 30-day period had ended. In the former case, that would appear to mean that the taxpayer could become liable to a First

Penalty (of both amounts A and B). In the latter case, they would appear to have no liability for a First Penalty and they would still have had a reasonable excuse after the commencement of the period for which any Second Penalty was chargeable. If, in either case, they were subsequently in breach of a TTP agreement, we presume that HMRC would use the discretion provided by paragraph 13 (special reduction) to adjust any resulting penalty or penalties but it is unclear what principles should guide that adjustment.

- 4.7. Our overall concern is that there needs to be clarity on all these aspects in advance of the introduction of the new penalty provisions for late payment in April 2022.

Association of Taxation Technicians

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Note:

The Association of Taxation Technicians

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