



TC04139

Appeal number: TC/2014/03484

*Schedule 56 Finance Act (FA) 2009 - Penalty for late payment of tax -
whether agents inaction was a reasonable excuse - no - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JONATHAN NEWMAN

Appellant

and

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 9 October 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 25 June 2014 and HMRC's Statement of Case submitted on 28 July 2014.

DECISION

The Appeal

5 1. Mr Jonathan Newman, ('the Appellant') appeals against a first late payment penalty imposed under Paragraph 3(2) of Schedule 56 Finance Act (FA) 2009, a second late payment penalty imposed under Paragraph 3(3) of Schedule 56 FA 2009 and a third late payment penalty imposed under Paragraph 3(4) of Schedule 56 FA 2009 for his failure to pay tax on time for the year ending 5 April 2011.

10 2. The Appellant also appeals a first late payment penalty imposed under Paragraph 3(2) of Schedule 56 FA 2009, and a second late payment penalty imposed under Paragraph 3(3) of Schedule 56 FA 2009 for his failure to pay tax on time for the year ending 5 April 2012.

Relevant Legislation

15 3. Payment of income tax is due in accordance with s 59B Taxes Management Act (TMA) 1970 and in this instance the due date for payment was 31 January 2012 under s 59B(4) for the 2010-11 liability and 10 August 2013 under s 59B(5) for the 2011-12 liability. Late payment penalties are chargeable where a taxpayer is late in paying tax due.

20 4. The first penalty is calculated at 5% of all tax remaining unpaid after the expiry of thirty days from the due date in accordance with Paragraph 3(2) Schedule 56 FA 2009.

25 5. Where tax remains unpaid, after the end of the period of five months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed under Paragraph 3(3) Schedule 56 FA 2009.

6. Where tax remains unpaid, after the end of the period of eleven months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed under Paragraph 3(4) Schedule 56 FA 2009.

30 7. The 'penalty date' as defined at Paragraph 1(4) Schedule 56 FA 2009 means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after thirty days from the date specified in s 59B(3) or (4)).

Background facts

Year 2010-11

35 8. The notice to file for the year ending 5 April 2011 was issued to the Appellant on 6 April 2011.

9. The filing date was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return.

10. The Appellant's electronic return for the year 2010-11 was filed online on 11 July 2013.
- 5 11. The Appellant chose to calculate his liability and filed online, whereby the liability was automatically calculated.
12. The Appellant's tax liability for the year was £5,805. The tax was due to be paid on or before 31 January 2012 in accordance with s 59B(4) TMA 1970.
13. At the penalty date of 3 March 2012, £5,805 of the tax liability remained unpaid.
- 10 14. Five months after the penalty date of 3 March 2012, £5,805 of the tax liability remained unpaid.
15. Eleven months after the penalty date of 3 March 2012, £5,805 of the tax liability remained unpaid.
16. The tax was finally paid in full on 11 April 2014.
- 15 17. HMRC issued a notice of penalty assessment on or around 16 July 2013 in the amount of £290, being 5% of the tax unpaid at the penalty date.
18. HMRC issued a second notice of penalty assessment on or around 16 July 2013 in the amount of £290, being 5% of the tax unpaid five months after the penalty date.
19. HMRC issued a third notice of penalty assessment on or around 16 July 2013 in the amount of £290, being 5% of the tax unpaid eleven months after the penalty date.
- 20 20. The return for the year ending 5 April 2012 was issued to the Appellant on 6 April 2012.
21. The filing date was 31 October 2012 for a non-electronic return or 31 January 2013 for an electronic return.
- 25 22. The Appellant's electronic return for the year 2011-12 was filed online on 31 January 2013. The resulting liability was nil.
23. On 11 July 2013 an online amendment was made to the 2011-12 return. This increased the liability from nil to £2,096.29.
24. The tax was due to be paid on or before 10 August 2013 in accordance with s 59B (5) TMA 1970.
- 30 25. At the penalty date of 9 September 2013, £2,096.29 of the tax liability remained unpaid.
26. Five months after the penalty date of 9 September 2013, £2096.29 of the tax liability remained unpaid.

27. £41.42 of the Appellant's tax liability for the year ended 5 April 2012 remained unpaid as at 28 July 2014, being the date of HMRC's Statement of Case to the Tribunal.

5 28. HMRC issued a notice of penalty assessment on or around 24 September 2013 in the amount of £104, being 5% of the tax unpaid at the penalty date.

29. HMRC issued a second notice of penalty assessment on or around 25 February 2014 in the amount of £104, being 5% of the tax unpaid five months after the penalty date.

10 Appellant's contentions

30. On 8 April 2014, the Appellant's agent submitted an appeal to HMRC against the late payment penalties for 2010-11 stating as follows:

15 'I write to appeal against the late payment penalties for 2010-11 of £870 as our client did not appreciate that these were payable until our company got involved.

Our client is now paying £250 per week to clear off his outstanding debt with HMRC and would therefore appreciate your lenience in this matter.'

20 31. HMRC responded in writing to the Appellant and the agent on 2 May 2014 advising that the appeal against the 2010-11 late payment penalties was made outside of the statutory time limit and that HMRC can only accept a late appeal if there is a reasonable excuse for the lateness.

32. The agent submitted a further letter on 20 May 2014 in which the grounds for appeal against the 2010-11 late payment penalties were stated as:

25 i. 'We write on behalf of the above client to appeal against penalties charged in respect of the non-payment of tax for the year ended 5 April 2011.

ii. The returns were late being filed due to their agent Mr P Coles of Salisbury House Tax Solutions Limited. Mr Coles advised them that the forms had in fact been filed at the correct time and there was no liability.

30 iii. It was clear to us examining the HMRC website that this was not the case and have since filed the return on their behalf and have ensured that the client settled the outstanding tax, which has now almost been completed.

iv. Unfortunately until we were appointed as agent to the client, the client was unaware that there was any liability due to them as they were trading from July 2011 as a limited company.

35 v. However the previous adviser did not carry out work in respect of the transfer of business and the sole trader continued to trade as a sole trader.

vi. When we commenced acting in July 2013 we had to file outstanding tax returns for both 2010-2011 and 2011-2012, both of which the client believed to have been done. It was not until then that the client was aware of the outstanding liability.'

5 33. On 11 June 2014, HMRC issued an additional letter advising the Appellant that the late appeal against the 2010-11 late payment penalties could not be accepted.

34. On 25 June 2014, an appeal was made to the Tribunal in which the previous grounds for appeal were reiterated.

10 35. The application to the Tribunal included a late appeal against the penalties charged as a result of late payment of the tax due for 2011-12. HMRC have not received an appeal against those penalties.

Reasonable excuse

15 36. In accordance with Paragraph 16(1) Schedule 56 FA 2009, an appeal against a late payment penalty will be successful where the taxpayer shows that there is a reasonable excuse for paying late.

37. In addition, Paragraph 16(2) Schedule 56 FA 2009 states:

- 20 a) An insufficiency of funds is not a reasonable excuse, unless attributable to events outside the Appellant's control.
- b) Where the Appellant relies on any other person to do anything, that is not a reasonable excuse unless the Appellant took reasonable care to avoid the failure, and
- 25 c) Where the Appellant had a reasonable excuse for the failure but the excuse has ceased, the Appellant is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

30 There is no statutory definition of reasonable excuse, which "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland v HMRC* [2006] STC (SCD) 536 at paragraph 18). This was confirmed by the First-tier Tribunal, in *Anthony Wood trading as Propaye v HMRC* (2011 UK FTT 136 TC 001010).

38. If there is a reasonable excuse it must exist throughout the failure period.

HMRC's case

35 39. HMRC objects to the late appeals against both the 2010-11 and 2011-12 late payment penalties. Penalty determinations for 2010-11 were issued on 16 July 2013. Penalty determinations for 2011-12 were issued on 24 September 2013 and 25 February 2014. It was clearly stated on each Notice of Penalty Determination that any appeal should be made in writing within thirty days of the date of issue shown on the

notice. However, an appeal against the 2010-11 penalties was not made until 8 April 2014 and the appeal against the late payment penalties for 2011-12 was not made prior to the Tribunal application of 25 June 2014. The appeals are therefore out of time.

5 40. Undelivered correspondence is recorded by HMRC and there are no records held to show any of the penalty notices or indeed any other mail was returned undelivered. Therefore, the penalty determinations were deemed to have been received within the ordinary course of post-delivery in line with s 7 of the Interpretation Act 1978.

10 41. HMRC contends that no reasonable excuse has been provided as to why a late appeal against the 2010-11 and 2011-12 late payment penalties should now be accepted.

15 42. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure that complete 2010-11 and 2011-12 Self-Assessment Tax Returns were filed on time and that the tax due for each year was paid by the legislative due date.

43. In the year ended 5 April 2011, the Appellant was self-employed. Therefore, he was required under s 8 TMA 1970 to make a return of his income for that year and make payment of any tax due by 31 January 2012.

20 44. In the year ended 5 April 2012, the Appellant was self-employed. Therefore, he was required under s 8 TMA 1970 to make a return of his income for that year and make payment of any tax due by 31 January 2013. An incorrect nil return for 2011-12 was filed on 31 January 2013. That return did not include the Appellant's income from self-employment. An amendment to the same was submitted on 11 July 2013.

25 45. HMRC records demonstrate that the Appellant has been making Self-Assessment returns since 1996-97. Therefore, HMRC consider the Appellant to be experienced with the Self-Assessment system, including the legislative filing and payment dates.

46. The Self-Assessment payment deadlines and the consequences of missing those deadlines are clearly shown on the HMRC website. HMRC contend that this information would have been readily available to the Appellant.

30 47. The Appellant's 2010-11 tax return was filed online on 11 July 2013. HMRC contends that the late filing of the 2010-11 tax return cannot in itself be deemed a reasonable excuse for the late payment of the Appellant's tax liability for that year. It was the responsibility of the Appellant to ensure that the tax return was filed in sufficient time to ensure receipt of a calculation on or before the payment date of 31
35 January 2012.

40 48. HMRC records demonstrate that late filing penalty determinations in respect of the outstanding 2010-11 tax return were issued to the Appellant on 14 February 2012, 7 August 2012 and 19 February 2013. Therefore, HMRC maintain that following the receipt of each notice it was unreasonable of the Appellant to believe that his 2010-11 tax return had been filed. HMRC would expect any prudent person who believed that

a return had been filed and later received a late filing penalty notification in respect of the same to contact them without delay for clarification. However, there is nothing held on HMRC records to suggest that the Appellant made contact at any time prior to the filing of his 2010-11 tax return on 11 July 2013.

- 5 49. The Appellant's 2010-11 tax return was filed online on 11 July 2013. As part of the online filing process a calculation of the tax due is automatically provided. Therefore, the Appellant and his current agent would have been aware of the tax due for 2010-11 by 11 July 2013. However, full payment of the 2010-11 liability was not made until 11 April 2014, more than two years after the due payment date.
- 10 50. The Appellant's 2011-12 tax return was filed online on 31 January 2013. The return did not include the Appellant's self-employed income. This resulted in a nil liability for the 2011-12 year. The return was subsequently amended on 11 July 2013 which resulted in a liability of £2,096.29 with a due payment date of 10 August 2013 in accordance with s 59B (5) TMA 1970. As part of the online amendment process a
15 calculation of the revised tax due for 2011-12 would have been provided. Therefore the Appellant and his current agent would have been aware of the revised tax due for 2011-12 by 11 July 2013. However, full payment of the 2011-12 liability has not yet been made.
- 20 51. The Appellant did not make payment of his outstanding 2011-12 liability despite the issue of late payment penalty notices on 24 September 2013 and 25 February 2014. Nor was any attempt made to contact HMRC to request a time to pay arrangement prior to 14 March 2014.
52. Inability to pay is not a reasonable excuse in accordance with s 59C (10) TMA 1970.
- 25 53. Where a taxpayer does not have the means to make payment by the due date, HMRC can consider a payment proposal and negotiate a payment plan to clear the liability in accordance with Paragraph 10 Schedule 56 FA 2009. In these circumstances, a taxpayer may avoid a penalty if he makes a formal payment
30 proposal, which leads to an acceptable time to pay arrangement, on or before the penalty date or the date the penalty arose.
54. Proposals made after the first late payment penalty trigger date, but by 30 days plus 5 months from the due date, can avoid only the second and third late payment penalties. Similarly, proposals made after the second late payment trigger date, but by
35 30 days plus 11 months from the due date, can avoid only the third late payment penalty.
55. Time to Pay is only agreed where HMRC is satisfied that a taxpayer cannot pay his/her liability on the actual due date. The taxpayer must offer the best payment proposals that they can realistically afford.
- 40 56. A Time to Pay agreement is a contract, which requires offer and acceptance. There is no statutory right to a Time to Pay arrangement; whether one is provided or not is a matter of HMRC's discretion. HMRC is entitled to withdraw from a Time to

Pay arrangement if a customer defaults on the arrangement or does not satisfy the conditions of the same. There is no right of appeal against an HMRC decision to refuse a request for extra time to pay.

57. HMRC records demonstrate that a request for a Time to Pay arrangement was received on 14 March 2014. The Appellant's agent proposed that payments of £250 weekly would be made from 14 March 2014 to clear the outstanding 2010-11 balancing payment and the 2011-12 payments on account. HMRC agreed to the same on the day of receipt. HMRC note that, although the Appellant was aware of his 2010-11 liability by 11 July 2013 and his correct 2011-12 liability by the same date, no attempt was made to submit payment proposals or agree a Time to Pay arrangement to cover the outstanding liability for each year until 14 March 2014.

58. As the Appellant did not make full payment of his 2010-11 liability, due on 31 January 2012 until 11 April 2014, and a Time to Pay arrangement was not agreed until 14 March 2014, each late payment penalty charged for the 2010-11 year remains due and payable.

59. As the Appellant has still not made full payment of the 2011-12 liability, due on 31 January 2013, and a Time to Pay arrangement was not agreed until 14 March 2014, both of the penalties charged for 2011-12 remain due and payable.

60. HMRC acknowledge that the Appellant made regular payments from 8 November 2013 to 7 March 2014. However those payments were not made in accordance with an agreed Time to Pay arrangement. To avoid late payment penalties the Appellant should have made full payment of the tax due for 2010-11 by 31 January 2012, and full payment of the tax due for 2011-12 per the amendment of 11 July 2013, by 10 August 2013. Alternatively, the Appellant could have contacted HMRC shortly after each due payment date to request a Time to Pay arrangement. A taxpayer cannot avoid late payment penalties by choosing to pay an outstanding liability by weekly or monthly instalments without the agreement of HMRC.

61. HMRC maintain that it was the responsibility of the Appellant to ensure that he complied with his tax responsibilities by filing his complete and correct 2010-11 and 2011-12 tax returns by the relevant due dates in accordance with s 8 TMA 1970. He was also responsible for ensuring that payment for each year was made by the legislative due date. HMRC expect a taxpayer to take reasonable care to explain to the third party what they require them to do, to set deadlines for the work and to make regular checks on progress.

62. The Appellant has not provided any evidence to suggest that he contacted his agent to confirm the filing status of his 2010-11 and 2011-12 tax returns. Nor has the Appellant provided any evidence to suggest that he sought confirmation of the tax due for each year on or shortly after the due payment dates.

63. In the case of *Stewarton Polo Club Ltd v HMRC* Judge Dr C Staker stated in paragraphs 14, 15 and 17:

5 “14. The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to file returns and pay taxes on time through reliance on a specialist.

10 15. The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted.

15 17. The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent such as an accountant, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the Appellant to a third party of itself amounts to a reasonable excuse.”

64. Furthermore, in the case of *Schola UK Ltd v HMRC* Judge M Tildesley OBE stated in paragraph 7:

25 “7. The Appellant's reason for not filing the return on time was essentially its agent made an honest mistake. The Appellant was bound by the actions of its agent and cannot avoid its responsibilities under the Tax Acts by transferring them to its agent. The agent's mistake was that it did not check that it had received the acknowledgement of receipt of the return which HMRC sends by e mail. The mistake could have been avoided if the agent had exercised proper care. The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts. The Tribunal, therefore, finds that the Appellant did not have a reasonable excuse for the late filing of the 2008/09 end of year return.”

35 65. With regard to ‘Special Reduction’ (Paragraph 9 Schedule 56 FA 2009), the law allows HMRC to reduce a penalty below the statutory minimum if they think it is right because of special circumstances. While ‘special circumstances’ are not defined, the courts accept that for circumstances to be special they must be ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe*) or ‘something out of the ordinary run of events’ (*Clarks of Hove Ltd v Bakers' Union*).

40 66. HMRC have considered special reduction, but their view is that there are no special circumstances which would allow them to reduce the penalty.

Conclusion

5 67. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, which prevents them from complying with their obligation to pay on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

10 68. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. If the taxpayer could reasonably have foreseen the event, whether or not it is within their control, HMRC would expect them to take steps to meet their obligations.

15 69. The late filing penalty determinations in respect of the outstanding 2010-11 tax return were issued to the Appellant on 14 February 2012, 7 August 2012 and 19 February 2013. Therefore, following the receipt of each notice, it was unreasonable of the Appellant to believe that his 2010-11 tax return had been filed. Any prudent person who believed that a return had been filed, and later received a late filing penalty notification in respect of the same, must be expected to contact HMRC without delay for clarification. However, as HMRC say there is nothing to suggest that the Appellant made contact at any time prior to the filing of his 2010-11 tax return on 11 July 2013.

20 70. Having a dilatory agent is not a reasonable excuse. It was the responsibility of the Appellant to ensure that all his tax obligations were met in accordance with s 59B TMA 1970. If the Appellant feels that an accountant failed in his/her professional capacity or did not follow his specific instructions then the Appellant should seek redress directly from that accountant.

25 71. The responsibility to pay taxes by the due date cannot be transferred to any other person acting on behalf of the Appellant. Where a person has asked another person to do something on their behalf, that person is responsible for ensuring that the other person carries out the task. They cannot claim they had a reasonable excuse merely because they delegated the task to a third party and that third party failed to complete
30 it.

35 72. The tax that was charged for the fiscal years 2010-11 and 2011-12 was statutorily due. The Appellant failed to make payment of the tax due for each year by the legislative due date or by the dates that each penalty arose. A Time to Pay arrangement in respect of the 2010-11 and 2011-12 liabilities was not requested or agreed until 14 March 2014. Therefore, the late payment penalties for tax years 2010-11 and 2011-12 have been correctly charged in accordance with Paragraph 3(2), Paragraph 3(3) and Paragraph 3(4) of Schedule 56 FA 2009.

40 73. The Tribunal finds that the late payment penalties charged are in accordance with legislation and there is no reasonable excuse for the Appellant's failure to pay his tax on time, nor by the date the penalties arose. There are no special circumstances which

would allow the penalties to be reduced under ‘Special Reduction’ and therefore the appeal is dismissed and the late payment penalties are confirmed.

5 74. 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
10 “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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 19 November 2014

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