



TC05145

Appeal number: TC/2014/6572

*INCOME TAX – late payment penalties – para 3 sch 56 FA 2009 - whether
a reasonable excuse for late payment*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr TIMOTHY RAGGATT QC

Appellant

- and -

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

Respondents

**TRIBUNAL: Judge Peter Kempster
Mr Leslie Brown**

Sitting in public at Centre City Tower, Birmingham on 12 April 2016

The Appellant in person

Mr Philip Osborne (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant (“Mr Raggatt”) appeals against penalties charged by the Respondents (“HMRC”) for late payments of income tax. At the hearing it was agreed by both parties that the matters under appeal are late payment penalties pursuant to sch 56 FA 2009 as follows:

(1) Tax year 2012-13 – thirty day, six month and twelve month delay penalties of £3,265 each, totalling £9,795.

(2) Tax year 2013-14 – thirty day penalty of £2,767, and a six month delay penalty of £873, totalling £3,640.

Law

2. Paragraphs 1 & 3 sch 56 Finance Act 2009 make provision for penalties where income tax is paid late and para 3 provides (so far as relevant):

“(2) P is liable to a penalty of 5% of the unpaid tax.

(3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

(4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.”

3. Paragraphs 13 to 15 sch 56 Finance Act 2009 provide a right of appeal to the Tribunal against para 3 penalties.

4. Paragraph 16 sch 56 Finance Act 2009 provides:

“(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.

(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.”

Appellant's case

5. Mr Raggatt submitted as follows.

6. It was accepted that the relevant income tax payments were paid late. However, there was a reasonable excuse for all the late payments. “Reasonable excuse” should be given its ordinary and natural meaning, per the Tribunal in *Fisher v HMRC* [2011] UKFTT 235 (TC) where Judge Jones QC stated (at [8]): “A reasonable excuse may involve an exceptional event but need not necessarily do so.”

7. Mr Raggatt had been in professional practice as a barrister for 40 years, during which time there had never been any suggestion of his not attempting to pay his tax liabilities. He had encountered exceptional financial circumstances in 2012 to 2014.

(1) In 2010 he had concluded a divorce settlement with a large lump sum and annual maintenance. The amounts had been agreed by reference to his past earnings. The government’s cuts to criminal legal aid had severely affected his professional practice, resulting in cashflow problems. In summer 2014 he had agreed a clean break with his ex-wife with a substantial lump sum. Payment of the lump sum was deferred for one year, which was recognition by the Family Court that he had no means to pay the sum until the sale of his house had completed.

(2) In 2012 his bank, C Hoare & Co, had changed its lending policy and had required him to secure his professional overdraft against his house, but without extending the overdraft limit to recognise the equity in the property. In 2014 the bank had stated it would not continue to act and stopped honouring standing orders and other payments. In January 2015 he had moved to NatWest and had chosen not to take an overdraft facility.

(3) Nevertheless, he had managed to make significant payments of tax – for example, around £20,000 in April 2013, around £18,000 in October 2013, and around £16,000 in January 2014.

(4) He had no investments apart from his house and his pension plan. His house sale had not completed until early 2016, due to the sluggish market. Access to his pension plan had not been possible, under the rules then in force, until his 65th birthday, which had been in 2015. When access had become possible he had drawn out such sums as he was able without triggering a tax charge.

8. Over the last nine months he had been able to bring his tax affairs up to date with payment of all income tax and interest liabilities. This had been achieved by payment of substantial sums – for example, around £113,000 in July 2015, around £20,000 in November 2015, and around £28,000 in February 2016. His practice had now diversified and there should be no further future payment problems. While his practice statement showed large receipts, it should be appreciated that there were chambers expenses to be accounted for out of such fee receipts. Unlike other professional practices, a legal aid barrister did not have aged debts that could be borrowed against. For around 18 months he had in effect been living hand to mouth.

9. HMRC had not behaved as should be expected. An official complaint was likely. HMRC had issued bankruptcy proceedings without notification to him or his accountant – he had only discovered the petition accidentally – and had now been

abandoned. He had not been given an opportunity to phase his payments; instead penalties had been issued despite his lack of capacity to pay. He had not been charged penalties in previous years when his accountants were PwC. He had previously been granted time to pay but had then been told that it was a one-off arrangement and would not be allowed again. He accepted that some of the instalment payments had been missed but he had caught up afterwards.

Respondents' case

10. For HMRC, Mr Osborne submitted as follows.

11. In HMRC's view there was no reasonable excuse within para 16 sch 56 for the late payments which had attracted the penalties. In particular, the statute excluded insufficiency of funds from being a reasonable excuse. Mr Raggatt had failed to show that the late payments were attributable to events outside his control.

12. Mr Raggatt's tax returns disclosed six-figure earnings which fluctuated from year to year but for the accounts year ended 30 April 2012 had been at the level of £290,000. No tax on those earnings would have been due until January 2014; there was ample time for a prudent taxpayer to plan the funding of the tax due. Mr Raggatt had not put aside funds to meet his known obligations; instead he had attempted to meet them out of current income, and failed.

13. In fact, Mr Raggatt was a habitual late payer. The schedule in the hearing bundle showed the payment history back to 2008, revealing multiple late payments. There was a period of over twelve months when no payment whatsoever had been made. Mr Raggatt had chosen to maintain his lifestyle rather than prioritise meeting his tax obligations.

Consideration and Conclusions

14. We accept that Mr Raggatt has not attempted to avoid (or evade) his income tax liabilities and that the late payment of his liabilities was due to his lack of funds at the relevant times. Paragraph 16 sch 56 removes the penalty liability where there is a reasonable excuse for the late payment but para 16(2)(a) provides that "an insufficiency of funds is not a reasonable excuse unless attributable to events outside [the taxpayer's] control".

Approach to "reasonable excuse"

15. We agree with Mr Raggatt that HMRC's formulation of the reasonable excuse test, stated in their decision letter dated 19 August 2014, as requiring "an unexpected or unusual event, either unforeseeable or beyond your control" is not correct. That appears to derive from on the dissenting judgment of Scott LJ in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 rather than the majority (Lord Donaldson MR and Nolan LJ) who rejected the test adopted in the dissenting judgment of Scott LJ that the cause of the default had to be an "unforeseeable or inescapable event". Lord Donaldson MR said (at 770):

5 "Scott LJ ...is of the opinion that the underlying cause of the insufficiency of funds must be an 'unforeseeable or inescapable event'. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness and (b) it treats foreseeability as relevant in its own right, whereas I think that 'foreseeability' or as I would say 'reasonable foreseeability' is only relevant in the context of whether the cash flow problem was 'inescapable' or, as I would say, 'reasonably avoidable'. It is more difficult to escape from the unforeseeable than from the foreseeable."

10 Nolan LJ, explaining his earlier decision in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907, also disapproved the over-emphasis of "foreseeability" as a test in determining whether a taxpayer had a reasonable excuse, said (at 756):

15 " My references in *Salevon* to 'the wrongful act of another' and to the distinction between 'the trader who lacks the money to pay his tax by reason of culpable default and the trader who lacks the money by reason of unforeseeable and inescapable misfortune' were directed to the facts of that case. They cannot be regarded as an all-purpose test of what constitutes a reasonable excuse."

20 This reliance by HMRC on the dissenting judgment has been commented on before by this Tribunal – see for example *Electrical Installation Solutions Limited v HMRC* [2013] UKFTT 419 (TC) (Judge Brannan at [50-53]). In the current appeal we have applied the test preferred by Lord Donaldson MR in *Steptoe* (at 770):

25 "... [I]f the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds."

30 *Findings on reasonable excuse*

16. From the schedule of payments prepared by Mr Osborne it is clear to us that – going back at least as far as 2008 – Mr Raggatt's practice has been to make occasional tax payments as and when his professional income permitted but without any particular discipline as to the due dates. We do not accept Mr Raggatt's suggestion that it is relevant that HMRC did not, apparently, penalise him for late payments in earlier tax years (ie before the introduction of the current sch 56 penalty regime for tax years 2010-11 onward). With the introduction of the sch 56 penalty regime Mr Raggatt, on advice, very correctly agreed a time-to-pay instalment plan with HMRC. Those monthly instalment obligations were met by Mr Raggatt's bank until he exhausted his £200,000 overdraft facility, and the bank declined to extend it, in August 2012. Mr Raggatt made a significant payment in November 2012 – again, following his usual practice, out of his professional income as it became available – and HMRC accepted that as not incurring any liability to penalties for 2010-11 and 2011-12. However the breach of the time-to-pay agreement meant that HMRC were not prepared to extend a similar facility for 2012-13.

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17. While we acknowledge and are sympathetic to Mr Raggatt’s financial difficulties in the relevant period, we are not satisfied that (in Lord Donaldson’s words) he exhibited “the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date”. Mr Raggatt has really just continued his long-established practice of paying irregular lump sum instalments to HMRC as and when he can afford to do so out of his professional income. Even on that basis, there is a period of around 18 months between payments in January 2014 and July 2015 with no explanation of why no tax payments were made despite fee receipts in that period – for example, £10,625 (net of VAT) in February 2014, £8,500 in December 2014, and £35,038 in February 2015.

18. It is not, in our opinion, appropriate for Mr Raggatt to blame his bank for not extending his overdraft facility in August 2012; the facility letter dated 18 April 2011 granting the £200,000 overdraft facility states “I should emphasise to you that the above facilities on your private and professional accounts are the maximum that the Bank is prepared to support. We expect you to monitor your drawings carefully to ensure that neither of the facilities is exceeded.” When the facility was restructured in March 2013 there was no reduction in the credit available – the £200,000 facility was merely converted into a £100,000 secured loan and a £100,000 overdraft.

19. We acknowledge that Mr Raggatt has now taken matters in hand and has brought his tax affairs up-to-date, including drawing significant sums out of his pension plan. However, we have concluded that in the period relevant to the penalties under appeal his approach did not “have proper regard for the fact that the tax would become due on a particular date”. Accordingly, we conclude that there was not a reasonable excuse (within the meaning of para 16 sch 56 FA 2009) for the late payments, and thus the penalties stand as assessed.

Decision

20. The appeal is DISMISSED.

21. This document contains full findings of fact and reasons for the decision and replaces the corrected summary decision notice dated 18 April 2016 issued on 6 May 2016. 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.

**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 6 JUNE 2016