



TC05300

Appeal number: T/2016/01699

*INCOME TAX – late penalty – whether reasonable excuse – no – appeal
dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Christopher Stroud

Appellant

- and -

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

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 27 June 2016 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 18 March 2016 and HMRC's Statement of Case dated 13 April 2016 .

DECISION

Introduction

5 Preliminary matter

1. The first matter which has to be decided is whether the application by the Appellant to be heard out of time is granted. On grounds of fairness and given that HMRC do not oppose the application, permission is granted.

10 2. This is an appeal against a Late Filing Penalty imposed under Paragraph 3(2) of Schedule 56, Finance Act (FA) 2009 for the failure to pay tax on time for the year ending 5 April 2012.

15 3. This is also an appeal against a first Late Payment Penalty imposed under Paragraph 3(2) of Schedule 56, Finance Act (FA) 2009 for failure to pay tax on time for the year ending 5 April 2014.

4. A second and third payment penalty was imposed for a failure to pay tax on time for the year ending 5 April 2014.

20 5. The point at issue is whether the Appellant had a reasonable excuse for the late payment of tax and if so, whether the excuse continued up to the date of the payment of the tax.

6. Relevant Legislation

25 7. 1) Where the customer was given a Notice to File under s 8 Taxes Management Act 1970 (TMA), s 59B(4) of that Act sets out the due date for payments as 31 January next following the year of assessment.

8. 2) Schedule 56(1) FA 2009 states the date after which a penalty will be incurred – is the date falling thirty days after the date specified in s 59B(4) TMA- if the tax is unpaid.

30 9. 3) In the event of default, Schedule 56 (3) (2) FA 2009 states that the Taxpayer is liable to a penalty of 5% of the unpaid tax.

10. 4) Schedule 56 (3)(3) FA 2009 states that if any amount of the tax is unpaid after the end of the period of eleven months beginning with the Penalty date, the Taxpayer is liable to a penalty of 5% of that amount.

35 11. 5) Schedule 56 (3)(4) FA 2009 states that if any amount of the tax is unpaid after the end of the period of five months beginning with the Penalty date, the Taxpayer is liable to a penalty of 5% of that amount.

12. 6) Schedule 56 (9) FA 2009 states that HMRC may reduce a penalty if they think it right because of special circumstances.

13. 7) Schedule 56 (16) Finance Act 2009 sets out the legislation in respect of reasonable excuse. Specifically it states that:

- 5 14. • An insufficiency of funds is not a reasonable excuse unless attributable to the events outside person (s) control.
15. • Where a person relies on any other person to do anything, there is no reasonable excuse unless person took reasonable care to avoid the failure, and
- 10 16. Where person has a reasonable excuse for the failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

17. **Relevant facts**

15 18. 2011 - 2012

19. A Notice to File for the year ending 5 April 2012 was issued to the Appellant with a filing date of 31 October 2012 for a non-electronic return and 31 January 2013 for electronic return. The electronic return was received on 29 January 2013 with the tax liability calculated for the year at £23,420.40.

20 20. The tax was due to be paid on or before 31 January 2013 pursuant to Section 59B (4) TMA 1970. At the penalty date of 3 March 2013 £23,420.40 of the tax remained unpaid. The tax liability was paid in full on 29 March 2013.

21. HMRC issued a Notice of Penalty Assessment on 19 March 2013 in the amount of £1,171 being 5 % of the tax unpaid at the penalty date.

25 22.

23. 2013-2014

24. A Notice to File for the year ending 5 April 2014 was issued to the Appellant; the filing date was the 31 October 2014 for non-electronic returns or 31 January 2015 for electronic return. The electronic return was received on 23 January 2015 which automatically calculated a tax liability at £2,451.80. The tax was due to be paid on or before 31 January 2015 but at the penalty date of 3 March 2015 £1,280.70 of the tax liability remained unpaid. Five months after the penalty date of 3 March 2015 £1,280.70 of the tax liability remained unpaid. Eleven months after the penalty date of 3 March 2015 £1, 280.70 of the tax liability remained unpaid.

30

25. £1,280.70 of the tax liability for the year ending 5 April 2015 remained unpaid as of 13 April 2016.

26. Penalty Notices at a rate of 5% of the tax unpaid at the penalty date which totalled £64.00 was issued on 17 March 2015, 14 August 2015 and 23 February 2016.

5

27. **The Submissions**

28. The Appellant appealed against the 2011-2012 Late Payment Penalty on the grounds that he had moved abroad and had instructed his Agent to deal with his tax affairs and inform him of payment due.

10 29. This appeal was rejected on 23 May 2013. A review was offered and carried out and the conclusion on 29 July 2013 was that the decision of HMRC should be upheld.

15 30. The Appellant complained to HMRC regarding his appeal on 1 April 2014 and the Complaints Team replied on 17 April 2014 advising him to make an appeal to HM Courts and Tribunal Service. This was not done until 18 March 2016 some two years later.

31. On 18 March 2016 the Appellant through his Agent Northern Accountants Ltd. notified the appeal to the Tribunal and stated the grounds of appeal as follows;

20 32. a) Our client did everything to be able to make payment on time but being out of the country and unavailable for contact at the time which resulted in a late payment. They made payment in full as soon as they were able to.

33. b) The tax was paid two months late and it is considered that the penalties equated to an interest rate of 69% which was described as “utterly extortionate”.

34. c) Their client refused to pay 69% interest on the two month late payment and

25 35. d) With regard to the penalties for the 2013-2014 period they considered this was a misallocation as the tax payment has been made in full.

30 36. Reference was made to the case of *Leachman v HMRC* (2011 UKFT 261) in which a fine was overturned on the basis of a genuine mistake which constituted a reasonable excuse. In reply HMRC say that the Appellant had been filing self-assessment returns since 2002 and would be expected to be aware of his obligations under self-assessment. Filing the tax return and paying any tax due by the deadline forms part of his responsibility to meet those obligations without prompt or reminder from HMRC. He should have put in place provisions to make the payment on time even if not in the UK. He should have managed his affairs and retained the funds to make the payment by the due date. No evidence was provided to show that the
35 Appellant had tried to make the payment on time.

37. In spite of the Appellant being unable to make the payments on time he was clearly able to file his 2011-2012 return on 29 January 2013, two days before the payment deadline and the 2013-2014 return on 23 January 2015 which was eight days before the payment deadline.

5 38. With regards to the Penalties being “extortionate”, they say that the Penalties were set by statute and HMRC has no discretion over the amount charged. Further the HMRC say that they have no power to discharge or adjust a Fixed Penalty which is properly due because a party thinks it is unfair. They confirm that the payments made against the 2013-2014 tax year are still outstanding and the payments received have
10 been allocated in order of receipt against charges due.

39. With regard to the case of *Leachman v HMRC (2011)*, HMRC say that that case was decided on its own merits and does not constitute a precedent.

40. Finally they say that this is not a case where they considered a special reduction by way of special circumstances would apply since they do not accept the Appellant
15 being out of the UK and not receiving reminders for payment to be a special circumstance.

41. They therefore believe that the Penalties for the 2011-2012 period of £1,171 and for the period of 2013-2014 totalling £192.00 should be upheld.

20 42. **Conclusion**

43. The Appellant draws reference to the *Leachman* case (2011) stating that there was a genuine mistake between him and his Agent’s understanding as to who would pay the tax. In this case, no evidence has been provided to show that there was such a mistake between the parties. It is possible for a mistake of fact to be capable of
25 amounting to a reasonable excuse but there is nothing to suggest that the Appellant and his accountants got their wires crossed and that they were operating under some sort of misapprehension as to who would undertake which task.

44. A reasonable person seeking to meet their obligation under the tax legislation would have made the necessary arrangements to put their accountants in funds to
30 make the payment by the due date. The Tax Returns were filed by the due date so it was clear that the Appellant was in communication with his accountants regarding the filing of the Returns. It is unclear why arrangements would not have been made at the same time for the payment of the tax.

45. Further, it is not reasonable for a person to transfer a task such as payment to a
35 third party without checking to see if those tasks were carried out regularly and on a timely basis. A Taxpayer should not be able to get out of their obligations in law by saying that they relied on a third party. There is no evidence that the task of making payments was in fact transferred to the accountants. Was there, for example, a letter of engagement with the accountants which outlined their responsibilities and duties?
40 We have found no evidence which suggest that the task of payment of the taxes was

given to the accountants. Given that the Appellant was familiar with the compliance regime over a number of years it is difficult to accept the Appellant's argument that payment could not be effected because he was out of the country and unavailable.

5 46. As regards the second argument of the Appellant that the Penalty is disproportionate, the Tribunal rejects this argument. The Tribunal has considered these matters previously in other cases. In deciding whether a Penalty is unfair the Tribunal looks at all the circumstances of the case to establish whether the penalty is "harsh and plainly unfair". The Penalty is determined by statute which establishes the quantum by reference to the lateness of the payment and the tax due. Given that the
10 Tribunal's power is very limited and the Penalty was properly imposed by statute, there is nothing here to suggest that the Penalty is unfair or disproportionate.

15 47. The Tribunal is sympathetic to the position of the Taxpayer. Whilst it is possible to be out of the country and not in communication with one's advisors, the necessary arrangements to do so should be put in place to allow the tax to be paid. In deciding this appeal it is necessary to consider the actions of the Appellant from the perspective of a prudent Taxpayer exercising reasonable foresight, due diligence and having proper regard to their responsibilities imposed by legislation. If the Appellant genuinely thought that he had made arrangements with the Accountants to make the payment on his behalf, there was no clear evidence presented to support this position.
20 However, simply relying on a third party does not provide a reasonable excuse. The law provides that reliance on a third party does not provide a reasonable excuse for the late payment.

25 48. Parliament created legislation imposing penalties for late payment. They also created the power to HMRC to mitigate any penalty with no provision for an appeal against its decision on mitigation. The Tribunal cannot impose its own view on the appropriate amount of the penalty nor can it discharge or adjust a Fixed Penalty just because it thinks it is unfair. For this reason, we must accept the rate at which the penalty is imposed. The reality is that the Default Surcharge System is not attempting to seek commercial restitution for late payment by the Taxpayer. It is a deterrent to
30 ensure that their business fulfils its two main priorities in its dealings with HMRC which are to submit VAT Returns on time and secondly to make payment by the due date.

49. In the circumstances therefore the appeal is dismissed on the grounds that there was no reasonable excuse and the Penalty is upheld.

35 50. 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
40 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

51.

**DR K KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 08 AUGUST 2016

5