



TC05534

Appeal number: TC/2016/04689

INCOME TAX – Late Payment Penalty - Schedule 56 Finance Act 2009 - Payment made by cheque - Cheque dishonoured by bank for an unknown reason - Whether reasonable excuse? - No - Whether special reduction incorrectly refused? - No - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR WILLIAM COOMBER

Appellant

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

The Tribunal determined the appeal on 22 November 2016, without a hearing, and 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 2 September 2016 (with enclosures), HMRC's Statement of Case (with enclosures), acknowledged by the Tribunal on 29 September 2016, and the Appellant's Reply, being a letter from Ashdown Hurley Chartered Accountants dated 26 October 2016 and its enclosure (page 2 of 2 of an undated bank statement)

DECISION

1. By no later than 31 January 2016, Mr Coomber was due to pay income tax of £18,841.94, in relation to the year ending 5 April 2015.
- 5 2. Mr Coomber tried to pay this sum by means of a cheque, but his cheque was dishonoured by his bank, Santander.
3. On 15 March 2016 HMRC imposed a first late payment penalty (under Paragraphs 1(1), 1(4) and 3(2) of Schedule 56 of the Finance Act 2009: 'the 2009 Act') of £942, being equivalent to 5% of the amount of tax remaining unpaid 30 days
10 after the due date.
4. Payment, made by a replacement cheque, was not in fact received by HMRC until 17 March 2016.
5. Despite representations made on Mr Coomber's behalf, HMRC upheld the penalty on 25 May 2016.
- 15 6. That decision was upheld on review on 5 August 2016.
7. In his Grounds of Appeal, Mr Coomber says that he sent the original cheque on 2 February 2016. There is no evidence as to the date of the cheque (for instance, the counterfoil) or the date upon which it was sent. But I find (i) that it was received by HMRC on 4 February 2016 and (ii) in accordance with HMRC's usual practice, the
20 amount was immediately credited to Mr Coomber's account, pending successful clearance.
8. However, the cheque was dishonoured by Mr Coomber's bank, Santander. On 8 February 2016 it was recorded by Santander, on its own system, as an 'Unpaid cheque', even though, and I so find, Mr Coomber had sufficient funds available to him
25 for the cheque to be honoured.
9. There was a conversation between Mr Coomber's agents and HMRC on 1 March 2016 during which the agents were mistakenly told that the amount owing was nil. I find that this happened because HMRC's records were not updated, removing the credit which had been applied in anticipation of the cheque clearing, until 2 March
30 2016.
10. Mr Coomber says that he only became aware that the cheque had not been cashed when he saw his printed bank statement on or about 1 March 2016. There is no evidence, even now, as to why the cheque was dishonoured. Production of the cheque might have helped. It is suggested that the cheque was returned by Santander to
35 HMRC, but, if it was returned, it will have been destroyed by HMRC in accordance with their routine policies. There is no evidence as to whether Mr Coomber ever asked Santander if, as part of its ordinary cheque-clearing processes, it scanned and kept a copy of the cheque which it was dishonouring. Likewise, there is no evidence as to any correspondence or communication between Mr Coomber and Santander

inquiring as to its treatment of this cheque and the reason for its dishonour. If Santander has given Mr Coomber a reason for that cheque being dishonoured, he has not put it before the Tribunal.

5 11. Having become aware of the situation, Mr Coomber paid the tax due, and it was credited by HMRC on 17 March 2016.

12. It is not in dispute that the payment, so made, was received late, and outside the 30 day period afforded by the legislation.

10 13. As such, the key question which I must determine is whether Mr Coomber can satisfy me, on the balance of probabilities, that he had a reasonable excuse for this failure: see Paragraph 16(1) of Schedule 56 of the 2009 Act.

14. The meaning of reasonable excuse in this context is well-established. It derives from the decision of HHJ Medd QC in *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, where he stated (in the context of VAT penalties):

15 “ It has been said before in cases arising from default surcharges that
the test of whether or not there is a reasonable excuse is an objective
one. In my judgment it is an objective test in this sense. One must ask
oneself: was what the taxpayer did a reasonable thing for a responsible
trader conscious of and intending to comply with his obligations
20 regarding tax, but having the experience and other relevant attributes of
the taxpayer and placed in the situation that the taxpayer found himself
at the relevant time, a reasonable thing to do?”

15 15. HMRC considered that there was no reasonable excuse for Mr Coomber not to have paid by the penalty date.

25 16. In his Grounds of Appeal, Mr Coomber argues that his first chance to monitor his bank statement - and hence discover the problem - was on 1 March 2016. I observe that Mr Coomber's case in this regard has fluctuated slightly. In his Grounds of Appeal dated 2 September 2016 it is said that the statement was *received* on 1 March 2016. On 26 October 2016 it is said that the statement was received on 29
30 *February 2016*. In the letter of 17 June 2016, it is said that the statement was *dated* 1 March 2016. Perhaps these discrepancies are inconsequential in the overall scale of things. However, unfortunately, the copy statement latterly provided on Mr Coomber's behalf, which deals with transactions up to and including 23 February 2016, is incomplete (it only has page 2 of 2) and otherwise undated.

35 17. Mr Coomber argues that he '*cannot be expected to contact the bank by telephone, on a regular basis, to see if cheques have cleared*'.

40 18. I disagree. In my view, it was Mr Coomber's responsibility, as the taxpayer, to make sure that his tax was paid on time. Mr Coomber chose to pay his tax liability by cheque rather than by some other means (for instance, BACS, Faster Payment or Direct Debit) which would have given him the immediate knowledge and assurance that the payment had been safely received. Mr Coomber also chose to pay his tax at a

very late stage. Whilst he was entitled to do so, he was nonetheless, in doing so, taking a risk that, if anything went wrong with the cheque, or (for example) if it went astray in the post, payment would not be made in time, and the clock for the purpose of penalties would start to run against him.

5 19. To my mind, it is also relevant that this was an important and large payment. Santander offers telephone banking, and his bank statement gives a freephone (0800) number at which the bank could be contacted. No reason is put forward why Mr Coomber, having made this payment by cheque, could not have checked with his bank to see if it had been cleared. I do not see any reason why he should not have
10 done so.

20. Mr Coomber advances the proposition that it is *'normal practice'*, if a cheque is dishonoured for some reason, for the creditor (here, HMRC) to contact the payer to inform them of the same. But there is no evidence or other material before me as to this alleged practice, and, if it exists, whether it is indeed *'normal'* as alleged, and, if
15 even if normal in other contexts, whether it applies to HMRC.

21. It is the taxpayer's responsibility to ensure that any sums due to HMRC are paid on time. In my view, it was not HMRC's responsibility to have told Mr Coomber that his cheque had been dishonoured, and I am not pointed to any statement of principle or decided case which says that HMRC is subject to any such duty.

20 22. I should add that I have no doubt at all that, had Mr Coomber become aware of the situation sooner, he would have paid sooner. But the question for me is one of wider principle.

23. Taking these factors into account, and applying the words of HHJ Medd QC, then, in my judgment, the reasonable taxpayer in Mr Coomber's position would have
25 phoned the bank to find out whether the big tax cheque had cleared. His failure to have done so was unreasonable.

24. In short, I do not consider that Mr Coomber has advanced any reasonable excuse for the failure to pay the tax on time.

25. I have also considered whether there are any *'special circumstances'*, within the
30 meaning of Paragraph 9 of Schedule 56 which would justify reduction of the penalty.

26. In *Clarks of Hove Ltd v Bakers' Union* [1979] All ER 152 the House of Lords considered the meaning of "special circumstances" in the context of employment law. Geoffrey Lane LJ said that "... *to be special the event must be something out of the ordinary, something uncommon ...*". Similarly, in *Crabtree v Hinchcliffe* [1971] 3 All
35 ER 967 in the context of share valuations for the purposes of capital gains tax, Lord Reid said "*'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'.*" In the same case, Viscount Dilhorne said "*for circumstances to be special they must be exceptional, abnormal or unusual ...*".

27. Those statements of principle have been quoted and adopted by the First-tier Tribunal in the context of Schedule 56 penalties: for example, in *White v HMRC* [2012] UKFTT 364 (TC).

5 28. In my view, there is nothing sufficiently abnormal or out of the ordinary in this case to justify a special reduction. A cheque for a large sum was presented, and it was dishonoured. The taxpayer failed to keep track of the payment, and whether the cheque had cleared. He both could, and should, have done.

10 29. I consider that HMRC, in assessing whether there are any special circumstances, has applied the correct test, in a way which is intelligible, taking account of relevant features, and leading to an outcome which is unchallengeable in public law terms. Even if I am wrong in my assessment of my own jurisdiction, and I can look at the matter of special reduction entirely afresh, I still do not apprehend any circumstance which is sufficiently out of the ordinary to engage Paragraph 9.

30. Accordingly, and for the above reasons, the appeal is dismissed.

15 31. 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
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

25 **Dr CHRISTOPHER McNALL**
TRIBUNAL JUDGE

RELEASE DATE: 6 DECEMBER 2016