



TC05535

Appeal number: TC/2016/03930

Capital Gains Tax – late payment penalty – Schedule 56 Finance Act 2009 – whether reasonable excuse – insufficiency of funds – whether outwith his control- yes – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEIL CROSSLEY

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 5 December 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 20 July 2016 (with enclosures), the appellant's letter to the Tribunal dated 10 September 2016, and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 6 October 2016.

DECISION

Background

5 1. This is an appeal against a first late payment penalty imposed under paragraph 3(2) of Schedule 56 Finance Act (FA) 2009 for a failure to pay tax on time for the year ending 5 April 2015.

2. There is no dispute that on the expiry of 30 days after the specified date for payment of tax Mr Crossley had not paid the all of the tax due and that the rate of
10 penalty is 5%.

3. The notice to file for the year ending 5 April 2015 was issued to Mr Crossley on 6 April 2015 and the electronic return was received on 30 January 2016 and processed on 3 February 2016. Mr Crossley chose to calculate his liability and therefore knew the sum to pay by the due date.

15 4. His total tax liability for that year was £16,766.68 of which £12,908.28 related to capital gains tax and £3,858.40 to income tax. On the expiry of the 30 days, namely 3 March 2016, £14,366.68 of the tax liability remained unpaid.

5. Mr Crossley is disputing only that part of the penalty which relates to the late payment of capital gains tax. HMRC have not addressed the fact that their penalty is
20 calculated on the whole of the outstanding tax paid. Further it has proved impossible to reconcile the figures produced. Mr Crossley confirmed that he paid a total of £16,354.89 (covering tax and interest) in two instalments on 9 and 10 March 2016. However, the self-assessment statement dated 3 March 2016 shows an outstanding balance of £16,372.26. The difference is not material to this decision.

25 The facts

6. Mr Crossley had a portfolio of Buy to Let properties funded by Royal Bank of Scotland (“RBS”). He had a flexible business loan with RBS secured by charges on each property. On 23 September 2014, he sold one of those properties for £112,816 (after expenses). RBS insisted on repayment of 100% of the gross sale proceeds of
30 £115,000 before the legal charge on the property was discharged.

7. On 27 February 2016, Mr Crossley’s 25 year investment savings policy matured with cleared funds of £21,555.34 on 2 March 2016. He received cleared funds on 7 March 2016 and paid HMRC two instalments of £6,394.89 and £10,000 on 9 and 10 March 2016 from his HSBC bank account (The maximum daily transfer was
35 £10,000.)

Discussion

8. This is a most unusual case. What is the law? I had particular regard to paragraph 16 Schedule 56 FA 2009 which reads as follows:-

“(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if the person 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) –

- 5 (a) An insufficiency of funds is not a reasonable excuse, unless attributable to events outside the person’s control,
- (b) ...
- (c) Where the person had a reasonable excuse for the failure but the excuse has ceased he/she is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.”
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9. As HMRC correctly point out, there is no statutory definition of “reasonable excuse”. Although the case relates to Vat, the principle is the same for CGT, and in *The Clean Car Co Ltd v Customs & Excise Commissioners* [1991] VAT TR 234 HH Judge Medd QC said:-

15 “It has been said before ... the test of whether or not there is a reasonable excuse is an objective one. In my judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a reasonable trader conscious of and intending to comply with his obligations 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

20 reasonable thing to do?”

10. Mr Crossley has consistently argued that whilst he was aware that he would face a capital gains tax bill, nevertheless, because RBS would only enable him to give a clean title to the purchaser if the whole sale proceeds were remitted to them, his inability to pay was completely outwith his control. I find that he could only conclude

25 the sale if he could give a clean title and he could only do that if all of the sale proceeds went to RBS. That was an event that was entirely outwith his control. Accordingly, insufficiency of funds is capable of being a reasonable excuse. Was it?

11. In this instance, on the balance of probability, given that Mr Crossley also had an outstanding income tax liability, it was likely that he had no other funds available.

30 This is not the “usual” situation where a taxpayer receives funds but does not make provision for the tax liability. He had to sell the property to repay RBS and he had no room to manoeuvre with RBS.

12. He did pay his outstanding tax liability promptly after his policy matured and he received the cleared funds which meant that the outstanding tax was paid 38 days late

35 13. I find that in the unusual circumstances pertaining in this case, Mr Crossley did act both wholly reasonably and without unreasonable delay. Objectively viewed he did the best that he could in the situation in which he found himself.

14. For all these reasons I find that the penalty in regard to capital gains tax is not upheld but it is in respect of Income tax. The appeal is therefore partially successful.

15. 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 “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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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 7 DECEMBER 2016

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