



TC03607

Appeal number: TC/2013/07184

Income tax – late payment penalty – whether reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RODNEY GARDNER

Appellant

- and -

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

**TRIBUNAL: JUDGE W D F COVERDALE
 MR ALAN SPIER**

Sitting in public at Manchester on 4th February 2014

Miss S Nash, Accountant, of Messrs Simpson, Burgess Nash for the Appellant

Mrs H Roberts, Officer of HMRC, for the Respondents

DECISION

1. Rodney Gardner appeals against penalties charged by the Respondents for the late payment of his 2010-2011 and 2011-2012 income tax liability. The tax returns for both years were submitted on time on the 31st January 2012 and the 31st January 2013 respectively. Any tax owed for 2010-2011 was due by the 31st January 2012 and the tax owed for 2011-2012 was due by the 31st January 2013: S59B Taxes Management Act 1970
2. The total tax payable pursuant to the 2011-2012 tax return was £21,391.74. No payment was made within 30 days of the due date and a penalty of £1,069.00 was imposed on the 19th April 2012 under Schedule 56 of the Finance Act 2009 i.e. 5% of the sum due.
3. On the 4th September 2012 a further penalty of £1,069.00 was imposed following the continued failure to pay the tax due, which was by then more than 6 months late.
4. Payments of £398.76 and £2,500 were made on the 29th November 2012 and the 7th January 2013 respectively; this left £18,492.96 outstanding on the 31st January 2013 and a further 5% penalty of £924.00 was imposed on the 2nd April 2013.
5. The total tax payable pursuant to the 2012-2013 tax return was self assessed as £131,950.00. No payment was made within 30 days of the due date and a penalty of £6,597.00 was imposed on the 2nd April 2013.
6. On the 14th August 2013 a further penalty of £6,597.00 was imposed following the continued failure to pay the tax due, which was by then more than 6 months late.
7. On the 18th October 2012 a time to pay arrangement was made but Mr Gardner did not adhere to this arrangement. A number of Self Assessment Statements were issued to Mr Gardner and there was correspondence between his agents and the Respondents.
8. There have been adjustments to the late payment penalties and the Respondents have today produced to the Tribunal a revised schedule showing that the total penalties for 2010-2011 are now £2,695.00 and the total penalties for 2011-2012 are £4,044.00.
9. Paragraph 13 of Schedule 56 of the Finance Act 2009 provides that a person
 - (1) may appeal against a decision of HMRC that a penalty is payable ...
 - (2) may appeal against a decision of HMRC as to the amount of a penalty payable ...
10. Paragraph 16 states:

(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.

5 (2) For the purposes of sub-paragraph (1)

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside [the person's] control,

(b) where [the person] relies on any other person to do anything, that is not a reasonable excuse unless [the person] took reasonable care to avoid the failure, and

(c) where [the person] had 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 ended.

15 11. In this case the Tribunal is satisfied that the penalties have properly been charged and it is, therefore the reasonable excuse test that is pertinent today.

12. in considering what is a reasonable excuse the Tribunal has applied the principles set out in the case of *Customs & Excise Commissioners v Steptoe* (1992) STC 757: if there is an inability to pay tax that is not a reasonable excuse but the underlying reason for that inability to pay can constitute a reasonable excuse.

13. In *Eastwell Manor Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 293 (TC) it was stated that:

“The test in Steptoe requires the Tribunal to take for comparison a person in a similar situation to that of the actual taxpayer who is relying on the reasonable excuse defence. The Tribunal must then ask itself - with that comparable person in mind - whether, notwithstanding that person's exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the insufficiency of funds which led to the failures.

The Tribunal thus needs to be persuaded that that reasonable competent businessman would have defaulted when faced by the same or similar predicament, despite exercising reasonable foresight”.

14. The Tribunal accepts the Respondents' submission that the question for the Tribunal is whether a reasonable competent businessman, giving his affairs reasonable foresight and applying due diligence, would have made his payment late.

15. The principal matters upon which Mr Gardner relies in this appeal are:

35 1.) He believed that his tax liability was likely to be substantially reduced or extinguished by terminal loss relief; he had reasonable cause to believe that his liability would be cancelled based upon information provided by his professional advisers.

2.) He had business and legal problems and changed professional advisers.

3.) His previous accountant had proposed an inappropriate accounting date (which impacted upon the terminal loss calculation). He had relied upon that accountant who failed to submit amendments to the 2011-2012 Self Assessment returns for either the Limited Liability Partnership or the individual partners.

4.) He believed he was acting correctly in advising the Respondents that he would not have any liability and in not paying any tax; he demonstrated his responsibility by keeping the Respondents fully advised of the difficulties he was facing

5.) There was a significant and unexpected reduction in his work following an adverse decision in Harrison v Black Horse Ltd.

6.) Put together, these were exceptional circumstances.

16. With regard to the issue of terminal loss relief Mr Gardner did indeed write to the Respondents on 09.09.2013 advising that the years 2010-2011, 2011-2012 and 2012-2013 had now been adjusted and he asked the Respondents to reconsider their position in the light of the amended returns.

17. The Respondents have correctly observed that only a revised income tax return alters the tax due for a year. Future loss claims do not alter the liability for a tax year: they are a claim for relief. The relevant time for consideration of whether there is a reasonable excuse for the late payment of tax is the time a sum is due and not later.

18. Mr Gardner's loss claim arose in the year 2012-2013. Where a claim includes a claim to carry back the loss to earlier years the claim does not disturb the earlier year's assessment. Neither does the claim disturb the penalty charged in that earlier year because the return for the earlier year has not been amended. When the claim for losses is made the effective date of payment attracting the credit will be the date the valid claim to the relief is made. This date was after the trigger dates for the late payment penalties for 2010-2011 and 2011-2012.

19. Any amendment to a tax return that reduces a liability will, in turn, reduce the late payment penalty. The Respondents acknowledge that the 2011-2012 tax return was amended and the tax liability reduced by £90,710.20 to £41,239.8 on 09.09.2013 and consequently the late payment penalties were reduced to £2,061.00 (5% of £41,239.00) at that time.

20. Furthermore an overpayment relief claim for 2010-2011 was processed by the Respondents and a free standing credit of £2,157.42 was allocated on 28.10.2013. The 2010-2011 tax liability was therefore reduced to £19,235.32 and the late filing penalty amended to £2,738.

21. Further adjustments were made on 29.01.2014 and these reduced the late payment penalties further to the levels recited in paragraph 8 above.

22. The above matters have been recited at some length in order to demonstrate that appropriate allowances have been made in respect of loss relief and overpayment relief. The Tribunal concludes that no further allowances can be made to Mr Gardner in respect of these matters.

5 23. At all material times Mr Gardner has relied upon accountants to keep his tax
affairs in order. Miss Nash, his present accountant, submits to the Tribunal that if her
predecessor had adopted a Cash basis for accounting, rather than a Work in Progress
basis, the above figures would have been significantly different and losses would have
been smoothed out with less financial prejudice to Mr Gardner. This may well be
10 correct but the Respondents have to deal with accounts as submitted to them and they
cannot themselves change a taxpayer's accounting basis.

24. In so far as the accounting basis has led to Mr Gardner's liability for penalties
he cannot rely upon the actions of his previous accountants as a reasonable excuse for
the late payment of tax: Paragraph 16(2)(b) of Schedule 56 of the Finance Act 2009.

15 25. Likewise the adoption, by his previous accountants, of an accounting date that
Mr Gardner and his new accountants now consider to be inappropriate cannot assist
him in this appeal, nor any other failures by those accountants.

26. Mr Gardner suggests that he has acted in good faith in keeping the Respondents
fully advised of his difficulties and his arguments. It has to be observed that he did not
20 even make timely payment of that part of his tax liability that he would, in any case
and regardless of the loss relief argument, have been obliged to pay. He did not
adhere to a Time to Pay arrangement.

27. Finally Mr Gardner relies upon a business misfortune in the form of an adverse
Court decision (*Harrison v Black Horse Ltd*) which had a disastrous effect upon his
25 solicitor's niche practice and resulted in a significant reduction of work. The Tribunal
considers this to be something that a reasonably competent businessman would have
taken into account in conducting a specialist business and Mr Gardner, as a practising
solicitor, would be well aware of the concept of Litigation Risk. This does not amount
to a reasonable excuse within the terms of the *Stepto* and *Eastwell Manor* tests.

30 28. The penalties have properly been imposed and this appeal is, therefore,
dismissed.

29. 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
35 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.

**W D F COVERDALE
TRIBUNAL JUDGE**

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