



TC06943

Appeal number: TC/2018/07155

INCOME TAX – penalties under Schedule 56 FA 2009 for not paying tax by relevant date – interaction with failure to notify liability in time – whether reasonable excuse: yes, but once it ceased not remedied without unreasonable delay – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SABIRA GULAMHUSSEIN

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 21 January 2019 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 12 November 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 4 December 2018 and the appellant's response on 2 January 2019.

DECISION

1. This was an appeal by Ms Sabira Gulamhussein (“the appellant”) against two penalties of £804 each assessed on her for her failure to pay the tax due for the tax year 2015-16 by the relevant dates.

Facts

2. The appellant was issued with a notice to file an income tax return for the tax year 2015-16 on 2 November 2017. That notice required the appellant to deliver the return by 2 February 2018 (“the due date”).

3. The return was filed on 27 November 2017 and showed a tax liability of £16,086.72.

4. On 28 November 2017 HMRC issued a notice informing the appellant that a penalty of £804.00 had been assessed for failure to pay the tax by 2 March 2017 and that a further penalty of £804.00 had been assessed for failure to pay the tax by 2 August 2017.

5. On 10 May 2018 the appellant, through her accountants Smartax Ltd, appealed to HMRC against the penalties.

6. On 21 June 2018 HMRC rejected the appeals as they said that the appellant had failed to notify liability by 5 October 2016. They informed her that she could request a review or notify her appeal to the Tribunal.

7. On 20 July 2018 the appellant requested a review.

8. On 15 October 2018 HMRC wrote to the appellant with the conclusion of the review. The conclusion was that the penalties were upheld.

9. On 12 November the appellant notified her appeals to the Tribunal.

Law

10. Schedule 56 Finance Act 2009 governs the penalty in this case:

“Penalty for failure to pay tax

1—(1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the day after the date specified in or for the purposes of column 4 of the Table in relation to that amount.

	Tax to which payment relates	Amount of tax payable	Date after which penalty is incurred
PRINCIPAL AMOUNTS			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid

Amount of penalty: occasional amounts and amounts in respect of periods of 6 months or more

3—(1) This paragraph applies in the case of—

(a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table,

...

(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.

11. The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to pay by the given date (paragraph 16 Schedule 56), if a time to pay arrangement was in force (paragraph 10) or if HMRC's decision as to whether there are special circumstances was flawed (paragraph 9).

12. Section 59B Taxes Management Act 1970 ("TMA") (referred to in the Table) provides relevantly:

“(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

(b) was not given notice under section 8 ... of this Act until after the 31st October next following that year,

the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 ... was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.”

Grounds of appeal & HMRC’s response

13. The grounds of appeal given by Smartax on the appellant’s behalf are:
 - (1) A late payment penalty should not be justified on the basis of a failure to notify.
 - (2) HMRC Manuals show that where there is both a failure to notify penalty and a surcharge, the surcharge is cancelled – the same should apply to late payment penalties.
 - (3) The appellant took reasonable care to ensure her tax affairs were in order by seeking to register for SA on 24 January 2017 before the payment date and the filing date, an act wrongly denied by HMRC’s reviewing officer.
 - (4) She made further attempts to register and succeeded only in October. During this time she was undergoing a turbulent pregnancy with her fourth child. Had she been registered first time she would have got a UTR so that she could pay the tax. She was concerned that without a UTR the payment would not be allocated correctly.
 - (5) The “penalty clock” should stop when notification of liability was made, which was on 24 January 2017.
14. HMRC say in response that:
 - (1) The appellants application to register for SA was rejected because her PAYE record was in the name of Sabira Dhanji, so that the NINO quoted by her did not match HMRC’s records and the system automatically rejected the application.
 - (2) The appellant did not contact HMRC again until 6 October 2017 when she requested a UTR and was told she was not registered. She only then explained that she wished to be known by as Ms Gulamhussein, not Mrs Dhanji, and the records were updated so she was able to register online.
 - (3) Because she had not notified liability in time the payment date remained unchanged. Late registration for SA following a failure to notify does not change the date of liability to pay. A payment date can only be altered if failure to notify does not apply.
 - (4) Because the appellant sought to register on 24 January she must have been aware of the requirement to pay the tax due and when. By not contacting HMRC to find out why the application was rejected and then submitting a further form in the same wrong name shows a lack of care, so there was no reasonable excuse.
 - (5) The Manuals refer to the position before 2009 in relation to the surcharge in s 59C TMA, not Schedule 56 penalties.

(6) HMRC considered whether the grounds of appeal revealed any special circumstances but considered they did not.

Reasons for my decision

15. Two points of law are clear. The appellant failed to notify liability before 5 October 2016, something which she was required to do were she to avoid a penalty by s 7 TMA, given the level of her dividends in 2015-16 which made her liable at the dividend higher rate.

16. The second point is that by failing to notify liability by 5 October 2016, the payment date for her tax liability for the year was 31 January 2017 and not any later date – see s 59B(3) and (4) TMA.

17. In fact HMRC do not seem to have charged her a penalty for the failure to notify despite the mandatory wording of paragraph 16 Schedule 41 FA 2008. They must then in my view have accepted that the appellant had a reasonable excuse for not notifying by 5 October, namely her ignorance of the requirement as was put forward by her accountants, who rightly contrast the heavily publicised filing date for returns with the much less well known failure to notify deadline.

18. And this is a complete answer to the appellant's point about the Manuals. The Schedule 56 penalties do interact with failure to notify penalties in this way: paragraph 15(1) Schedule 41 FA 2008 provided for a penalty under *that* Schedule to be reduced by any late payment penalty, while paragraph 9A Schedule 56 says no account is to be taken in that Schedule of a Schedule 41 penalty. As there is no Schedule 41 penalty there is nothing to be reduced by these penalties, and even if it were possible, nothing to reduce these penalties by.

19. However the accountants do say that the appellant was aware (or at least they were on her behalf) of the penalty date for late payment as they say that their client attempted to register on 24 January well within time for payment to be made by the end of February.

20. There is however nothing in the law which prevents a person paying the tax due before filing a return, and it seems somewhat odd for the appellant to be attempting to register for SA on 24 January so as to be able to pay by the end of February when the filing deadline was much nearer, 2 February on my reckoning, 9 February by HMRC's apparent concession (though the appellant would not have known that). The accountants say that the appellant thought she simply had to file the tax return without any registration requirement, something which is also true, but is not practically possible if the return is filed electronically (though here the paper deadline was the same given the date of the notice to file).

21. However the position remains that the tax had to be paid by 2 March 2017 to avoid a penalty, but was not paid until much later. Is there a reasonable excuse for that failure? The appellant says that she did not wish to pay without a UTR or the payments sent to HMRC without a reference number of any sort might get lost. That is obviously a possibility, given how much HMRC stress that a payment reference must be included with payment, but the appellant had a National Insurance Number ("NINO"), which

acts as a reference for those within PAYE who are not within the self-assessment system.

22. But assuming that approach of hers was reasonable, did the reasonable excuse remain after HMRC rejected the registration for self-assessment in January? The appellant exhibited a response from HMRC's computer rejecting her application which does not mention the mismatch of surname with her NINO, but merely says that they could not confirm her identity as "the information does not match our records". HMRC say in their statement of case that she should have contacted HMRC for further information as she was told to do by the rejection screen. But the screenshot does not say that. It told her to visit the GOV.UK website and search "tell HMRC about a change" to update her personal details, but did not tell her what was wrong.

23. She did contact HMRC again on 25 May 2017 (*pace* HMRC's submissions) when she was told she could not be given a UTR because she was "not in SA".

24. She then applied to register again on 4 July 2017 (ditto) but was again rejected because she used the same details as in January.

25. She phoned HMRC on 6 October 2017 again requesting a UTR. The same day she was advised to register again and "general guidance given".

26. An hour later she told HMRC that, as they note, she wanted to be known as "Miss Gulamhusen" (*sic*). She was then able to register.

27. Up to that point in the narrative of events I was sympathetic to a claim for reasonable excuse for not having made the payment by the penalty date, but my sympathy evaporated when I discovered that payment was actually made on 31 January 2018. Over three months is in my view far too long to count as remedying "without unreasonable delay" – paragraph 16(1)(c) Schedule 56 FA 2009.

28. In my view then there is no reasonable excuse for the failure to pay the tax by the penalty date.

29. HMRC have addressed the question whether there were special circumstances, but have found none. I cannot say that this decision was flawed.

30. 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.

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 25 JANUARY 2019