



TC07013

Appeal number: TC/2017/04806

Capital gains tax - penalties for late payment of income tax - appellant asserts she was not conversant with self-assessment and her agent was awaiting an assessment - whether reasonable excuse - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

LORRAINE ABBOTT

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 8 February 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 8 June 2017, and HMRC's Statement of Case received by the Tribunal and appellant on 31 August 2017 with enclosures. The Tribunal wrote to the appellant on 4 September 2017 stating that if she wished to reply to HMRC's Statement of Case she should do so within 30 days of receiving a copy from HMRC. The appellant did not respond.

DECISION

1. This is an appeal by Mrs Lorraine Abbott ('the appellant') against:
 - (1) A first late payment penalty of £1,293 imposed under Paragraph 3(2) of Schedule 56 Finance Act ('FA') 2009 for her failure to pay tax on time for the year ending 5 April 2015.
 - (2) A second late payment penalty of £1,293 imposed under Paragraph 3(3) of Schedule 56 FA 2009 for her failure to pay tax on time for the year ending 5 April 2015.
2. The point at issue is whether the appellant has a reasonable excuse for making late payments.

Background facts

3. The appellant's return for the year ending 5 April 2015 was issued to her on 17 September 2015.
4. The filing date was 24 December 2015 for a non-electronic return or 31 January 2016 for an electronic return.
5. The appellant's non-electronic return for the year ending 5 April 2015 was received late on 17 June 2016 and was processed on 29 September 2016.
6. The appellant's tax liability for the year was £25,871.71.
7. The tax was due to be paid on or before 31 January 2016, in accordance with s 59B(4) TMA 1970.
8. At the penalty date of 3 March 2016, £25,871.71 of the tax liability remained unpaid.
9. Five months after the penalty date of 3 March 2016, £25,871.71 of the tax liability remained unpaid.
10. The tax liability was finally paid in full on 31 October 2016.
11. HMRC issued a notice of penalty assessment on or around 4 October 2016 in the amount of £1,293, being 5% of the tax unpaid at the penalty date.
12. HMRC issued a notice of penalty assessment on or around 4 October 2016 in the amount of £1,293, being 5% of the tax unpaid 5 months after the penalty date.

Relevant Legislation

13. The legislation relating to the imposition of penalties for late payment of income tax is contained in:

Taxes management Act (TMA) 1970

Section 59 B (3) & (4) - Payment of income tax and capital gains tax

(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 or 8A 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 or 8A 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.

Schedule 56 Finance Act 2009

Paragraph 1(1) & 1(4)

(1) A penalty is payable by a person where he/she fails to pay an amount of tax payable 30 days after the date specified in section 59B(3) or (4) TMA 1970 as the date by which the amount must be paid.

(4) The penalty date in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after 30 days from the date specified in section 59B(3) or (4)).

Paragraph 3(2), 3(3) & 3(4)

(2) A person 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, a person 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, a person is liable to a penalty of 5% of that amount.

Paragraph 9

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to -

(a) staying a penalty, and .

(b) Agreeing a compromise in relation to proceedings for a penalty.

Appellant's contentions

14. On 14 October 2016 the appellant's agent, Mr Waller, appealed against the penalties, on the following grounds:

"I am amazed that my client is being held responsible the demand dated 30 September 2016. The last communication was dated 25 May 2016, received 15 June 2016, and after a phone call agreed if it were received by 30.6.16 no charge of penalty. I would also point out that my client's husband's return was sent at same time as the first return of the above (Mrs Abbott) and he received an assessment dated 11.11.15. Awaiting your reply. Also enclosed is Self-Assessment appeal against penalties form."

15. HMRC sent the appellant a letter on 10 November 2016 advising that the extended date of 30 June 2016 was for the tax return only. No late filing penalty had been imposed. The payment deadline remained as 31 January 2016. HMRC advised that the appellant did not make a payment until 12 October 2016. The late payment penalty was therefore correct.

16. On 10 April 2017 the appellant's agent, Mr Waller, wrote to request that the interest on the penalties be adjusted to take in consideration the length of time HMRC took in replying to his letters. This letter was taken, incorrectly, as an appeal against the late payment penalties.

17. On 23 May 2017, HMRC sent out a decision letter to the appellant advising that the deadline for making an appeal against the 30 day and 6 month late payment penalties had passed, and that if she did not agree that the appeal was late she could ask HM Courts and Tribunals Service to review her case.

18. On 8 June 2017 Mr Waller notified the appellant's appeal to the Tribunal, giving the appellant's grounds as:

- "My client's only tax experience has only been the PAYE system.
- She was awaiting an assessment for capital gains.
- Both Mr and Mrs Abbott sent tax returns for year ending 5/4/15 on 12/10/15.
- Mr Abbott received an assessment dated 11/11/15. Mrs Abbott received an assessment dated 30/9/16.
- The delays in awaiting letters at up to 6-8 weeks caused most of these delays."

19. The appeal was returned by HM Courts and Tribunals Service, as details of the decision appealed against and a copy of any written record of any decision appealed against and any statement of reasons for that decision was not included with the appeal.

20. On 3 July 2017 the appellant emailed HM Courts and Tribunals Service to include HMRC's decision letter and to add:

- “Mr Waller is our accountant, therefore our legal representative.
- My tax returns were a mirror image of my husband's, while his were calculated by his tax office a year earlier, mine was not, due to my tax office's incompetency.
- I never received the 30 day or 6-month penalty notices, only a tax bill (10 months late) followed a month later by a demand for interest payments.
- I have always been PAYE, so I was expecting the calculation to come through exactly the same as my husband's.
- During this period I was also forced to retire due to ill health. Consequently, I have found this current situation incredibly stressful and completely avoidable if my tax office had acted efficiently.”

HMRC's case

21. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the appellant to ensure her tax liability for the year ending 5 April 2015 was paid by the legislative due date.

22. Self-assessment places responsibility on customers for their own tax affairs. This includes ensuring that HMRC get payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

23. On 18 August 2015, Mr Waller wrote to HMRC to request a tax return for the year ending 5 April 2015 as his client, Mrs Abbott, had a Capital Gain during the year.

24. HMRC issued the self-assessment return, as requested, on 17 September 2015.

25. The core SA Return (6 pages) covers some types of basic income, such as investment income, state benefits and company pensions/annuities and also covers some reliefs and allowances for taxpayers to claim. As per page TR2 of the return, if a customer requires a supplementary page which has not been issued with the Return, it is his/her responsibility to obtain it by ringing the Self-Assessment Order line. Alternatively, supplementary pages can be downloaded from the HMRC site on the Internet.

26. The self-assessment return for the year ending 5 April 2015 was signed by the appellant on 14 October 2015, and sent in by Mr Waller on 20 October 2015 along with Enterprise Investment Scheme certificate and claim to relief form (EIS form). As page 2 of the return indicated that an employment page and a capital gains summary was required but not included with the completed return, it was returned to Mr Waller on 24 November 2015 as it failed to satisfy the requirements of s 8 and 8a TMA 1970. Section 8 TMA 1970 requires that returns provide information reasonably required for the purpose of establishing the amounts in which a person is chargeable. HMRC will only accept the return if it meets s 8 and 8a TMA 1970. HMRC also advised that the Additional Information supplementary page was required to claim Enterprise Investment relief. The appellant was advised at the same time. HMRC deferred the non-electronic filing date to allow time for the additional information to be provided.

27. Mr Waller completed the Employment, Capital Gains Summary and Additional Information pages and sent the return back to HMRC on 5 December 2015. This was received on 15 December 2015.

28. As the figure of Capital Gains included in the core SA return did not match the figure on the Capital Gains summary page, and as no calculations were provided by Mr Waller or the appellant, HMRC were unable to establish the correct figure. Once again the return was sent back to Mr Waller on 23 May 2016 with a covering note advising why the return was unsatisfactory.

29. Mr Waller contacted HMRC on 6 June 2016 to advise that the EIS form had been correctly completed and requested a copy of SA108 Capital gains summary notes. HMRC extended the return filing date to 30 June 2016 to give him the opportunity to amend the return and issued a copy of SA108 notes as requested.

30. Mr Waller made the necessary amendments and sent the return back to HMRC on 16 June 2016.

31. Once the return meets the requirements it will be logged on to HMRC systems at the date it was received. In this case the return, meeting the requirements of Section 8 and 8a TMA1970, was not received in satisfactory form until 17 June 2016 and was processed on 29 September 2016.

32. The liability for the tax year ending 5 April 2015 was due for payment on 31 January 2016. The appellant did not make full payment until 1 November 2016, which was after both the due payment date and the penalty date, therefore the late payment penalties were correctly imposed in accordance with Paragraph 3(2) of Schedule 56 FA 2009.

33. In the appeal to the Tribunal on 6 June 2017, Mr Waller states that delays in awaiting letters for up to 6-8 weeks caused most of these delays.

34. HMRC contends that the obligation to pay the tax liability does not depend on a tax return having been filed, or a bill for the tax liability or reminder having been received from HMRC. The appellant and her agent, Mr Waller, were aware

that tax on the capital gains made in the year ending 5 April 2015 was due to be paid and this was well in advance of the due date for payment. If the exact liability was not known by 31 January 2016 the tax due could have been estimated by either Mr Waller or the appellant and payment made.

35. Both Mr Waller and the appellant state that identical returns were submitted on 12 October 2015, and that Mr Abbott received his assessment on 11 November 2015. The appellant states that her tax returns were a mirror image of her husband's. She adds that whereas his were calculated by his tax office a year earlier, hers were not, "due to my tax office's incompetency".

36. HMRC contends that each case is dealt with on its own merits. The appellant signed her return on 14 October 2015 and the return was submitted on 20 October 2015. Whilst HMRC cannot comment on other cases, the action taken in the appellant's case was in line with HMRC guidance. A return can only be logged onto HMRC's systems when it meets the requirements of s 8 and 8a TMA 1970. In the appellant's case this was 17 June 2016 and was processed on 29 September 2016.

37. HMRC's records show that Mr Waller has submitted non-electronic self-assessment returns on the appellant's behalf for the years ending 5 April 2011, 2012, 2013 and from 2015 onwards. HMRC contend that although Mr Waller acted on the appellant's behalf, she remains responsible for dealing with and adhering to her obligation to ensure that her tax returns were filed and payment of the tax due were made by the legislative due date. This obligation cannot be transferred to another person.

38. The appellant states that she never received the 30 day or 6-month penalty notices, only a tax bill (10 months late) followed a month later by a demand for interest payments. The penalty notices were sent to the address held on HMRC's record at the time. This was Castlemount, 123 Park Avenue, Enfield EN1 2BE, which is the address the appellant confirmed was her correct address in an email to the Tribunal.

39. HMRC records show that correspondence was not returned under the returned mail service with the Royal Mail. The documents were sent to the address as shown on HMRC's records at the time; under the Taxes Management Act, Part XI, Section 115, they are deemed to have been served on the customer. Therefore the documents are deemed to have been served within the ordinary course of post-delivery in line with s 7 of the Interpretation Act 1978.

40. Mr Waller's letter of 10 April 2017 was an appeal against the interest charged on the penalties. HMRC charge interest on late payments at an annual rate, on a daily basis. It accrues from the date the payment was due, to the date the customer makes payment. Legislation does not provide an avenue of appeal against such interest. There is no mechanism in the Taxes Acts that would allow Mr Waller or his client, Mrs Abbott, to appeal. However, Mr Waller had made an

earlier objection against the interest on 16 November 2016 and HMRC responded on 3 January 2017 to advise the interest charged had been levied correctly.

41. In order for the appellant's appeal to succeed, she must demonstrate that a reasonable excuse existed which prevented her from complying with her Income Tax obligations. HMRC have concluded, based on the evidence held, that no reasonable excuse exists and as a consequence the penalties were correctly charged in accordance with legislation.

Special reduction

42. Paragraph 16(1) allows HMRC to reduce a penalty if they think it is right because of special circumstances.

43. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include:

- ability to pay, or
- the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

44. In other contexts "special" has been held to mean 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

45. HMRC have considered the reasons given by the appellant for appealing the penalties and submit that they are not special circumstances which would merit a reduction of the penalties below the statutory amount.

46. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55 FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was "flawed when considered in the light of the principles applicable in proceedings for judicial review".

47. HMRC's decision not to reduce the penalties under paragraph 16 was not flawed, but in any event there are no special circumstances which would require the Tribunal to reduce the penalties. The late payment penalties charged are in accordance with legislation and there is no reasonable excuse for the appellant's failure to pay her tax on time, nor by the date the penalty arose. HMRC also consider that there are no special circumstances which would allow the penalty to be reduced under Special Reduction.

Conclusion

50. An appeal against a late payment penalty will be successful where the taxpayer shows that there is a reasonable excuse for paying late.

51. Also, where the appellant had a reasonable excuse for the failure, but the excuse has ceased, the appellant is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

52. There is no statutory definition of reasonable excuse, which “is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v HMRC* [2006] STC (SCD) 536 at paragraph 18). This was confirmed by the First-tier Tribunal, in *Anthony Wood trading as Propaye v HMRC* (2011 UK FTT 136 TC 001010). Although the decisions in these cases are not binding, HMRC’s view is that the reasoning is relevant to this appeal.

53. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer’s control, and which prevents them from complying with their obligation to pay on time. However, a combination of unexpected and foreseeable events may, when viewed together, be a reasonable excuse.

54. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. If the taxpayer could reasonably have foreseen the event, whether or not it is within their control, HMRC would expect them to take steps to meet their obligations.

55. The liability for the tax year ending 5 April 2015 was due for payment on 31 January 2016. The appellant did not make full payment until 31 October 2016, which was after both the due payment date and the penalty date, and therefore the late payment penalties were correctly imposed in accordance with Paragraph 3(2) of Schedule 56 FA 2009.

56. As HMRC say, the obligation to pay the tax liability does not depend on a tax return having been filed, or a bill for the tax liability having been received from HMRC. The appellant and her agent, Mr Waller, were aware that tax on the capital gains made in the year ending 5 April 2015 was due to be paid and the due date for payment. If the exact liability was not known by 31 January 2016 the tax due could have been estimated by either Mr Waller or the appellant and payment made.

57. The grounds of appeal put forward by the appellant and Mr Waller do not amount to a reasonable excuse for the late payment.

59. The late payment penalties charged are therefore in accordance with legislation and there is no reasonable excuse for the appellant’s failure to pay her

tax on time nor by the date the penalty arose. There are no special circumstances which would allow the penalty to be reduced.

60. I therefore dismiss the appeal and confirm the late payment penalties of £2,586.

61. 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.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 28 FEBRUARY 2019