



*INCOME TAX – penalty for late payment – no reasonable excuse – no special circumstances
– penalty proportionate – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC7219

Appeal number: TC/2019/01003

BETWEEN

PAUL HENRY BELLWOOD

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 12 June 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 6 February 2019 (with enclosures), HMRC's Statement of Case (with enclosures) prepared on 29 March 2019, and various communications between the parties..

DECISION

INTRODUCTION

1. This appeal is against a penalty of £76 for the late payment of income tax for the tax year 2016 – 2017 (the “**penalty**”). The penalty has been visited on the appellant pursuant to the provisions of schedule 56 to the Finance Act 2009.

SUMMARY OF THE LAW

2. Payment of income tax by a taxpayer who is within the self-assessment regime is due in accordance with section 59B Taxes Management Act 1970. In the case of this appellant, the due date was 31 January 2018. If payment is not made within 30 days of that date, a taxpayer is liable to a penalty of 5% of the tax outstanding. A taxpayer can avoid liability for the penalty if he can show that he has a reasonable excuse, or there are special circumstances (which include whether the penalty is disproportionate). An insufficiency of funds or reliance on another (broadly speaking) cannot be a reasonable excuse.

THE FACTS

3. From the documents that I have read, I find the following facts:

(1) The appellant submitted an electronic tax return for the tax year 2016 – 2017 on 6 November 2017. HMRC calculated the tax due from him as being £3010.35 and a tax calculation showing this was given electronically by HMRC to the appellant.

(2) That tax was due and payable on 31 January 2018. HMRC had failed (initially) to give credit against this amount for the sum of £1,481.52 which had been paid by the appellant to HMRC on 9 December 2015. So the actual amount payable on that date was in fact £1,528.83. Credit for the £1,481.52 was not given to the appellant until 11 July 2018.

(3) The £1,528.83 was still outstanding on 2 March 2018. The appellant made a payment of £1,505.18 on 27 March 2018 and the balance of £23.65 was paid on 14 September 2018.

(4) HMRC initially assessed the appellant for a penalty of 5% of £3,010.35 (£150) but subsequently, having credited the appellant with the £1,481.52, subsequently reassessed the penalty in the amount of £76 (i.e. 5% of the £1,528.83 rounded down).

(5) The appellant appealed against the penalty to HMRC on 29 December 2018 and subsequently notified that appeal to the tribunal on 6 February 2019.

(6) HMRC had also visited a late filing penalty on the appellant but this was subsequently withdrawn.

(7) HMRC’s records show that the appellant has been in the self-assessment regime since 1996.

BURDEN AND STANDARD OF PROOF

4. The burden of establishing that a valid penalty notice has been served on the appellant rests with HMRC. The burden of establishing a reasonable excuse or that there are special

circumstances rests with the appellant. In both cases the standard of proof is the balance of probabilities.

DISCUSSION

5. The appellant puts forward two grounds of appeal. Firstly that he had made a payment of £1,481.52 in December 2015 which was not credited to his account until July 2018. He had made many calls to HMRC to tell them about this error. They did not respond and it was this delay and lack of response which caused the penalty. Secondly, he has never received either an explanation for HMRC's failure to give him credit on a timely basis, for that earlier payment, nor has he ever had an apology from HMRC as to why they failed to give him such credit. He has been promised such an explanation and an apology but has received neither.

6. Taking the second of these two points first, the failure to give an explanation or an apology is not a reasonable excuse for having failed to have made a timely payment of tax in the first place. It might, however, be something about which the appellant can make a complaint to HMRC.

7. However, the initial failure to give credit for the earlier payment and their delay in investigating that before finally giving the appellant credit for that payment, can, potentially, be a reasonable excuse.

8. In the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

"The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

9. In my view this is an accurate reflection of the test and I gratefully adopt it.

10. Regrettably for the appellant it is my view that HMRC's delay in acknowledging and then giving credit for the earlier payment does not provide him with a reasonable excuse.

11. When he submitted his tax return of 2016 – 2017, he was provided by HMRC with a tax calculation which set out the amount that he had to pay in respect of that tax year. This would have been provided to him at the time that he submitted the electronic return. From the evidence I have seen, this set out the amount of payment as being £3010.35. He therefore knew that this amount had to be paid on 31 January 2018.

12. He was confident that HMRC had lost his earlier payment of £1,481.52, and so, instead of paying the full amount, he paid £1,505.18 on 27 March 2018. But he should, of course, have paid this on 31 January 2018, and had he done so, then I think it is highly unlikely that a penalty would have arisen even though the balance of £23.65 was not paid until September 2018. The appellant has given no explanation as to why this payment was not made until two months after HMRC gave him credit for the earlier payment of £1,481.52. But no matter. In my view, the appellant simply got his maths and timing wrong. He could (I suspect) have paid the full amount of £1,528.83 on 31 January 2018. I say this because he was able to pay £1,505.18 some two months later on 27 March 2018. But he failed to do so. The fact that HMRC had lost the earlier payment does not provide an excuse for failing to make a payment which took into

account that lost payment, on time. The objectively reasonable taxpayer in the appellant's position would have paid the £1,528.83, and then argued the toss with HMRC.

13. The appellant clearly has a reasonable excuse for not paying the full amount of £3,010.35 on 31 January 2018. But he has no reasonable excuse for not paying an amount of £1,528.83 on that date.

14. The failure by HMRC to give credit to the appellant for his earlier payment against his 2016 – 2017 tax bill is not a special circumstance. HMRC have said that they have taken into account special circumstances and that there are none. I agree. The Upper Tribunal decision in *Barry Edwards* [2019] UKUT 131 (TCC) endorses the principle that HMRC (and indeed this tribunal) has a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be “special”. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. All that matters is whether the tribunal (or HMRC) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.

15. As I have said above, it was up to the appellant to do his maths correctly, and he should have paid £1,528.83 on 31 January 2018. This is notwithstanding HMRC's failure to give him credit for the earlier payment. That failure is not a special circumstance. Nor is HMRC's lack of explanation or apology. Neither of these is relevant to the late payment of the tax and thus the late payment penalty.

16. I have also considered whether the penalty regime as a whole and its application in this case to the appellant is disproportionate i.e. they go further than is necessary to achieve the object of the penalty regime. Clearly the purpose of the penalty regime for late payment is to encourage timely payment. A regime which imposes a 5% penalty for late payment is proportionate. A similar regime, the default surcharge regime, has been found to be so by the Upper Tribunal. And its application to the appellant would need to be “not merely harsh but plainly unfair” if it is to be disproportionate. A penalty of £76 is not.

DECISION

17. For the foregoing reasons I dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

18. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

RELEASE DATE: 21 JUNE 2019