



TC07810

INCOME TAX – Penalties for late payment of tax – Schedule 56 Finance Act 2009 – whether Appellant had a reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/00190

BETWEEN

ANTHONY JOHN PRESTON

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ROBIN VOS

This appeal was originally assigned to the basic category. However, as a result of the Coronavirus pandemic and the cancellation of the hearing which had been due to take place on 30 March 2020, the appeal was re-categorised on 1 April 2020 as a default paper case. Neither party has requested that the appeal should, instead, be determined by way of a hearing.

The Tribunal therefore determined the appeal on 6 August 2020 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 23 December 2019 (with enclosures), HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 21 May 2020, the Appellant’s Reply dated 9 June 2020 (with enclosures) together with a bundle of correspondence and documents produced by HMRC.

DECISION

INTRODUCTION

1. The appellant, Mr Preston has been charged penalties for the late payment of tax in respect of the tax years ended 5 April 2017 and 5 April 2018. The total amount of the penalties is £8,914.

2. The assessment of the penalties and the amount of the penalties is not in dispute. For the record, based on the evidence provided, I am satisfied that the penalties have been properly assessed and calculated. The only issue I need to determine is whether Mr Preston has a reasonable excuse for his failure to pay the relevant tax on time.

RELEVANT FACTS

3. The essential facts relating to the payment of the tax in question are not in dispute. There is more to say about the reasons put forward by Mr Preston as to why the tax was paid late but I will deal with those reasons below in my consideration as to whether he has a reasonable excuse.

4. Mr Preston submitted a self-assessment tax return for the tax year ended 5 April 2017 on 31 January 2018. On that date, he became liable to a balancing payment of tax of £139,365.

5. He made four payments totalling £40,000 between 25-28 February 2018. There was also a further payment of £5.60 which was made at some point prior to 28 February 2018. This left a total of £99,359.40 owing at that date.

6. On 28 February 2018, Mr Preston contacted HMRC and agreed a time to pay arrangement which involved six instalments to be paid monthly between 28 March 2018 – 28 August 2018.

7. Mr Preston paid the first four monthly payments but then failed to make the payments in July and August 2018.

8. As a result of this, on 9 October 2018, HMRC assessed penalties in respect of the tax remaining unpaid more than 30 days after the due date (£4,968) and tax remaining due more than six months after the due date (£1,606).

9. After these penalties had been issued but before Mr Preston had received the penalty notices, he called HMRC to ask if the payment plan could be reset. The officer he spoke to suggested that he should submit his tax return for the year ended 5 April 2018 so that any payment plan could take into account any further liabilities. He submitted the completed tax return on 24 October 2018. This showed a tax liability for the year of £15,699.95.

10. Mr Preston wrote to HMRC on 6 November 2018 to appeal against the penalties which had been issued in October 2018.

11. On 11 January 2019, a further time to pay agreement was agreed by HMRC. Although HMRC's confirmation did not say so on the face of it, this arrangement related only to the tax due for the tax year ended 5 April 2017 (together with interest) and not to the tax due for the year ended 5 April 2018. Mr Preston observed the terms of this agreement and all of the tax was paid by 27 April 2019.

12. In the meantime, on 19 March 2019, HMRC issued further penalties. The first was a penalty of £1,556 as the tax due for the year ended 5 April 2017 was now more than 12 months late. The second was a penalty of £784 as the tax due in respect of the tax year ended 5 April 2017 was more than 30 days late.

13. The bulk of the tax due for the tax year ended 5 April 2018 was paid on 17 April 2019 with a final balance of £5 paid on 27 December 2019.

LATE PAYMENT PENALTIES

14. Subject to any payments on account, payments of income tax are generally due under the self-assessment system by 31 January after the end of the relevant tax year (s 59B(4) Taxes Management Act 1970). This means that the tax for the year ended 5 April 2017 was due on 31 January 2018 and the tax for the year ended 5 April 2018 was due on 31 January 2019.

15. Schedule 56 to Finance Act 2009 imposes penalties where tax is paid late. The combined effects of paragraphs 1 and 3 of schedule 56 is that there is a penalty of 5% of the amount of tax due if the tax is paid more than 30 days late, a further 5% in respect of any tax which is more than six months late and a final penalty of an additional 5% of any tax which is paid more than 12 months late.

16. Paragraph 16 of schedule 56 provides that there is no liability to a penalty if the taxpayer can show that there is a reasonable excuse for the failure to pay the tax. However, an insufficiency of funds is not a reasonable excuse unless this is attributable to events outside the taxpayer's control (paragraph 16(2)(a) of schedule 56).

17. HMRC may also reduce a penalty if they think it is right to do so as a result of special circumstances (paragraph 9 of schedule 56). Special circumstances do not however include the taxpayer's ability to pay.

18. Paragraph 10 of schedule 56 makes provision for the suspension of penalties where HMRC has agreed a deferral of the payment of tax. If the taxpayer complies with the agreement, no penalty is payable for the period between the date when the taxpayer requests the deferral and the date the agreement comes to an end. However, if the taxpayer breaches the agreement, any penalty becomes payable in the normal way.

12 MONTH LATE PAYMENT PENALTY FOR THE YEAR ENDED 5 APRIL 2017

19. In accordance with paragraph 10(2) of schedule 56, no penalty is payable if the taxpayer would have become liable to the penalty during the period of any agreed deferral unless the agreement is breached.

20. On 11 January 2019, Mr Preston agreed with HMRC a deferral of the remaining balance due for the tax year ended 5 April 2017. There was no breach of this agreement and the instalments were paid on time.

21. Although the effect of the agreement was that the tax remained outstanding more than 12 months after it was due, the result of the agreement is that Mr Preston cannot be liable for the penalty which would otherwise have arisen in the absence of any such agreement.

22. The penalty of £1,556 issued on 19 March 2019 is therefore cancelled.

REASONABLE EXCUSE

23. The test as to whether or not a taxpayer has a reasonable excuse is an objective one. In *The Clean Car Co Ltd v Customs & Excise Commissioners* [1991] VATTR 234, Judge Medd QC said:

“One must ask oneself: was what the taxpayer did a reasonable thing for a responsible 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 in at the relevant time, a reasonable thing to do?”

24. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal confirmed at [71] that, although the test is objective:

“In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the Tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which the taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).”

25. The burden is on Mr Preston to show that he has a reasonable excuse.

26. In their Statement of Case, HMRC submit that the First-tier Tribunal does not have jurisdiction over the time to pay arrangement. It is not entirely clear what HMRC mean by this statement. However, it does not appear that HMRC are suggesting that the Tribunal has no jurisdiction to hear Mr Preston’s appeal against the late payment penalties. This must be right. Schedule 56 confers a clear jurisdiction on the First-tier Tribunal to consider such appeals. There is nothing in paragraph 10 of schedule 56 which suggests that the Tribunal should not have any such jurisdiction where HMRC have allowed payment of tax to be deferred (as is the case with a time to pay arrangement).

27. What HMRC appear to be saying is that the Tribunal should consider whether Mr Preston had a reasonable excuse for failing to pay the tax on the relevant statutory due dates and that it should not focus solely on whether Mr Preston had a reasonable excuse for failing to pay the tax when it became due under the time to pay agreement. This is in contrast to the skeleton argument which HMRC had prepared in advance of the proposed hearing on 30 March which specifically stated that the period of default (and therefore the period in respect of which a reasonable excuse must exist) was the period which started on 28 June 2018. This was the date when the last payment under the time to pay arrangement was made.

28. HMRC do not make any specific submissions on this point. However, it seems to me self-evident that if a taxpayer has agreed with HMRC before the date on which a penalty becomes payable (in this case 30 days after 31 January 2018) that the payment of tax may be deferred, the taxpayer has a reasonable excuse for not paying the tax by the date on which a penalty would otherwise be incurred.

29. As the time to pay agreement was made on 28 February 2018, Mr Preston does therefore have a reasonable excuse for not having paid the tax within 30 days of 31 January 2018 (i.e. by 2 March 2018). This is no doubt one of the reasons for the existence of paragraph 10 of schedule 56 which suspends penalties where tax is deferred.

30. However, that is not the end of the story. Paragraph 10 of schedule 56 specifically permits the assessment of penalties where a deferral agreement is breached. In this case, the deferral agreement was breached by the failure to make a payment on 28 July 2018. I therefore need to consider whether Mr Preston had a reasonable excuse for the failure to make the payment on 28 July and, if so, whether that excuse continued until 11 January 2019 when the further time to pay agreement was made.

31. Mr Preston has put forward two reasons why he did not make the scheduled payments in July and August 2018. The first is that he had a number of unexpected bills (he refers to medical bills, a new boiler and other setbacks as well as struggling to service his borrowings) which left him short of funds. The second reason is that, from early 2018, his son was struggling with depression related problems which resulted in him giving up his university

course in Japan in February 2018 and having ongoing problems which flared up in July/August 2018. Mr Preston says, this was a stressful time both for him and his wife.

32. Whilst I have considerable sympathy for Mr Preston given the circumstances in which he found himself and in no way wish to underestimate the impact of mental health problems both on those who suffer from them and those who are affected by the mental health problems of others, I cannot accept that, in this case, the problems suffered by Mr Preston's son and the impact that this may have had on Mr Preston himself constitute a reasonable excuse for the late payment of tax.

33. Mr Preston has provided documents which show that his son returned to the UK from Japan on 1 February 2018. This was, of course, before Mr Preston entered into the time to pay arrangement with HMRC on 28 February 2018. This demonstrates that, despite the problems with his son, Mr Preston was able to deal with his tax affairs. He was presumably also able to assess his financial resources and, in particular, whether he would be able to meet the monthly payments which he agreed with HMRC.

34. The fact that Mr Preston was able to make the relevant payments for the first four months also shows that these problems were not, at least at that stage, preventing Mr Preston from paying the tax which was due.

35. The only reasonable conclusion from this is that the failure to pay the final two instalments in July and August 2018 was not as a result of any stress or mental health issues but was instead due to a shortage of funds.

36. As already mentioned, a shortage of funds is not normally a reasonable excuse but it can become a reasonable excuse if it is attributable to events outside the taxpayer's control. Mr Preston says that he had unexpected bills including medical bills and also the cost of a new boiler. However, the onus is on Mr Preston to provide evidence of this. Unfortunately, he has failed to do so. The only evidence he has produced is an invoice for an unspecified amount dated 18 October 2019 for some counselling which Mr Preston has been receiving.

37. I do however note that HMRC, in their Statement of Case, specifically say that they do not request Mr Preston to provide any private medical bills or medical documents although they then go on to point out that Mr Preston has not volunteered any documents which show why he did not pay his tax liability by the legislative due dates. There is clearly an inconsistency here. If the reason Mr Preston did not pay the tax was because he was short of funds as a result of unexpected medical bills, this could constitute a reasonable excuse as the shortage of funds would be due to events outside Mr Preston's control.

38. The problem is that I have no information at all about the unexpected expenses which Mr Preston has incurred. He has not given any details about the amounts involved and he has not provided any documentation for non-medical-related expenses which he refers to such as the boiler, other setbacks and the cost of servicing his borrowings. I am therefore unable to accept, based on the evidence which has been provided, that any shortage of funds which may have caused the failure to stick to the payment plan was attributable to events outside Mr Preston's control.

39. My conclusion therefore is that Mr Preston does not have a reasonable excuse for his failure to pay the tax in relation to the first two penalties – £4,968 for being more than 30 days late in paying the tax due and £1,606 for paying tax more than six months late.

40. The remaining penalty is the penalty of £784 in respect of the payment of the tax due for the year ended 5 April 2018, more than 30 days late.

41. Mr Preston's explanation for this is that he thought that, having been asked to submit his tax return for the year ended 5 April 2018 early so that any liabilities could be incorporated into the subsequent time to pay arrangement which was agreed in January 2019. He did not therefore realise that he had to pay this tax separately from the amounts due under the time to pay agreement. He had explained to HMRC that he was expecting a bonus in March 2019 and would also be able to start drawing down on his pension in March 2019, thus enabling him to pay off his outstanding tax liabilities. He had assumed that HMRC had understood that this tax would also not be paid until March/April 2019.

42. The clear inference from this explanation is that the real reason for the late payment of the tax for the year ended 5 April 2018 was that Mr Preston was short of funds. Although it is clear that Mr Preston was suffering from mental health issues throughout the relevant period, this does not appear to me to have been a significant factor in the failure to pay the tax.

43. Mr Preston would have been aware since, at least, October 2018 that he would have to pay tax in respect of the tax year ended 5 April 2018 by 31 January 2019 as this was made clear when he submitted his tax return on 24 October 2018.

44. It is also apparent from Mr Preston's letter to HMRC of 17 March 2019 that he was aware that there was a balancing payment due for the tax year ended 5 April 2018 which had to be paid separately from the time to pay arrangement which was agreed in January 2019.

45. Mr Preston does not refer to any unexpected financial obligations between October 2018 and January 2019 which would prevent him from paying the tax due for the year ended 5 April 2018. In the circumstances, it would be reasonable to expect somebody in Mr Preston's position either to take steps to ensure that he had the funds to pay the tax due or to make arrangements with HMRC to defer the tax (as he did with the tax due for the year ended 5 April 2017).

46. I do not accept that there was some sort of informal agreement that the tax due for the year ended 5 April 2018 could be deferred until March/April 2019. Mr Preston was well aware that a formal agreement needed to be entered into in order to defer the payment of tax and was also aware that the tax due for the year ended 5 April 2018 was not included in the agreement which he reached with HMRC in January 2019.

47. Mr Preston does not therefore have a reasonable excuse for the late payment of tax for the year ended 5 April 2018.

SPECIAL REDUCTION

48. Mr Preston does not suggest that there are any special circumstances which, whilst not constituting a reasonable excuse, should lead to a reduction in the amount of the penalties.

49. HMRC have considered whether there are any special circumstances justifying such a reduction and have concluded that there are not.

50. The Tribunal only has jurisdiction to revisit HMRC's decision if it is flawed in a judicial review sense. This means either that HMRC have not taken into account all of the relevant considerations or that they have reached a conclusion which no reasonable officer of HMRC could have reached in the circumstances.

51. It is clear to me that HMRC have taken all of the relevant factors into account and have reached a decision which was reasonably open to them in the circumstances. I do not therefore have any jurisdiction to reconsider this aspect although I would, in any event, agree that there are no special circumstances which justify a reduction in the amount of the penalties.

CONCLUSION

52. The penalties issued on 9 October 2018 for £4,968 and £1,606 in respect of the late payment of tax for the year ended 5 April 2017 are upheld, as is the penalty of £784 issued on 19 March 2019 in respect of the late payment of tax for the tax year ended 5 April 2018. This is because Mr Preston does not have a reasonable excuse for his failure to pay the tax.

53. The penalty of £1,556 issued on 19 March 2019 in respect of the late payment of tax for the tax year ended 5 April 2017 is cancelled as Mr Preston has no liability for that penalty as a result of HMRC's agreement to defer the payment of tax.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

ROBIN VOS

TRIBUNAL JUDGE

RELEASE DATE: 13 AUGUST 2020