



TC07848

INCOME TAX – Schedule 56 Finance Act 2009 - penalties for late payment – whether taxpayer had a reasonable excuse for his late payment – appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01875

BETWEEN

SAJMIR KERA

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 4 September 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 25 May 2020 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 27 July 2020.

DECISION

INTRODUCTION

1. This is an appeal by Sajmir Kera ('the Appellant') against penalties totalling £1,649 imposed by the Respondents ('HMRC') under Paragraph 3 of Schedule 56 Finance Act (FA) 2009, for failures to submit payment on time for the tax year ending 5 April 2017 and 2018.
2. HMRC accept that there were delays in dealing with the Appellant's 2016-17 tax issues and are therefore not defending the penalties imposed in relation to the 2016-17 tax year. That aspect of the appeal is allowed. In those circumstances the appeal proceeds in relation to a penalty of £284 imposed in relation to the tax year 2017-18 only.

BACKGROUND

3. The Appellant's first tax payment for the year ending 5 April 2018, was due by no later than 31 January 2019, under Section 59B Taxes Management Act ('TMA') 1970.
4. Paragraph 3 of Schedule 56 FA 2009 sets out the provisions in relation to the late payment penalty system. The penalties for late payment can be summarised as follows:
 - i) Under paragraph 3(2) the first penalty is calculated at 5% of all tax remaining unpaid after the expiry of 30 days from the due date.
 - ii) Where tax remains unpaid, after the end of the period of five months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed (paragraph 3(3)).
 - iii) Where tax remains unpaid, after the end of the period of 11 months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed (paragraph 3(4)).
5. The Appellant's tax for the tax year 2017-18 was paid on 28 June 2019 and was therefore late, and a penalty of £284 was therefore imposed under (i) above.

Filing date and Penalty date

6. The 'penalty date' is defined at Paragraph 1(4) Schedule 56 FA 2009 and is the date on which a penalty is first payable for failing to pay the amount, the day after 30 days from the date payment became due.

Reasonable Excuse

7. A taxable person who is otherwise liable to a late payment penalty, may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the penalty (Paragraph 16 of Sch 56 of FA 2009).
8. The law under paragraph 16(2) of Sch 56 of the Finance Act 2009 specifies three situations that are not reasonable excuse:

- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
- (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
- (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.
9. There is no statutory definition of “reasonable excuse”. Whether or not a person had a reasonable excuse is an objective test and “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).
10. 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. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. 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.
11. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that there is a reasonable excuse for the late payment.

The background facts

12. The Appellant’s SA return for the year 2017-18 was issued on or around 10 January 2019 and so was due to be returned by 17 April 2019. Tax was due to be paid by 31 January 2019.
13. The Appellant does not dispute that the payment was not made until June 2019.
14. The Appellant appealed to the Tribunal on 25 May 2020.

The Appellant’s case

15. The Appellant’s grounds of appeal are that he struggled to register for the self-assessment regime and did not successfully do so until January 2019. He therefore had a reasonable excuse for not paying the tax on time.

HMRC’s Case

16. Surcharges issued under Paragraph 3 of Schedule 56 of the Finance Act 2009 are a penalty based solely on the amount of tax outstanding after the due date, and neither the respondents nor the Tribunal have the power to reduce the amount because of mitigating circumstances.

Reasonable Excuse

17. A taxable person who is otherwise liable to a late payment penalty, may escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the penalty (Paragraph 16 of Sch 56 of FA 2009).
18. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

“It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. 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 at the relevant time, a reasonable thing to do?” [Page 142 3rd line et seq.].
19. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.
20. If there is a reasonable excuse it must exist throughout the failure period.
21. The Appellant has not provided a reasonable excuse for his failure to make payment for the tax years 2017-18 on time and accordingly the penalties have been correctly charged in accordance with the legislation.
22. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

23. Paragraph 9(1) of Schedule 56 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 9(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 overpayment by another.
24. 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).
25. Where a person appeals against the amount of a penalty, paragraph 15(1) and (2) of Schedule 56, 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 9 (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'.
26. HMRC have considered the Appellant's grounds of appeal but assert that his circumstances do not amount to special circumstances which would merit a reduction of the penalties.

27. Accordingly, HMRC's decision not to reduce the penalties under paragraph 9 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

FINDINGS OF FACT

28. The Appellant set up a self-assessment account by filing an SA1 form. That was done on 2 January 2019 in relation to the 2016-17 and 2017-18 tax years.

29. The tax return for 2017-18 was filed electronically on 26 March 2019 showing a tax liability of £5,687.50. The return was filed within the time to file. Mr Kera should have notified the Respondent by 5 October 2018 that there was income on which there is a tax liability for the 2017-18 year. He did not do so and therefore penalties apply on the amount unpaid at 31 January 2019.

30. The Appellant's agent indicates that the Appellant attempted to register for self-assessment on 15 November 2017, 25 December 2017, 2 January 2018 and 23 January 2018. I have seen a copy of the "check details" forms for online registration in relation to 15 November 2017 and 25 December 2017, wherein the wrong NINO was used. The agent appears to have handwritten on that copy of the December form that the form was resubmitted with the correct NINO on 2 January 2018. Certainly, on the agent's letter dated 23 January 2018 the NINO appears to be recorded correctly. I accept that although the wrong NINO was used prior to January 2018, the correct NINO was used in attempting to submit the form subsequently.

31. The letter of 7 January 2020 suggests that the problem was an incorrect name spelling on the NI card. It is not clear to me why the agent has reached the conclusion that this was the difficulty. An error message advising that "we cannot confirm your identity" was issued in response to the November attempt and the letter of Mr Kera's representative indicates that the same error message was received to their attempts through January 2018. Mr Kera telephoned the helpline to try and resolve the problem but was told that there was no record of him. Given the difficulty previously was that the Appellant or his representative were using the wrong NINO, it may be that the caller again gave an incorrect number. No information is provided as to when these telephone calls took place but the other attempts to set up a SA account took place at the end of 2017 or beginning of 2018. I therefore consider it likely that these calls took place at around about the same time.

32. At around that time Mr Kera's father was seriously ill in Albania causing anxiety for Mr Kera. It does not appear to have prevented Mr Kera attempting to register.

33. The letter of Harry Sager and Co dated 23 January 2018 attaches the 2017 self-assessment return and therefore the tax liability for that tax year was known at 23 January 2018. The Appellant would further have known that those monies would have been due by 31 January 2018. That document further indicates the amount that Mr Kera would have expected to have become due by 31 January 2019.

34. I accept that Mr Kera was then making corrections to his name on NI documentation and that efforts continued to obtain a UTR. A UTR was obtained by early January 2019.

35. In the first half of 2019 Mr Kera's wife was hospitalised with pregnancy complications and he had sole care of his two young children. I have no information as to the nature or length of the hospital admissions or any impact that it may have had.

36. On or around 26 March 2019 a penalty notice was issued to Mr Kera at his registered correspondence address at 9 Urban Drive.

37. On 5 April 2019 Mr Kera appealed against the penalty to the Respondent.
38. The Appellant knew that the Respondent considered that he had outstanding unpaid tax at the date of 5 April 2019 if not before.
39. On 28 June 2019 the tax liability was paid in full.
40. A person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable. I am satisfied that the penalty notice dated on or around 26 March 2019 gave proper notice (*Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761) and was sent to the postal address linked to the Appellant's SA account.

DISCUSSION

41. Relevant statutory provisions are included as an Appendix to this decision.
42. I have concluded that the tax for the 2017-18 tax year was not paid on time. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalty imposed is due and has been calculated correctly.
43. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event, which prevents him or her from complying with an obligation which otherwise they would have complied with.
44. It does appear that at the end of 2017 and beginning of 2018 Mr Kera made some efforts to register for a SA account. Those failed. Irrespective of why those attempts failed, Mr Kera has not provided any information of what he was doing to further his application until January 2019. I am told that he was attempting to change his name on NI documentation, but I have seen no dates or details of why this took a full 12 months. By January 2019 he would have failed to account for his 2016-17 earnings by over a year, and would be about to miss the deadline for the following year.
45. Mr Kera had a UTR by the beginning of January 2019 but did not pay his tax until June of that year. He also received a penalty notice in March 2019. No explanation has been provided to me as to why then he did not pay his liability by 31 January 2019.
46. Monies were paid on 3 April 2019, 21 May 2019 and 28 June 2019. Since Mr Kera calculated his own tax liability he must have known what was due, and he must have known that the April and May payment would not cover the debt. In any event, by 3 April 2019 the payment for the 2017-18 tax year was already two months overdue.
47. I do accept that had Mr Kera not been had to make convoluted efforts to change his NI documentation, or possibly simply input the correct NINO he may have been in a position to notify the debt by October 2018. However, having managed to file a return, it is not suggested that there were any delays in understanding what was due. Mr Kera knew that he would have to pay his liabilities in January 2019 and he knew that the due date would be 31 January 2019 because the documentation he received in being issued a return said as much. At no point after his SA account had been properly established has he contacted the Respondent and explained a need for a delay in payment. The monies were earned in the 2016-17 and 2017-18 tax years and so ought to have been available.
48. Reference has been made in submissions regarding the ill-health of the Appellant's father and wife, but no further information has been provided. The Appellant's father's ill-

health does not appear to have had any impact on the Appellant's pursuit of a UTR number, and the Appellant continued to make payments and correspond with the Respondent through the first half of 2019, suggesting that his wife's ill-health was not significantly impacting on his ability to deal with his tax-liabilities.

49. I conclude that the Appellant has not shown a reasonable excuse for the late payment of his tax liabilities for the tax year 2017-18.
50. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.
51. Paragraph 15 of Schedule 56 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mr Kera.
52. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which Mr Kera relied upon was delays prior to January 2019. He does not offer any explanation for the subsequent delay to June 2019. I have explained above why I do not consider that delay in registering can provide Mr Kera with a reasonable excuse for his late payment.

CONCLUSION

53. I therefore confirm the fixed penalty of £284 for the tax year 2017-18. Interest has been properly accrued and is payable by the Appellant (*HMRC v Gretton* [2012] UKUT 261 (TCC)).

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.

ABIGAIL HUDSON

TRIBUNAL JUDGE

RELEASE DATE: 17 SEPTEMBER 2020

**APPENDIX
RELEVANT STATUTORY PROVISIONS**

Finance Act 2009

55. The penalties at issue in this appeal are imposed by Schedule 56.

Schedule 56

56. Paragraph 1(4) of Schedule 56 states that the “penalty date”, in relation to an amount of tax, means the day after the date falling 30 days after the date specified in section 254(5) of FA 2004 as the date by which the amount must be paid.

57. Paragraph 3 sets out the amount of penalty payable –

3(1)...

(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.

58. Paragraph 9 of Schedule 56 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

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.

59. Paragraph 13 of Schedule 56 gives a taxpayer a right of appeal to the Tribunal and paragraph 15 of Schedule 56 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

15—

- (1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may —
 - (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9 —
 - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
 - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.
- (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.
- (5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

60. Paragraph 16 of Schedule 56 contains a defence of "reasonable excuse" as follows:

16—

- (1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make payment —
 - (a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and
 - (b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.]
- (2) For the purposes of sub-paragraph (1)—
 - (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
 - (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
 - (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

61. Section 8 - Personal return- provides as follows:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.