



[2021] UKFTT 0202 (TC)

TC08152

INCOME TAX – penalties – request for repayment of penalties and interest paid as a short term loan – whether Tribunal has jurisdiction – no – appeal against penalties for late payment as business in difficulty because of Brexit – whether special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL

Appeal number: TC/2019/09459

TAX CHAMBER

BETWEEN

JAMES BRYER

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The hearing took place on 3 November 2020. With the consent of the parties, the form of the hearing was by video. A face to face hearing was not held because of the restrictions arising current restrictions on movement arising from the COVID-19 crisis. The documents to which I was referred were contained in an electronic bundle of 100 pages including authorities.

The Appellant appeared in person

Ms Iyewuare, litigator of HM Revenue and Customs 'Solicitor's Office, for the Respondents

DECISION

Procedural matters

1. The parties were advised by the Tribunal that this would be a “hearing of the appeal”. It appears from the Tribunal file that it should have been listed as a case management or preliminary hearing, as the subject matter of the appeal was unclear.
2. Specifically, following receipt of the notice of appeal, the tribunal had asked HMRC for representations on jurisdiction because Mr Bryer had appealed an amount of £39,956 but had provided only a decision in respect of an amount of £5,421. HMRC made representations on jurisdiction in February 2020, asking for further and better particulars as to the matters under appeal.
3. Clearly, the COVID-19 crisis intervened shortly thereafter and no further progress was made until, in August 2020, the matter was listed for hearing. Given the issue as to jurisdiction, one would have expected this to be a case management or preliminary hearing. However, as noted above, the parties were advised that it would be a hearing of the appeal.
4. Both parties therefore attended in the expectation that this would be a hearing of the substantive appeal, and the bundle and the parties’ submissions were prepared on that basis.
5. In the circumstances, I considered that it was in the interests of justice (taking into account the overriding objective) to hear the parties’ arguments on the substantive appeal in addition to considering the case management questions involved in this case.

The Notice of Appeal

6. On 19 December 2019 Mr Bryer appealed an amount of £39,956, requesting “repayment of penalties and interest paid during this very difficult time caused by delays created by the actions of Parliament”.
7. Attached to his notice of appeal was a review conclusion letter from HMRC regarding a 30 day late payment penalty charged on 19 March 2019 for the tax year ended 5 April 2018. The amount of that penalty was £5,421.00. HMRC agreed that this was an appealable matter and that it had been appealed in time.
8. In subsequent correspondence as to the scope of the appeal, HMRC identified that an appeal had also been made to HMRC in respect of a six month penalty in the amount of £5,421 in respect of the same period. HMRC had refused to consider that appeal to them due to a procedural issue with regard to payment but had apparently not carried out a review. HMRC agreed that this was also an appealable matter and were prepared to treat the Notice of Appeal as including an appeal against this amount. However, Mr Bryer had not included any documentation regarding this penalty in his appeal to the Tribunal.
9. Given the disparity between the amounts identified as appealable and the amount which was stated to be appealed, HMRC requested further and better particulars of the balance of the amount appealed.
10. In correspondence with the Tribunal on 27 January 2020, Mr Bryer stated that he had been appealing against the full amount for 12 months and did not understand why HMRC were “hiding behind technicalities” and considering only one penalty. It would appear that Mr Bryer did not appreciate that the Tribunal is wholly independent of HMRC and also did not appreciate that, as such, it is necessary to include with an appeal to the

Tribunal the appropriate documentation in respect of all decisions which were being appealed.

11. In a letter dated 4 December 2019 to HMRC, Mr Bryer had described the appealed amount as being penalties and interest which he had to pay at the end of 2018. During the hearing it was eventually established that the amount appealed was made up of the following, which had been included (inter alia) in a Self-Assessment Statement issued to Mr Bryer on 16 April 2019:
 - (1) 2/2/18 – interest – £984.70
 - (2) 20/11/18 – interest – £213.68
 - (3) 20/11/18 – interest – £96.59
 - (4) 26/7/18 – 30 day late payment penalty 16/17 – £10,648
 - (5) 26/7/18 – interest – £247.45
 - (6) 4/10/18 – six month late payment penalty 16/17 – £10,498
 - (7) 4/10/18 – interest – £180.40
 - (8) 20/11/18 – interest – £3,245.87
 - (9) 20/11/18 – interest – £2,817.14
 - (10) 20/11/18 – interest – £2,192.20
 - (11) 31/1/18 – interest – £2,087.60
 - (12) 31/7/18 – interest – £1,323.48
 - (13) 25/4/19 – 30 day late payment penalty for 17/18 – £5,421, issued on 19 March 2019 (this was the penalty for which a review conclusion letter was attached to the ground of appeal)
12. These amounts total £39,956.11 and the copy of the SA statement in the bundle has a handwritten amount of £39,956.11 included on it.

Appellant's case

13. Mr Bryer's case, in summary, was that he had made payments to HMRC in respect of the amounts set out at §10 and that he now wanted to have these repaid to him as he was suffering from cashflow difficulties as a result of Brexit.
14. He was involved in a commercial real estate business and, as a result of the actions of Parliament, transactions had been lost. Mr Bryer had therefore been unable to pay his tax on time.
15. Mr Bryer stated that he had disputed each of the penalties and interest by appealing to HMRC. He had paid the penalties and interest because he had not wanted to become involved in litigation with HMRC.
16. Mr Bryer argued in correspondence and in the hearing that the penalties and interest should be repaid to him because the impact of Brexit and the delays caused by government's failure to implement should be regarded as "special circumstances", meriting a reduction. Both Theresa May (when Prime Minister) and Baroness Hale (in the Supreme Court) had described Brexit as amounting to "special circumstances" and HMRC should therefore also be required to regard it as such. There was also some confusion in some of the HMRC letters to him as to dates, and he considered that HMRC

had not properly taken into account the points as to special circumstances which he had made in correspondence.

17. In correspondence with HMRC (for example, in a letter dated 8 July 2019 addressed to HMRC debt management) Mr Bryer requested that the amounts be repaid to him “in the short term” as a loan so that he could meet his mortgage obligations and to keep his business afloat. He considered that it was only fair that the government should provide support, given that his business difficulties had been caused by the government’s actions. He noted that the government had been able to provide British Steel with a loan for similar Brexit-related circumstances.
18. Mr Bryer considered that the interest and penalties should be regarded in the same way as, in each case, the government was trying to take money away from him.

HMRC’s case

19. HMRC submitted that there are no appeal rights in respect of the interest amounts. The interest arose automatically as a result of the late payment and neither HMRC nor the Tribunal has any power to amend or waive the interest charged.
20. HMRC noted that had been difficult to establish what Mr Bryer was appealing against. Nevertheless, Mr Bryer had been within the self-assessment system for a number of years and should be regarded as familiar with the process of the dealing with his tax obligations. Mr Bryer had not established any reasonable excuse for the failures that led to the late payments; these had arisen despite having entered into Time To Pay agreements with HMRC on 2016. Mr Bryer had a pattern of defaults and late payments even before the Brexit referendum.
21. With regard to special circumstances, HMRC submitted that Brexit had affected many people and could not be regarded as an argument for defaulting on tax payments. A taxpayer acting reasonably would have put funds aside to meet their tax obligations.

Discussion

Subject matter of the appeal

22. Rule 20(2)(d) of the First-tier Tribunal (Tax Chamber) Rules (the Tribunal Rules) states that a notice of appeal must include details of the decision appealed against.
23. Mr Bryer appealed an amount of £39,956 but provided only a review conclusion letter in respect of one penalty, amounting to £5,421. HMRC agreed in correspondence that a subsequent penalty for the same amount was an appealable matter, although it had not been included in the notice of appeal.
24. Mr Bryer set out a summary of the calculation of the amount appealed in an email of 30 September 2020, prior to the hearing and in response to HMRC’s application for directions in February 2020. This email stated that

“the £39,644 [*sic*] will be a combination of penalties and interest as set out below:

5/4/17 – interest – £3,245.87

5/4/17 – interest – £2,817.14

5/4/17 – interest – £2,192.00

5/4/17 – 30 day penalty – £10,648.00

5/4/17 – interest – £714.00

5/4/17 – 6 month penalty – £10,498.00

5/4/18 – interest – £640.41
5/4/18 – interest – £4,298.81
5/4/18 – interest – £3,863.92
5/4/18 – 30 day penalty – £5,421.00
5/4/18 – interest – £232.70
5/4/18 – 6 month penalty - £5,421.00
5/4/18 – interest – £154.99
5/4/18 – 12 month penalty – £5,421.00
5/4/18 – interest – £70.63
27/11/18 – legal costs – £916.40”

25. Although Mr Bryer’s email refers to “£39,644”, this list in fact amounts to over £56,500 and includes a number of items which were not included in the list in Mr Bryer’s appeal. Given his reference to “£39,644” it was not clear whether he was attempting to apply to include all of these items within his appeal or attempting to elucidate at that time the amounts which were eventually established in the hearing to be under appeal, which are those set out in §10.
26. In conjunction with the overriding objective in Rule 2 and the fact that HMRC had attended prepared to make submissions as to the substantive appeal, I considered it appropriate to hear the arguments put forward by the appellant generally in respect of the amounts stated to have been included in the £39,956 and to consider in respect of these whether the Tribunal has jurisdiction to consider the appeal in respect of such amounts.

Interest

27. Mr Bryer sought repayment of various amounts of interest which he had paid to HMRC.
28. It is well-established that this Tribunal is a creature of statute and has only those powers which have been conferred upon it. Interest is a statutory charge and there are no rights of appeal against interest charged on late payments. Mr Bryer did not dispute that he had paid the relevant tax late.
29. As such, and regardless of whether or not the appeal has been properly made, this Tribunal has no power to amend or waive interest charges, let alone order repayment of an amount of interest paid by a taxpayer. Mr Bryer’s appeal in respect of interest payments cannot succeed and is therefore dismissed.

Late payment penalties generally

30. This Tribunal does have jurisdiction to hear appeals against late payment penalties.
31. It was unclear whether Mr Bryer wanted to dispute most of the penalties imposed on him as such. His submissions in the hearing and in the correspondence between Mr Bryer and HMRC stated that he was challenging HMRC’s refusal to repay the penalties to him as a loan. In the hearing, he said that he was “appealing for the penalties and interest paid in 2019 to be repaid”. However, at various points in correspondence he also made the point that payments had been made late due to the business difficulties which he stated had arisen as a result of Brexit.
32. To the extent that Mr Bryer wished to appeal HMRC’s refusal to repay those penalties to him as a short-term loan in order to assist his cashflow which has been impaired due to

Brexit, it is clear that statute makes no provision for an appeal against a refusal by HMRC to lend back to a taxpayer any penalties previously paid to HMRC by that taxpayer.

33. As noted above, this Tribunal has only the powers conferred on it by statute. It does not have a general supervisory jurisdiction. As such, this Tribunal would have no jurisdiction in respect of such an appeal, and so would have no power to consider the reasonableness or otherwise of the refusal, even if details of the decision appealed against had been properly detailed in the appeal as required by Rule 20(2)(d) of the Tribunal Rules.
34. To the extent that Mr Bryer wished to appeal against the penalties themselves, notwithstanding the fact that he had paid the penalties to HMRC, no evidence was provided to the Tribunal to show that the appeal to this Tribunal was brought in time in respect of any penalties other than that charged on 19 March 2019. The penalties had all been issued substantially more than 30 days before the date on which the appeal to the Tribunal was made.
35. As such, I find that the appeal in respect of all penalties other than that issued on 19 March 2019 was brought out of time and, in the absence of permission to make a late appeal (and in the absence of any application for such permission) the Tribunal does not have jurisdiction to hear the appeal in respect of any of the penalty amounts other than that issued on 19 March 2019, as follows.
36. HMRC had stated that they would consider an appeal against a later penalty in the same amount as well, but it was clear from the information before the Tribunal that Mr Bryer had not included that penalty in the amount appealed.

Late payment penalty issued on 19 March 2019

37. Mr Bryer appealed the 30 day late payment penalty of £5,421 issued to him on 19 March 2019. The review conclusion letter in respect of this penalty was issued on 26 November 2019; Mr Bryer appealed to this Tribunal on 19 December 2019 and so the appeal in respect of this penalty was brought within the statutory deadline.
38. Mr Bryer did not give a specific reason for this particular late payment; it was included in his general submissions as to the effect of Brexit on his business and that “special circumstances” should be considered to apply and the penalty reduced to nil accordingly.

Whether special circumstances existed

39. Mr Bryer argued that:

- (1) the penalties had arisen as a result of loss of income and shortage of cashflow caused by the impact of Brexit, and also from the delays caused by the failure of the Government and Parliament to implement Brexit. The loss of income meant that he was defaulting on mortgages and other loans and that the banks had threatened foreclosure proceedings. He needed the interest and penalties repaid in order to be able to help with cashflow.

- (2) The markets in which he operated had stalled due to decisions made by the UK Government and it was only fair that support should be provided in the short term. The Government had, for example, granted a significant loan to British Steel to help with Brexit-related difficulties. It was not reasonable for the Government to cause problems and then penalise businesses which had suffered as a result.

- (3) Theresa May, when Prime Minister, had stated that Brexit would only be delayed in exceptional circumstances. As Brexit had been delayed several times, it was clear that exceptional circumstances must therefore exist. Similarly, the Supreme Court had noted

that there had been a “prolonged suspension of Parliamentary democracy” which had taken place in “quite exceptional circumstances”.

(4) He acknowledged that he owed amounts for the 2017/18 tax year and would pay these as soon as he was able but needed cashflow in the interim to keep his business operating and pay off his debts in the short term. He had offered to agree a payment plan with HMRC once the repayment of the interest and penalties had been made to him.

(5) Brexit must fall within “extenuating circumstances” as the impact of the vote and subsequent political decisions and delays had a major unprecedented impact on the economy and particularly the commercial property investment market in which he operated. Transactional volumes had fallen to extremely low levels and his income had fallen below the basic cost of living.

(6) HMRC had also not dealt with correspondence in a timely manner and he had been passed between various departments when he had tried to contact them to deal with the matter.

40. Schedule 56 of Finance Act 2009 does not define “special circumstances”, although it does state that ability to pay and the fact that a potential loss of revenue from one person is balanced by a potential overpayment to another cannot amount to special circumstances. The latter is not in point here. Mr Bryer stated that he was experiencing cashflow problems: although Schedule 56 states that ability to pay cannot alone amount to special circumstances, case law has established that the reason why a person cannot pay may be capable of being special circumstances where it is something that is
41. HMRC’s policy defines special circumstances as either uncommon or exceptional or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of the law.
42. The parties did not specifically refer to any case law with regard to special circumstances. However, the Tribunal took note of case law available, including *Collis v HMRC* [2011] UKFTT 588 (TC). The Tribunal in *Collis* held that the special circumstances in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme or the provisions themselves.
43. The Tribunal’s jurisdiction with regard to special circumstances is appellate rather than supervisory: the Tribunal must consider whether HMRC acted unreasonably: that is, that they have acted in a way that no reasonable body of commissioners could have acted, or took into account some irrelevant matter or disregarded something to which they should have given weight.
44. In their review letter, HMRC stated that they had taken into account “Point 1, 2 and 3 above”. These points had been made by Mr Bryer in correspondence and were:
 - (1) That Brexit had caused cashflow problems and Mr Bryer had had very little earnings since June 2018 as he had been unable to borrow given the recent rules and regulations on banks;
 - (2) It was unfair and inequitable that HMRC, an agency of the UK government, should benefit (in the form of penalties and interest) from problems caused by the government;
 - (3) The government had granted British Steel a significant loan for problems created by Brexit.
45. Having considered these points, the review officer concluded that there were no special circumstances which allowed him to reduce the penalties.

46. I note that the difficulties faced by Mr Bryer were not unique to him: indeed, Mr Bryer had provided HMRC with copies of information from the Bank of England and others which stated that there had been a detrimental impact on the commercial property investment market as a whole.
47. As such, even if politicians and the higher courts consider that the country in general was experiencing “exceptional circumstances”, this does not mean that “special circumstances” which merit a reduction in penalties exist for a particular taxpayer.
48. Noting again that this Tribunal has an appellate, not supervisory, jurisdiction with respect to “special circumstances”, I do not consider that HMRC have acted unreasonably in concluding that “special circumstances” do not exist in this case. Although this Tribunal has jurisdiction only to consider the penalty issued on 19 March 2019, I consider that this would apply equally to the other penalties which Mr Bryer had paid and was seeking to have repaid to him.

Decision

49. For the reasons given above, this Tribunal has jurisdiction only in respect of an appeal against the penalty issued on 19 March 2019 and finds that the penalty should not be reduced or eliminated as a result of “special circumstances”.
50. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

51. 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 01 JUNE 2021