



TC05650

Appeal number: TC/2016/03763

INCOME TAX – late payment penalties – tax return by former accountants amended on advice of new accountants after the deadline for payment and after the trigger dates for penalties – liability to penalties – reasonable excuse – special circumstances

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID STEINER

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE CHRISTOPHER STAKER

The Tribunal determined the appeal on 23 September 2016 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 30 June 2016 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 12 August 2016.

DECISION

Application for full reasons and application for extension of time

1. A summary decision was given in this case when initially determined on 23 September 2016. The decision was to dismiss the appeal.
2. In a letter to the Tribunal Service dated 20 November 2016, the Appellant's representatives requested reconsideration of that decision.
3. In a letter dated 13 December 2016, the Tribunal Service informed the Appellant's representatives that the request for permission to appeal was outside the time limit, and that the Appellant would need to make a request for permission to appeal out of time.
4. The Appellant's representatives responded in a letter dated 15 December 2016, stating that the Tribunal's decision had arrived when the Appellant's business was closed for several days and that thereafter the further delay was due to a clerical error on the part of the Appellant's representatives.
5. This correspondence was copied to HMRC under cover of a letter from the Tribunal Service dated 6 January 2017, which gave HMRC 14 days to make any representations on whether the time-limit should be extended. No response was received from HMRC.
6. By virtue of rule 35(4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Appellant cannot apply for permission to appeal before first requesting full written findings and reasons for the decision. The Tribunal therefore treats the 20 November 2016 letter as a request for full written reasons.
7. The decision notice containing the summary decision gave the Appellant 28 days from the date of release of that decision to request full reasons. The Tribunal treats the 15 December 2016 letter as a request for an extension of that time limit. Having regard to the representations made, the circumstances as a whole and the lack of any expressed objection by HMRC, the Tribunal grants that request.
8. The present document therefore is confined to providing full reasons for the summary decision that has already been given. If the Appellant wishes to apply for permission to appeal, he will now have to make a new application within the relevant time limit after he has received this document.

Introduction

9. The Appellant appeals against a late payment penalty (imposed under paragraph 3(2) of Schedule 56 to the Finance Act 2009 ("paragraph 3(2)"), and a 6 month late payment penalty (imposed under paragraph 3(3) of Schedule 56 to the Finance Act 2009 ("paragraph 3(3)").

10. Both penalties are for late payment of the full amount of income tax for 2012-13.

The facts

11. The Tribunal takes into account that the Appellant did not file any reply to the HMRC statement of case, which the Appellant had the opportunity to do if he
5 disputed any of the facts as set out in the HMRC statement of case. On the basis of the material before it as a whole, the Tribunal makes the following findings of fact.

12. The Appellant filed a 2012-13 tax return on 31 January 2014. It stated that his tax liability for the year was £1,752.80.

10 13. However, the Appellant subsequently filed an amendment to his 2012-13 tax return on 4 March 2015, which increased his tax liability to £35,503.60.

14. On 3 March 2014, £25,144 of this £35,503.60 tax liability had not been paid.

15. Five months after this, £8,052 of this £35,503.60 tax liability still remained unpaid.

15 16. In December 2015, HMRC imposed penalties under paragraph 3(2) and paragraph 3(3) in the sums of £1,257 and £402 respectively.

17. The tax liability for 2012-13 was not paid in full by the Appellant until 15 December 2015.

Applicable legislation

20 18. Pursuant to section 59B of the Taxes Management Act 1970 (“TMA 1970”), the Appellant was required to pay his tax liability for 2012-13 by 31 January 2014.

19. Paragraph 1 of Schedule 56 provides that “A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4”.

25 20. Item 1 in that table is “income tax”, the amount of which specified in column 3 is “Amount payable under section 59B(3) or (4) of TMA 1970”, and the date in respect of which is specified in column 4 is “The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid”.

30 21. Paragraph 3(2) provides that in relation to case concerning item 1 in that table, “P is liable to a penalty of 5% of the unpaid tax”.

22. Paragraph 3(3) provides that “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”.

23. Paragraph 9(1) of Schedule 56 provides that “If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule”. Paragraph 9(2) provides that “special circumstances” does not include ability to pay.

5 24. Paragraph 12 of Schedule 56 provides that the Appellant may appeal to the Tribunal against a penalty, or the amount of a penalty.

25. Paragraph 15(3) and (4) of Schedule 56 provides that in such an appeal, if the Tribunal substitutes its own decision for that of HMRC, the Tribunal may rely on paragraph 9 of Schedule 56 to a different extent to HMRC only if the tribunal thinks
10 that HMRC’s decision in respect of the application of paragraph 9 was flawed considered in the light of the principles applicable in proceedings for judicial review.

26. Paragraph 16(1) of Schedule 56 provides that:

- 15 (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 a payment—
- (a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure ...

27. Paragraph 16(2) of Schedule 56 provides that:

- 20 (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
 - 25 (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.

Arguments of the parties

30 28. The Appellant contends (in his grounds of appeal and in correspondence with HMRC) as follows. The Appellant’s original tax return for 2012-13 was submitted on time by his previous accountants. When his current accountants took over, they reassessed his affairs and resubmitted the return with corrections to errors that they had found. Once this amended return was received by HMRC, the Appellant was
35 aware of the additional tax due. He organised a payment arrangement with HMRC, and has now paid in full. The Appellant should not be penalised given that the original return was submitted on time and that it was only when the errors came to light that that it was found there was additional tax to pay.

40 29. HMRC contends as follows. Even if the original return was filed on time, the full amount of the Appellant’s actual tax liability was due for payment on 31 January

2014. The amended tax return was filed only after the trigger dates for the two penalties imposed. The fact that the Appellant entered into a payment plan is of no relevance, as the penalties had already been incurred at the time that he did so.

The Tribunal's findings

5 30. The Appellant has not disputed the facts set out in paragraphs 12-17 above. In particular, he has not disputed the amount of his tax liability for 2012-13 (namely the amount as per his 4 March 2015 return). Nor has he disputed the amounts of that tax liability that remained unpaid on the relevant trigger dates for the two penalties.

10 31. The Appellant was required to pay the full amount of his tax liability by 31 January 2014. This means the Appellant was required by 31 January 2014 to have paid the full amount of the tax liability indicated on his 4 March 2015 return. The fact that the amendment to the tax return was filed only on 4 March 2015 does not affect the legal obligation to have paid the correct amount of tax by 31 January 2014. By
15 the time that the amended tax return had been filed, the trigger dates for the two penalties had already passed. The subsequent filing of an amended tax return and the subsequent entry into a payment agreement could not affect the Appellant's liability to those penalties.

20 32. The Tribunal therefore finds that the penalties have been correctly imposed in accordance with the legislation, subject only to the question whether the Appellant has a reasonable excuse for the late payment, or possibly, whether there are special circumstances justifying a reduction of the penalty.

25 33. Erroneously under-declaring a tax liability in a tax return filed on time is not of itself a reasonable excuse for late payment of the correct tax liability. This could only potentially afford a reasonable excuse if there is a reasonable excuse for the under-declaration of tax in the original tax return.

34. The only explanation given by the Appellant for the under-declaration of tax in the original tax return was that the original return was filed by his former accountants, and that it was only when he engaged his present accountants that the error came to light.

30 35. The Tribunal appreciates that this is a case where the underpayment of tax only became known to HMRC because the Appellant himself voluntarily submitted an amended tax return. The Tribunal accepts that this was done on the advice of new accountants who disagreed with the tax return prepared by the previous accountants. The Tribunal understands that the Appellant may consider that he has acted
35 throughout in good faith on the advice of two different sets of accountants.

36. However, unfortunately for this Appellant, this is of itself is not sufficient. An error on behalf of a taxpayer's accountants is not of itself a reasonable excuse. Apart from anything else, paragraph 16(2) of Schedule 56 provides that "where P relies on
40 any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure". Furthermore, although previous case law of the

Tribunal has held that in in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist (for instance *Penfold v Revenue & Customs* [2015] UKFTT 44 (TC) at [30]), this does not mean that a taxpayer will always have a reasonable excuse for mistakes made by his or her
5 accountant when preparing a tax return. To establish a reasonable excuse it would be necessary to provide evidence for instance of what instructions and information were given by the taxpayer and accountant (to establish whether the taxpayer gave complete and correct information), and of what advice was given by the accountant (to establish that the advice which led to the error was on an issue sufficiently
10 specialised that the taxpayer had in effect no choice but to follow that advice).

37. The material submitted by the Appellant at the time of its summary decision in this case consisted of a general statement to the effect that the original accountants had made a mistake and that this had been noticed by the new accountants. No details were given of exactly what mistake was made, or why, and no evidence was given in
15 support of such details. The material before the Tribunal at that time was not adequate to establish a reasonable excuse. The Tribunal therefore finds that the Appellant has not established a reasonable excuse for the late payment of tax.

38. Furthermore, on the evidence before HMRC at the time of their 17 June 2016 review decision on the appeal, HMRC was lawfully entitled for the same reason to
20 find that there were no special circumstances justifying a reduction in penalty. That decision was not flawed considered in the light of the principles applicable in proceedings for judicial review. The Tribunal therefore cannot substitute its own decision on this issue for that of HMRC, but if it could, it would reach the same conclusion.

25 39. The appeal is therefore dismissed.

40. In their 20 November 2016 letter, which was sent after the Tribunal's summary decision had been released, the Appellants' representatives now provide slightly more detail (albeit with no supporting evidence). It is said that the previous accountant suggested the use of film rights as a method of reducing the Appellant's tax, but that
30 the new accountants subsequently advised that these schemes are not acceptable to HMRC. The Tribunal does not at this stage take into account what is said in the 20 November 2016 letter, as the present document is confined to providing full reasons for the summary decision that has already been given. If the Appellant wishes now to seek to rely on further evidence, he will have to do so as part of an application for permission to appeal. However, the Appellant would need to establish a proper
35 justification for seeking to introduce new evidence after the Tribunal has already given its decision.

41. 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
40 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.

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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 9 FEBRUARY 2017

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