



TC06676

Appeal number: TC/2017/06160

INCOME TAX – late payment penalties – not advised by HMRC that there would be a penalty – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A P SPRAKE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR LESLIE HOWARD**

Sitting in public at Norwich on 2 June 2018

The Appellant appeared in person

Sadia Shakeel, presenting officer, for the Respondents

DECISION

1. This is an appeal against a late penalty payment of £1,499 issued by HMRC on
5 14 March 2017 in relation to payment of tax for the 2015-16 tax year.

2. It is not disputed that the tax liability was due on 31 January 2017, under s59B
Taxes Management Act 1970, and was in fact paid on 10 April 2017.

Appellant's contentions

3. The appellant, Mr Sprake, contends that he has a reasonable excuse for the late
10 payment because HMRC had not advised him that there would be a penalty when he
had contacted HMRC to advise them that the payment would be late. In January 2017
his business had had some cashflow problems due to delays in selling properties, and
one customer in particular was late in paying and would not be able to make payment
until March 2017.

4. Mr Sprake argued that he had called to ask for advice on making the payment
15 late and was not told that there would be a penalty for making a late payment. He was
advised only that there would be an interest charge.

5. Mr Sprake noted that if he had been advised that there would be a penalty, he
would have taken steps to borrow the money. He had not borrowed the money
20 because the bank would have charged him a fee for the loan and an early repayment
of the loan, and he did not want to incur the fee if it was not necessary. Mr Sprake
noted that he had been in business for more than forty years and had paid his taxes on
time.

6. Mr Sprake noted HMRC's contention that he should have known about the
25 penalty system from correspondence and from the previous late filing penalty but
replied that he was too busy to read correspondence in detail and did not recall that he
had paid a penalty more 15 years ago. He accepted that his self-assessment statement
issued on 10 January 2017 had included information on the reverse with details of
penalties that would apply to late payments.

7. Mr Sprake explained that he had paid £10,000 of his tax liability on time, and
30 that the rest was paid when funds were received from the late paying customer.

HMRC's contentions

8. For HMRC it was submitted that the penalty was corrected raised and had been
35 notified to Mr Sprake as required by the provisions of Schedule 56, Finance Act 2009
on or around 20 April 2017.

9. HRMC submitted that Mr Sprake did not have a reasonable excuse for the late
payment. In particular, lack of funds is specifically stated in legislation not to amount

to a reasonable excuse unless it is attributable to events outside the taxpayer's control (paragraph 16(2)(a) of Schedule 56, Finance Act 2009).

10. HMRC submitted that the test of whether there is a reasonable excuse has been established in case law as an objective test: the test is whether a reasonable and prudent taxpayer intending to comply with tax obligations, in the circumstances of the appellant at the time, would have taken the same actions.

11. Further, HMRC submitted that a reasonable excuse must not only be reasonable but also causative, following the decision of Judge Mosedale in *Morgan and Donaldson* [2013] UKFTT 317 and that something cannot be an excuse for a default where it was not the cause of the default. HMRC submitted that Mr Sprake's misunderstanding of the penalty system was not the reason that he paid late and so cannot be a reasonable excuse.

12. HMRC submitted that there is "ample information" available online and in through correspondence to inform taxpayers of the penalty system. Although HMRC accept that Mr Sprake was not specifically informed in his telephone call with HMRC on 25 January 2017 that there would be a penalty for late payment. HMRC submitted that Mr Sprake has been within the self-assessment regime for nineteen years and so should be aware that penalties were charged for late payment. HMRC contended that Mr Sprake would have been aware of the penalty system in any case, as he had been charged a late filing fee for the 2000-1 tax year.

13. HMRC also noted that Mr Sprake could have requested a time to pay arrangement before the due date, or within the 30 days of the due date, but did not do so. HMRC submitted that the telephone call between Mr Sprake and HMRC on 25 January 2017 did not ask for a formal time to pay arrangement. Such an arrangement would have required an agreement to pay specific amounts on specific dates, with an immediate part-payment. In these circumstances, where the appellant did not know when he would be in a position to make payment as evidenced by his subsequent call to HMRC on 22 February 2017 to advise that the payment would be made as soon as the funds came in, a formal arrangement could not have been entered into.

30 **Relevant law**

14. Under paragraph 1, Schedule 56, Finance Act 2009, a penalty is payable where a person fails to pay an income tax liability on or before the date falling 30 days after the amount is due. As the liability was paid more than more than 30 days after the due date, a penalty arose. The amount of the penalty is 5% of the tax unpaid at the due date, as specified in paragraph 3 of Schedule 56, Finance Act 2009.

15. Under paragraph 16, Schedule 56, Finance Act 2009 liability to a penalty will not arise where the taxpayer satisfies HMRC or, on appeal, the Tribunal that there is a reasonable excuse for the failure. However, paragraph 16(2)(a) confirms that lack of funds is not a reasonable excuse unless attributable to circumstances outside of the taxpayer's control

Discussion

16. It is not disputed that the payment was made late nor that the penalty was correctly calculated. The question for the tribunal is whether or not Mr Sprake had a reasonable excuse for his late payment.

5 17. The test of whether something amounts to a reasonable excuse is not defined by statute. Case law has determined that whether or not a person has 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” taking into account what a reasonable and prudent taxpayer intending to comply with their tax obligations in the appellant’s
10 position would have done in the circumstances.

18. We consider that a reasonable and prudent taxpayer intending to comply with their tax obligations would have (at a minimum) read the material provided by HMRC, including the self-assessment statement dated 10 January 2017, and would therefore have been aware that a penalty would be charged for late payment of tax.

15 19. We also consider that a reasonable and prudent taxpayer who had been in business for a considerable time would have been aware of the penalty system generally. Mr Sprake accepted that he chose to delay payment to HMRC because he did not want to have to pay bank charges for a short-term loan. The delay in payment is, however, equivalent to treating HMRC as a short-term lender and we consider that
20 a reasonable and prudent taxpayer would have checked whether there would be financial consequences beyond interest to late payment in circumstances when it is clear that other lenders would charge a fee in addition to interest.

Telephone call

20. We note that Mr Sprake indicated that he had called HMRC for advice on 25
25 January 2017 and had been incorrectly advised because no mention of a penalty was made by HMRC in that call. A transcript of that call was included in the bundle provided to the Tribunal and Mr Sprake agreed that the transcript was materially accurate.

21. A review of the transcript shows that Mr Sprake called HMRC to tell them that
30 he would be “late paying the tax” because the funds had been used to run the business due to a late paying customer who would not be able to pay until March. HMRC responded “So you just want to let us know that you will be late paying is that?” and Mr Sprake had replied “That’s it. I’m going to be late paying, yes”. He was advised that there would be an interest charge on the record. At no point in the transcript does
35 Mr Sprake ask HMRC what the consequences of the late payment will be.

22. Accordingly, the transcript does not include a request for advice; in the call, we consider that Mr Sprake makes it clear that he is providing information *to* HMRC rather than requesting information *from* HMRC. Whilst it may have been helpful for HMRC to volunteer the information that a penalty would be payable when Mr Sprake
40 contacted them to tell them that a payment would be made late, we do not consider

that Mr Sprake had in fact requested advice from HMRC in this call as to the consequences of late payment.

23. Even if Mr Sprake had specifically requested advice, the Upper Tribunal has made it clear in case law that an argument that he had a legitimate expectation that he could rely on HMRC's advice would be a matter that could only be pursued through judicial review in the Administrative Court and not through an appeal to this Tribunal.

Conclusion

24. The appeal is dismissed and the penalty confirmed.

25. 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: 23 AUGUST 2018