



[2019] UKFTT 0670 (TC)

TC07445

**Penalties – late payment – Sch.56 of FA 2009 – No UTR – never completed a tax return
--whether a reasonable excuse – whether special circumstances – no -appeal dismissed
in part -reduction in penalty**

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02695

BETWEEN

HENRY IRVING

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE DR KAMEEL KHAN

**CHRISTOPHER JENKINS,
MEMBER**

Sitting in public at Bristol Civil and Family Justice Centre on 10 September 2019

The Appellant did not appear

Ms Laurie Outten, PRESENTING OFFICER OF HM REVENUE AND CUSTOMS.

DECISION

INTRODUCTION

Mr Henry Irving appeals against penalties imposed under Schedule 56 FA 2009 imposed in relation to the late payment of his tax liability for the year 2016-2017 which includes 3, 6 months and 12-month penalties.

Under Schedule 56 penalties are imposed as follows:

Late payment	Penalty
30 days late	5% of tax due
6 months late	5% of tax outstanding at that date
12 months late	5% of tax outstanding at that date

The penalties must have been made correctly according to the legislation. Schedule 56 FA 2009 provides for an appeal providing:

1. The taxpayer has 30 days to lodge an appeal with HMRC against a tax penalty.
2. A late appeal may be accepted at the discretion of HMRC or the tribunal judge.

The following penalties have been levied on Mr Irving and were appealed:

Schedule 56 Penalty for failure to make payment on time

Income tax due: £19,441.05

Outstanding: £625.67

**Interest accrued at 28 February 2019*

Payment 12 February 2019

Lateness/Delay 12 months 12 days

End of tax year	End of notification period	Deadline to pay	30 Days Late payment penalty (5%)	6 Months Late payment penalty (5%)	12 Months Late payment penalty (5%)
05 April 2017	06 October 2017	21 January 2018	02 March 2018	31 July 2018	31 January 2019

Tax Year	Filing Date	Date Return Received	30 Days Late payment penalty (5%)	6 Months Late payment penalty (5%)	12 Months Late payment penalty (5%)
2016/17	15 April 2019	09 February 2016	£972.05	£972.05	£972.05

TOTALS
£972.05 **£972.05** **£972.05**

Rounded down to the nearest £ = £2,916.00

Findings of Fact

1. The penalties relate to the tax year 2016 /2017 and involve the sale of an interest held in the PXP Vietnam Emerging Equity Fund. The interest was disposed 1 December 2016.
2. The investment in the Fund was made by the appellant's father on his behalf some 15 years before and was never held directly by the appellant but with a wealth management firm, with which he had little contact.
3. The appellant claimed that he had never completed a tax return before, had no idea of his tax liability what and got confused which year the sale related to for tax purposes.
4. A capital gains tax liability arose on the sale of the interest in the fund.
5. The notification period for informing HMRC of the chargeable income tax or capital gain liability for the year of assessment 2016 /2017 ended on the 6th of October 2017.
6. The deadline to pay the income tax for 2016/ 2017 pursuant to section 59B (4) TMA1970 is 31 January 2018.
7. On 2 March 2018, a 30-day late penalty was imposed. The appellant became liable to pay a penalty of 5% of the unpaid tax under FA 2009, Schedule 56, paragraph 3(2).
8. On the 31 July 2018 a six months late penalty was imposed. The appellant became liable to pay an additional penalty of 5% of the unpaid tax under Finance act 2009 Schedule, 56 paragraph 3(3).
9. On the 31 January 2019, a 12 months late penalty payment was applied. The appellant became liable to an additional penalty of 5% of the unpaid tax under Finance Act 2009, Schedule 56 paragraph 3(4).
10. On the 8 January 2019, the appellant registered under the self-assessment system notifying HMRC of his obligation to submit a tax return.
11. The appellant was keen to meet the payment and filing deadlines. He made five phone calls to HMRC helpline.

The first call was on 7th of December 2018. He was told that he needed a unique tax reference (UTR) number to complete his tax return. He was informed that this would be sent in the post.
12. By the 18 December 2018, he had not received the UTR number. He called HMRC to follow up on the UTR the number.
13. On 4 January 2019 after not receiving the UTR code, he called and sent another request letter.
14. On 23 January 2019 he called to say he had not received an activation code and was informed that this takes 10 days to arrive. He explained that without the activation code he would be late in paying his tax.

He called again on 26 January, a call which is not shown on the HMRC log and requested access to all information relating to calls made by him to HMRC.

15. He was informed during the conversation that the date for completing his tax return (paper and online) would be extended to the 15 April 2019.

16. HMRC notes show that the activation code was activated on the 26 January 2019. This is strange given the appellant made a call to HMRC on 26 January, requesting the activation code. It seems that the activation code had not been sent on 26 January.

On the 12 February 2019 payment of tax of £19,441,05 plus interest was made.

17. HMRC notes on the 21st of March 2019 show the deadline to appeal against the penalty for late payment penalties was 21 March 2019, the Appellant appealed on the 23 April 2019.

Grounds of Appeal

18. The appellant says that he was confused and not experienced in tax matters and never completed a tax return. As a result, he had no idea what he was supposed to do and did not know which tax year the sale of the assets related to.

19. He said it was an investment which was made by his father on his behalf over 15 years ago. The investment was never held directly by him but by a wealth management company with whom he had little contact. While he appreciates that paying tax is his responsibility, he feels that charging penalties for late payment seems unnecessarily cruel and unfair. This was the first tax return he would be completing and it is unlikely that he will complete any further returns in future.

20. He felt he had paid a considerable amount of tax already and the fact that he had to pay capital gains tax rather than income tax meant he was being taxed at a higher rate. He felt that being taxed at the higher rate and charging penalties added “insult to injury”.

21. He further stated that HMRC failed to send his UTR and activation codes on time to complete the returns.

HMRC submissions

22. The fact is that the appellant did not pay tax which he owed on time. HMRC make the point that he is a professional and works for an investment firm (Hargraves Lansdowne) and he should have been aware that a liability would arise once an asset had been sold. In any event he should have contacted HMRC to find out his tax obligations at the time of the sale. He had 10 months to enquire into his tax obligations and he did nothing. He should have found about his tax liability, returns, filing dates or sought advice.

23. As regards the investment made by his father, HMRC said this is not a reason for him not to know since the investment was actually made on his behalf and he received the profits and should have known that a tax liability would arise on the disposal of the investment. A prudent taxpayer would have paid by the 31st of January 2018 not one year later.

24. HMRC do acknowledge that the UTR activation code was late in being sent to the appellant.

25. They said there is no reasonable excuse based on the facts of this case since ignorance of the law is not an excuse.

Statutory provisions

26. Section 7(1) of the Taxes Management Act 1970 ('TMA') provides as follows:

7 Notice of liability to income tax and capital gains tax

Every person who –

(a is chargeable to income tax or capital gains tax for any year of assessment, and [...] shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.'

27. Section 59B of TMA provides for the payment (or repayment) of any outstanding liability (or overpayment) in relation to income tax and capital gains tax for a relevant year. Under sub-s 59B (4), the time limit for making such adjustment is 'on or before the 31st January next following the year of assessment'.

28. In relation to the late payment penalties, paragraph 16 of Sch. 56 to FA 2009 provides the defence of 'reasonable excuse' on an appeal to HMRC or the Tribunal.

29. In the absence of a reasonable excuse, a penalty can be reduced if there are 'special circumstances' under paragraph 16 of Sch. 55, and paragraph 9 of Sch. 56.

30. The Tribunal's jurisdiction in under paragraph 15 of Sch. 56, which provide that the Tribunal has the power to:

- (1) affirm or cancel the penalty imposed by HMRC; and
- (2) to substitute for HMRC's decision another decision that HMRC had power to make.'

Discussion

The First Issue to be decided relates to the Late Appeal

31. The Tribunal has a discretion to hear an appeal late. In this matter the appellant was approximately one month late with the appeal, which is not a significant period. In considering a late appeal the Tribunal must consider the following:

- (1) What is the purpose of the time limit?
- (2) How long was the delay?
- (3) Is there a good explanation for the delay?
- (4) What will be the consequences for the parties of the extension of time?
- (5) What will be the consequences for the parties of a refusal to extent time?

Purpose of the time limit

32. The purpose of the 30-day time limit to lodge an appeal is to provide finality. A short but reasonable time is provided for an appeal to be lodged; if no appeal is lodged, HMRC have the right to assume that the liability is accepted and can proceed to enforce it.

The length of the delay

33. The appellant was gathering information to make his appeal. In the period before the appeal was lodged, the appellant was in the process of making a data request to establish the time line for telephone calls made to HMRC and the requests made in those calls. The delay was short.

Is there a good explanation of the delay?

34. The explanation for the delay is that the appellant was not aware of the procedure for making an appeal and dealing with tax matters and therefore could not take action on something he did not know. This would seem a plausible explanation. He did take prompt action once the period for making the appeal had expired.

Consequences if the appeal is or is not allowed to proceed?

35. The consequences for the appellant depend on how likely his appeal is to succeed. While the grounds of appeal were not strong it did look as though he suffered further delay as a result of not receiving the activation code on time and he would have been disadvantaged if a penalty was imposed where HMRC had delayed in providing information to him which was required to complete his return.

36. For these reasons the appeal is heard out of time. The taxpayer made good efforts to communicate with HMRC once he knew of the liability to tax and paid the tax due. He requested an activation code, which took some time to arrive and was given extra time to complete his returns. He may have incurred less penalties if the activation code delivered on time.

37. So, I move on to consider whether the appellant can prove that he should be excused the penalties. Subject to the discussion below, the penalties imposed are due and have been calculated correctly.

38. There are really only three reasons for which a person can be excused liability to a properly imposed penalty and they are:

- (1) If he has a reasonable excuse;
- (2) If there are special circumstances;
- (3) If the penalty is disproportionate

39. When considering a reasonable excuse defence, the Upper Tribunal Decision in *Christine Perrin v HMRC [2018] UKUT 156* sets out the law as follows:

“81. When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

40. First, establish what facts the taxpayer asserts to give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

41. Second, decide which of those facts are proven.

42. Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

43. Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

44. The taxpayer asserts that he did not know the law but this does not give rise to a reasonable excuse.

45. It is true that the appellant knew that the investment was made on his behalf and he received the benefit of that investment and it would be sensible to assume there would be a tax liability on the profits. A reasonable person would have taken steps to find out and not waited 10 months before actioning the matter.

46. He may not have understood the investment made on his behalf but would have known he was the recipient of a benefit.

47. He works for a company which provided financial advice and it would have been a sensible first step to consult one of his fellow employees to ask for advice. He did make efforts to find out about his tax liability and to file returns but it was a year late. These are not the actions of a reasonable man and do not support a reasonable excuse. There is therefore no reasonable excuse.

48. Special Circumstances

The Tribunal has a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be 'special'. Whether this is being out of the "ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive".

49. In this case, there are circumstances which may reduce the penalty given the activation code was not sent by HMRC to the appellant on time. I can see from the tax press that there were delays in sending out these codes and HMRC accepted that the code was late.

50. When the appellant registered under the self-assessment system on 8 January, he should have received his UTR 14 days later on the 22 January. He should have received his activation code in January and would not have incurred a 12-month penalty if this was received on time.

The paperwork shows that he called on 26 January still requesting an activation code.

51. The appellant was clearly trying to sort things out and made five phone calls between 7 December 2018 and 26 January 2019 to HMRC requesting information on the UTR and code. The none provision of the code meant the appellant was delayed in submitting his return.

52. The penalty payment is therefore reduced by £972.05 which represents the 12-month late payment penalty imposed on the 31 January 2019.

The other penalties are upheld.

No question of proportionality was raised by the appellant.

53. Conclusion

The appeal is partly allowed. The 12-month penalty is removed but the other penalties are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**JUDGE DR KAMEEL KHAN
TRIBUNAL JUDGE**

Release date: 06 November 2019