



TC07860

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01778

BETWEEN

SCOTT KELLY

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 25 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 14 May 2020 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 7 August 2020 and the Appellant's Reply dated 2 September 2020 (with enclosures).

DECISION

INTRODUCTION

1. This is an appeal by Scott Kelly ('the Appellant') against penalties totalling £222 imposed by the Respondents ('HMRC') under Paragraph 3 of Schedule 56 Finance Act (FA) 2009, for failure to submit payment on time for the tax year ending 5 April 2019.

BACKGROUND

2. The Appellant's first tax payment for the year ending 5 April 2019, was due by no later than 31 January 2020, under Section 59B Taxes Management Act ('TMA') 1970.
3. 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)).
4. The Appellant's tax for the tax year 2018-19 remains unpaid and was therefore late, and a penalty of £222 was therefore imposed under (i) above.

Filing date and Penalty date

5. 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

6. 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).
7. 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.

8. 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).
9. 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.
10. 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

11. The Appellant’s SA return for the year 2018-19 was issued on or around 6 April 2019. Tax was due to be paid by 31 January 2020.
12. The Appellant does not dispute that the full payment was not made by 31 January 2020, and part of the monies remain outstanding.
13. The Appellant appealed to the Tribunal on 20 May 2020.

PERMISSION TO APPEAL OUT OF TIME

14. The Appellant has not appealed to the Respondent initially, but appealed directly to the Tribunal. Under s49 D of the Taxes Management Act I therefore would ordinarily have no jurisdiction to determine the case. However, The Respondent has agreed to treat the matter as an appeal to HMRC at the same time. The appellant’s appeal to HMRC under s31A TMA 1970 was therefore made outside the statutory deadline. In their Statement of Case HMRC have said that they have no objection to the taxpayer’s appeal under s31A being made late. I therefore consider that HMRC have now given consent under s49(2)(a).

The Appellant’s case

15. The Appellant’s grounds of appeal are that he should not be taxed at 45% on income taken out of his pension. 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 2018-19 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 notice to file was issued to 61 Sutherland Chase and a return duly filed on 16 August 2019. A tax liability of £5,337 was calculated and was due on 31 January 2020.

29. On 13 December 2019 the Appellant made an online complaint to HMRC. His complaint appears to be about his former employer rather than anything that the Respondent could resolve. He was therefore fully aware at least six months prior to the due date that monies would become due. The complaint does not at any point address the ability to pay tax at the end of January 2020.

30. Two payments totalling £888.40 were made towards that tax payment, but £4,448.60 remained outstanding by the penalty date of 2 March 2020. On or around 17 March 2020 a penalty notice was issued due to unpaid tax. It is not suggested by the Appellant that he did not receive that penalty notice. It was issued to the same correspondence address as the notice to file and there is no evidence of any postal difficulties at the relevant time. It was not returned marked undeliverable. I therefore conclude that it was received by Mr Kelly. The penalty notice makes it clear that the outstanding monies must be paid immediately or interest and further penalties may be incurred. As at the date of submission of the statement of case £3,109.60 remains outstanding.

31. Mr Kelly did not apply for a (Time To Pay) TTP agreement.

32. The Appellant's tax liability for the relevant year is as a result of pension income in the sum of £177,000. Mr Kelly asserts that he is paying by monthly instalments of £446, however, he has not made a TTP agreement with HMRC, and therefore that facility is not open to him. The online system made it clear to him that continued failure to pay in full would result in interest and penalties accruing.

33. On 14 May 2020 Mr Kelly appealed against the penalty to the Respondent.

34. 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 17 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

35. Relevant statutory provisions are included as an Appendix to this decision.

36. I have concluded that the tax for the 2018-19 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.

37. 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.

38. In his notice of appeal Mr Kelly appears to indicate that for some reason he has sought to follow a different route to that suggested in correspondence. He seems to explain that he

wrote to the Respondent in December 2019 “explaining my circumstance” but received no response. Instead of following that up, he waited, notwithstanding no agreement with the Respondent having been reached and the deadline for payment passing on 31 January 2020. Upon further correspondence from the Respondent in February 2020 he then telephoned HMRC and the implication from what he has written is that a Mr. Ferguson advised him to fill in a form. He tells me that the website is very confusing and I conclude from what he has written that despite the advice from Mr. Ferguson, he did not fill in the form. Instead of calling HMRC again to seek guidance, he wrote to the Complaints Service. Such a correspondence was in no way reasonably likely to resolve the issue of overdue tax. Again, instead of then seeking guidance from HMRC he has appealed to the Tribunal. Again, an action that has no reasonable prospect of resolving the fact that his tax liability has become due and has not been paid. It is clear that Mr Kelly was fully aware that his tax was due and that he could contact HMRC at any point to seek help. Notwithstanding that he chose to complain rather than pursue effective methods of ensuring his liabilities were met.

39. In his notice of appeal Mr Kelly makes various assertions in relation to employment law proceedings that are not before this Tribunal. If expenses are being incurred in those proceedings then that is a matter for him, his representative in those proceedings and the judge in those proceedings. It cannot have a bearing on his liability for tax on taxable income. Should it have a direct effect on his ability to pay that tax, then he must make an application for TTP and explain those difficulties in that application.
40. Unfortunately legal proceedings can be costly and carry an element of risk, but should Mr Kelly be deemed correct in his arguments then his costs will be reimbursed. In any event, the decision to pursue legal proceedings cannot be a factor obviating the necessity of paying tax properly due. Mr Kelly has issued a number of letters to HMRC but all appear to challenge the rate of tax, rather than indicate that the assessed tax will not or cannot be paid. I have no jurisdiction to determine the proper rate of tax to be paid, this appeal having been lodged against the imposition of penalties for non-payment only. That said, the rate of tax is fixed in law.
41. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal had explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. The Appellant has a significant degree of higher education and ought to have no difficulty understanding communication from HMRC. Having been told that his tax would become due on 31 January 2020 he cannot reasonably have believed that he would be entitled to pay in instalments just because he chose to, particularly in light of repeated correspondence indicating that the whole amount was and had become due.
42. I conclude that the Appellant has not shown a reasonable excuse for the late payment of his tax liabilities for the tax year 2018-19.
43. 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.
44. 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 Kelly.

45. 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 Kelly relied upon was delays in employment law proceedings. He does not offer any explanation of why expenses incurred in other proceedings would entitle him to pay his tax late. I have explained above why I do not consider that incurring expenses in and of itself can provide Mr Kelly with a reasonable excuse for his late payment. For the same reasons I consider that it would be inappropriate to reduce the penalties due to special circumstances.

CONCLUSION

46. I therefore confirm the fixed penalty of £222 for the tax year 2018-19.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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: 01 OCTOBER 2020

**APPENDIX
RELEVANT STATUTORY PROVISIONS**

Finance Act 2009

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

Schedule 56

49. 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.

50. 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.

51. 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.

52. 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)).

53. 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.

Taxes Management Act 1970

54. 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.