



INCOME TAX - Penalties imposed for late payment of tax for 16/17 - Schedule 56 Finance Act 2009 - Taxpayer paid, timeously, sum equivalent to total amount of tax calculated as due for 16/17 - Sum re-allocated by HMRC to Revenue adjustment made to 15/16 following an inquiry - Has HMRC satisfied the burden of showing that the penalties in issue were lawfully imposed? - No - If wrong about that, did the Appellant nonetheless have a reasonable excuse? - Perrin considered and applied - Yes - If wrong about that, did HMRC consider special circumstances? - No - Appeal allowed

TC07159

Appeal number: TC/2018/07666

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARY APPIAH

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

The Tribunal determined this Appeal on 17 May 2019, without a hearing, and 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 27 November 2018, and Ms Appiah's email of 10 February 2019

HMRC's Paper Hearing Submission / Statement of Case, dated 9 January 2019 and the attachments to it

DECISION

1. This is my decision in relation to Ms Appiah's appeal against two penalties, amounting to £90, which HMRC has imposed on her under Schedule 56 of the Finance Act 2009 ('the 2009 Act') in relation to her failure to pay tax for the year 2016/7 on time.

2. I have decided to allow her appeal and dismiss the penalties, for the reasons set out more fully below.

3. The penalties that have been charged are as follows:

10 (1) A 30 days late payment penalty of £45, said to have been imposed on or around 13 March 2018, pursuant to Paragraph 3(2) of Schedule 56 of the 2009 Act;

15 (2) A 6 month late payment penalty of £45, said to have been imposed on or around 28 August 2018, pursuant to Paragraph 3(3) of Schedule 56 of the 2009 Act.

4. I remind myself that this is a penalty appeal, and accordingly HMRC bears the burden of satisfying the Tribunal (albeit, only to the civil standard, namely, the balance of probabilities) that the penalties were lawfully imposed.

5. The following facts are not in dispute:

20 (1) Ms Appiah's self-assessment return was filed, on time, electronically, on 29 January 2018;

(2) Ms Appiah's tax liability for 2016/7 was calculated at £903;

(3) That liability was due to be paid on or before 31 January 2018;

(4) Ms Appiah paid HMRC £903 on 31 January 2018.

25 **The Grounds of Appeal**

6. The Grounds for Appeal are that Ms Appiah believes that the penalties are unfair, for a number of reasons. In summary:

(1) She was unaware that she had a tax liability;

30 (2) Her accountant made an error in filing her self-assessment tax return for 2015/16 as he failed to tick the box confirming that Ms Appiah had a student loan;

(3) Ms Appiah was out of the country for over 12 months and did not find out that she owed an amount for student loan until she returned to the UK in April 2018;

35 (4) In January 2018, she had paid £903, in good faith, as she was informed that was what was owed after her self-assessment liability for 2016/7;

(5) The £903 was not set off against her 2016/7 liability, but was instead set off against the student loan, but Ms Appiah was not informed of this until 29 October 2018. Until then, as far as she was concerned, all taxes for 16/17 had been paid;

(6) HMRC cancelled the penalties for 2015/6 but refuse to do so for 2016/7, which is unfair and inconsistent.

7. HMRC's response, set out in its Statement of Case, in summary, is this:

5 (1) Ms Appiah was in receipt of an Income Contingent Repayment Loan ('ICR') which was available to higher education students. This was repayable via self-assessment tax return for self-employed debtors;

(2) Ms Appiah's self-assessment return for 2015/16 did not tick the student loan box;

(3) The due date for tax payable for 2015/16 was 31 January 2017;

10 (4) An inquiry for 2015/16 was opened on 24 October 2017. This was because Ms Appiah's self-assessment return for that year, and the absence of a tick in the student loan box, did not match records from the Student Loan Company;

(5) As a result of that inquiry, the payment for 2015/16 was amended to £1633.41;

15 (6) The income tax due for 2016/7 was £903, and £903 was paid on 31 January 2018;

(7) As at 31 January 2018, £1633.41 was due and unpaid for 2015/16;

(8) HMRC allocated the £903 to 2015/16, being the oldest debt, and Ms Appiah did not request that it be re-allocated.

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Discussion

8. This is an unusual situation. HMRC makes various assertions in its Paper Hearing Submission as to the lawfulness or regularity of what it has done in Ms Appiah's case. 25 For example, it is asserted that the self-assessment system (it seems, automatically) 'will allocate a payment received against any tax liability outstanding in the order of the charge that has the earliest Statutory Due Date', and also 'Where HMRC choose how the payment is allocated, the payment can be reallocated at the customer's request at any point up to when HMRC communicates the allocation of payment to them. 30 However, after this point, both parties are bound by it'.

9. This is primarily a fact-finding jurisdiction, and facts depend on evidence. As other compositions of the Tribunal have remarked, evidence is a necessity. It is not a luxury. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to 35 prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant.

10. Nothing by way of admissible evidence is advanced by HMRC to support these propositions.

40 11. The self-assessment system print suggests that the inquiry amendment was created on 18 January 2018. There is no other evidence before me about the inquiry which is said to have been opened.

12. There is no evidence from HMRC as to when it actually informed Ms Appiah of what had been done - i.e, there is no evidence of the communication of the allocation to her, timeously (and/or of the making her aware, by no later than that point) that she could still call for the £903 to be put against 2016/7.

5 13. There is no evidence even as to the penalty said to have been issued on or about 13 March 2018, and whether that would, or would not, have put Ms Appiah on notice as to how HMRC had treated her payment of £903 at the end of January. The Notice of Penalty Assessment (Form SA370) in the bundle is evidentially useless: it is a blank template which does not even refer to the tax year to which it relates. It is the version
10 from 06/14.

14. Ms Appiah's agent's application of 8 August 2018 refers to a penalty notice dated 19 April 2018; and not 13 March 2018. There is no evidence as to what the notice dated 19 April 2018 said. But that application does make it clear that Ms Appiah (through her agent) knew, on 8 August 2018, that the payment had been reallocated. But it does not
15 evince any awareness that the payment could be (re)applied to 2016/7.

15. The most that can be gleaned from the papers is HMRC's suggestion, made in the review letter on 29 October 2018, that it was in fact more advantageous for Ms Appiah to have the £903 allocated to 2015/16 rather than to 2016/17, on the footing that the penalties chargeable on the outstanding amount for 2015/16 (presumably, the amount
20 owing on the Revenue amendment) would be greater than those for 2016/17 (on £903). That may or may not be so, but the letter does not give any figures.

16. I do not consider that it is fair to criticise Ms Appiah for not calling for re-allocation between 31 January 2018 and 29 October 2018 when there is no evidence that she (or, for that matter, her agent) were told what had been done by HMRC; and
25 what Ms Appiah could ask it do.

17. For the above reasons, I am not satisfied that HMRC has discharged the burden of demonstrating that the penalties are due. They must be dismissed.

Reasonable Excuse

18. However, and in case I am wrong about that, I go on to consider whether there is
30 nonetheless a reasonable excuse. The burden in this regard (albeit, again, on the balance of probabilities) falls on Ms Appiah.

19. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal (Judge Herrington and Judge Poole) considered the correct approach to deciding whether a 'reasonable excuse', within the proper meaning and effect of the legislation, exists.

35 20. My task is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default (accordingly, giving rise to a valid defence).

21. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, I should bear in mind all the relevant circumstances,
40 because the issue is whether the particular taxpayer has a reasonable excuse, taking into account the experience, knowledge and other attributes of the particular taxpayer, as

well as the situation in which that taxpayer was at the relevant time or times: see Paras [70] and [71] of that decision.

22. I accept Ms Appiah's evidence that she genuinely and honestly believed, when paying £903, that she had paid the tax owing for 16/17, and that she had no outstanding tax liabilities, and I find accordingly.

23. Moreover, I consider that her belief was a reasonable one. The £903 was the amount owed for 16/17. There is no evidence that she had been made properly aware, when she paid the £903, that money for an earlier year was owed; or that the £903 was going to be applied to that earlier year, and not to 16/17. As already explained, there is no evidence as to when (if, indeed, at all) Ms Appiah was made aware by HMRC of the true position, and the steps which could be taken to move the £903 back to 16/17 (which was Ms Appiah's prerogative - even if it did not make, or would not have made, commercial sense).

24. I assess those facts (including Ms Appiah's state of mind) as sufficient to amount to a reasonable excuse, judged objectively.

Special Circumstances

25. The legal test which I must apply is whether HMRC has approached the question of special circumstances justifying a reduction in the penalty in a way which can be shown to be flawed in the light of the principles applicable in proceedings for judicial review.

26. Even if I were wrong as to the whole of the foregoing, it nonetheless seems to me that HMRC should have considered the issue of special circumstances, but did not. That is a failure to consider a material factor which engages the ordinary principles of public law. Had it done so, it is certainly arguable that a different outcome might have been arrived at. In and of itself, that would suffice to allow the appeal.

Decision

27. The appeal is allowed. The penalties are dismissed.

28. 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.

**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 21 MAY 2019