



[2019] UKFTT 0677 (TC)

**TC07452**

*Income tax – individual tax return – late payment penalty – set off of tax payment against historic penalties – resulting in tax liability remaining unpaid - whether reasonable excuse – no – HMRC has discretion to allocate payment - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2013/04929**

**BETWEEN**

**KURIAKOS KRITIKOS**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE DR KAMEEL KHAN**

**The Tribunal determined the appeal on 29 October 2019 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 1 August 2013 (with enclosures) and HMRC's Statement of Case submitted on 7 February 2019 (with enclosures).**

## DECISION

### INTRODUCTION

1. On the initial appeal dated 7 March 2013 there is an appeal against the partnership 12-month late filing penalty. The appeal against the partnership late filing penalties for 2010-2011 has already been dealt with separately by the Tribunal under TC-2013-05176 – Planet Venus v HMRC.
2. As it is not clear from the appeal to the Tribunal which late payment penalties for 2010-2011 are being appealed against, HMRC has taken it as being all the late payment penalties charged for 2010-2011 on the personal self-assessment return.

### Nature of appeal

This is an appeal against:

3. A first late payment penalty imposed under Paragraph 3(2) of Schedule 56 Finance Act (FA) 2009 for the failure to pay tax on time for the year ending 5 April 2011.
4. A second late payment penalty imposed under Paragraph 3(3) of Schedule 56 Finance Act (FA) 2009 for the failure to pay tax on time for the year ending 5 April 2011.
5. A third late payment penalty imposed under Paragraph 3(4) for Schedule 56 Finance Act (FA) 2009 for the failure to pay tax on item for the year ending 5 April 2011.

### Background

6. Self-Assessment is based on voluntary compliance. Taxpayers who are within the self-assessment system must file their returns by the due date and pay the tax they owe by the date specified in law.
7. Payment is due in accordance with Section 59B Taxes Managements Act (TMA) 1970 and in this instance the due date for payment was 10 February 2012 under Section 59B (3). A late payment penalty is chargeable where a taxpayer is late in paying tax due.
8. It is essential that taxpayers who pay the right amount of tax at the right time feel confident that the system does not reward non-compliance. So, in addition to interest on late payment there is also a system for imposing late payment penalties.
9. The first penalty is calculated at 5% of all tax remaining unpaid after the expiry of 30 days from the due date in accordance with Paragraph 3(2) Schedule 56 FA 2009.
10. Where tax remains unpaid, after the end of the period of 5 months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed under Paragraph 3(3) Schedule 56 FA 2009.
11. 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 under Paragraph 3(4) Schedule 56 FA 2009.
12. The penalty date as defined at Paragraph 1(4) Schedule 56 FA 2009 means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after 30 days from the date specified in Section 59B (3) or (4)).

13. The onus of proof is for the respondents to show that the penalties have been correctly calculated. The burden then shifts to the appellant to demonstrate that a reasonable excuse exists for the defaults.

14. The standard of proof is the ordinary civil standard, which is on the balance of probabilities.

### **Findings of Facts**

15. The return for the year ending 5 April 2011 was issued to Mr Kritikos on 3 November 2011. The address the return was issued to was 198 Gloucester Road, BS7 8NU, the latest address for the appellant.

16. The filing date was 10 February 2012 for a non-electronic return and for an electronic return.

17. Mr Kritikos electronic return for the year 2010-2011 was received on 31 January 2012 and was processed on 2 February 2012

18. Mr Kritikos filed online whereby the liability was automatically calculated.

19. Mr Kritikos tax liability for the year was £1010.00.

20. The tax was due to be paid on or before 10 February 2012 in accordance with Section 59B (3) TMA 1970.

21. At the penalty date of 12 March 2012, 31 days after the due date, £1010.00 of the tax liability remained unpaid.

22. 5 months after the penalty date of 12 March 2012 £800.00 of the tax liability remained unpaid.

23. 11 months after the penalty date of 12 March 2012 £800.00 of the tax liability remained unpaid.

24. The tax liability was finally paid in full on 3 March 2015. This is approximately three years after the due date.

25. HMRC issued a notice of penalty assessment on or around 10 April 2012 in the amount of £50, 5% of the tax unpaid at the penalty date.

26. HMRC issued a notice of penalty assessment on or around 4 September 2012 in the amount of £40, 5% of the tax unpaid 5 months after the penalty date.

27. HMRC issued a notice of penalty assessment on or around 26 February 2013 in the amount of £40, 5% of the tax unpaid 11 months after the penalty date.

28. HMRC are not able to include a copy of the penalty notice sent to the Appellant as neither a paper nor a scanned photocopy is held on the department's files.

29. This is an acceptable practice and the tribunal accepts the specimen copies provided as outlined in *Kwiecinski v Commissioners for HM Revenue & Customs, (TC/2017/08739) at paragraphs 46-48.*

### **The Appeal**

30. On 7 March 2013 Mr Kritikos appealed against the penalties, on the grounds that the individual tax return was filed in time but due to flood damage the partnership return was not filed. In future, the partnership return will be issued on-line.

31. HMRC sent Mr Kritikos a letter dated 15 March 2013 advising that the appeal could not be considered until the tax outstanding was paid. HMRC requested Mr Kritikos pay the tax outstanding immediately or withdraw the appeal
32. HMRC sent Mr Kritikos a decision letter on 28 May 2013 rejecting his appeal and offering a review.
33. On 31 May 2013 Mr Kritikos requested a review of HMRC's decision, saying the 2010-2011 payment for tax was paid on time. However, the payment was allocated to penalties from previous years. The appellant was not happy that HMRC allocated the payment to penalties.
34. HMRC carried out a review and issued their review conclusion on 19 July 2013. The outcome of the review was that HMRC's decision should be upheld.
35. On 1 August 2013 Mr Kritikos notified his appeal to the Tribunal, giving his grounds as
  - All partnership returns were submitted on time
  - All liabilities were paid on the partner's individual tax returns
  - Partnership returns do not have tax liabilities as these are shown on the partnership pages of the partners tax return
  - Paper returns were sent by registered post each year. HRMC do not provide their own on-line returns for partnerships. I do not know why."

### **HMRC View**

36. This appeal is concerned with a simple matter of payment and with the ordinary everyday responsibilities of Mr Kritikos to ensure his tax liability for the year ending 5 April 2011 was paid by the legislative due date.
37. Self-assessment places responsibility on customers for their own tax affairs. This includes ensuring that HMRC get payment of the correct amount of tax and National Insurance at the correct time. The tax guidance and HMRC website give plenty of warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.
38. The tax liability calculated by the online system is computed from the figures the appellant or their agent enters onto the system. The online system is an integral part of the self-assessment system using the same application for calculating a tax liability.
39. The amount calculated by the online system is automatically entered onto the taxpayers account once the return is filed by the user. The self-assessment system includes that amount in its next statement run unless the user amends the return beforehand.
40. HMRC say that they properly allocated the payments made by the appellant and given there was no specific allocation of the money paid by the taxpayer, they allocated it to penalties which meant some of the tax liability remained outstanding and attracted further penalties. In such circumstances, there is no reasonable excuse and all penalties levied are payable.

### **Discussion**

41. Mr Kritikos balancing payment of £1010.00 was due to be paid on 10 February 2012. He made a payment of £1010.00 on 5 May 2012, over 2 months late. However, only £210.00 was allocated to the balancing payment as he had older liabilities in existence at that time.

42. HMRC followed normal commercial practises in allocating payments against older liabilities in existence at the time of receipt of the payment. The payment was allocated to penalties outstanding between the years 1999 to 2015, as shown on a detailed chart provided by HMRC.

43. HMRC can confirm that the earlier year's partnership late filing penalties were not cancelled and remained outstanding. Mr Kritikos also received his individual statements of account showing the late filing partnership penalties.

44. Where a taxpayer makes a payment for unpaid tax liabilities and that payment is not sufficient to meet all the liabilities in full, HMRC may exercise a discretion in allocating that payment to outstanding liabilities. This will not be done where the taxpayer has stated how the money should be allocated when it is paid but in the absence of such a stated allocation, the payments can be allocated by HMRC.

45. In this case, the appellant did not state how the payments he made should be allocated. It was therefore left to the discretion of HMRC. This position is supported by the caselaw.

46. In *Brown v Revenue & Customs [2015] UKFTT 571 (TC)*, the taxpayer received from HMRC late payment surcharges and penalties for various tax years. She appealed, arguing (among other things) that HMRC's allocation of tax payments resulted in an increase in the amount of late payment penalties and surcharges.

47. The First-tier Tribunal found that when making her various tax payments, the taxpayer did not request any of those payments to be allocated to her tax liability for any particular tax year. The tribunal therefore had to determine which payments should be allocated to which tax years' liabilities, which was of potential relevance to the calculation of the late payment penalties and surcharges.

48. The tribunal in *Brown* referred to another case *AJM Mansell Ltd v HMRC [2012] UKFTT 602 (TC)*. The tribunal in that case noted the following principle, derived from 19th century common law cases, that where a debtor makes a payment to a creditor they may appropriate the money as they please; however, if the debtor does not make any appropriation, the right of application devolves on the creditor (*The Mecca [1897] AC 286*).

49. Mr Kritikos knew about the existing penalties since he received his individual statements of account showing the historic late filing partnership penalties. The following notifications were given to the appellant –

a/ 22 September 2010 to the address on record at the time, 198 Gloucester Road, BS7 8NU,

b/ 13 October 2011 to the address on record at the time, 198 Gloucester road, BS7 8NU

c/ 5 December 2011 to the address on record at the time, 198 Gloucester Road, BS7 8NU

50. Mr Kritikos would also have been aware of the outstanding penalties beginning in April 1999, before the 2010-2011 balancing payment was due on 10 February 2012.

51. Therefore, in the absence of any allocation by the appellant, HMRC could allocate the payments made toward the tax liability as they saw fit, although their public law duties would preclude them from making an unreasonable allocation.

52. I therefore find that , although the HMRC's allocation of money paid by the appellant towards his tax liability was done in a way which was detrimental to the appellant, in that it resulted in the payment of further penalties, they were within the law in doing so and in matching the payment to historic liabilities in the form of penalties. The allocation was not unreasonable.

## **Reasonable excuse**

53. Paragraph 16 of Schedule 56 FA 2009, provides that a penalty does not arise in relation to a failure to make a payment if the person satisfies HMRC (or on appeal, a tribunal) that there is a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

The law specifies two situations that are not reasonable excuse:

- (a) An insufficiency of funds, unless attributable to events outside the appellant's control and
- (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

54. 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*).

55. HMRC's view is that 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.

56. 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 confirming to that standard.

57. If there is a reasonable excuse it must exist throughout the failure period.

58. The tribunal finds that there is no reasonable excuse in this case. The tax payments were late and it is not correct to say that there were no tax liabilities. This view arose from a fundamental misunderstanding of the law as to how sums paid towards a tax liability are allocated where there are historic liabilities to be settled.

## **Special Reduction**

59. Paragraph 16(1) allows HMRC to reduce a penalty if they think it is right because of special circumstances.

60. Special circumstances are undefined save that, under paragraph 16(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 over-payment by another.

61. In other contexts, "special" has been held to mean 'exception, 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.

62. HMRC have considered Mr Kritikos statement that 2010-2011 payment for tax was paid on time and the payment was allocated to penalties from previous years, and submit that they are not special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

63. Part of the consideration for Special Reduction includes whether in HMRC's opinion, a penalty has been raised when the legislation did not intend that taxpayer to be subject to the penalty regime. As the taxpayer was in the Self-Assessment system and had not paid the amount due by the deadline of 10 February 2012, HMRC do not consider that a special reduction applies.

64. Where a person appeals against the amount of a penalty, paragraph 22 (2) and (3) of Schedule 55, FA 2009 provides 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 16 (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'.

65. After considering all the facts, the decision not to reduce the penalties under paragraph 16 was not flawed and there are no special circumstances which would require the tribunal to reduce the penalties.

### **Conclusion**

66. The tribunal finds that the late payment penalties charged are in accordance with legislation and there is no reasonable excuse for Mr Kritikos failure to pay his tax on time, nor by the date the penalty arose.

67. The tribunal find that there are no special circumstances which would allow the penalty to be reduced under Special Reduction and therefore HMRC ask that the appeal is dismissed, and the £130 late payment penalties are confirmed.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

68. 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.

### **Legislation:**

Taxes Management Act 1970 Section 7 – Notice of liability to income tax and capital gains tax.

**JUDGE DR KAMEEL KHAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 6 NOVEMBER 2019**