



[2020] UKFTT 0123 (TC)

**TC07617**

*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/2019/06650**

**BETWEEN**

**DAVID SYKES**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ABIGAIL HUDSON**

The Tribunal determined the appeal on 7 February 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 17 October 2019 (with enclosures), and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 27 November 2019.

## DECISION

### INTRODUCTION

1. This is an appeal by David Sykes ('the Appellant') against penalties totalling £106, imposed by the Respondents ('HMRC') under Paragraph 3 of Schedule 56 Finance Act (FA) 2009, for failures to submit payment on time for the tax year ending 5 April 2018.

### BACKGROUND

2. The Appellant's first tax payment for the year ending 5 April 2018, was due by no later than 31 January 2019, 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 2017-18 remains unpaid and a penalty of £106 was therefore imposed under (i) above. I understand that a second penalty has been imposed under (ii) above, but that is not the subject of this appeal.

#### *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 2017-18 was issued on 6 April 2018 and so was due to be returned in paper form by 31 October 2018 or online by 31 January 2019. Tax was therefore due to be paid by that date.
12. The Appellant does not dispute that the payment has not been made.
13. The Appellant appealed to the Tribunal on 17 October 2019.

#### **The Appellant’s case**

14. The Appellant’s grounds of appeal are that he sought to pay the tax in the following tax years, and was awaiting a response when the tax became due. His agent advised him that he need not pay the tax outstanding because his application would be successful. He therefore had a reasonable excuse for not paying the tax.

#### **HMRC’s Case**

15. 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*

16. 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).
17. ‘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.].

18. 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.
19. If there is a reasonable excuse it must exist throughout the failure period.
20. The Appellant has not provided a reasonable excuse for his failure to make payment for the tax years 2017-18 on time and accordingly the penalties have been correctly charged in accordance with the legislation.
21. 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*

22. 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.
23. 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).
24. 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’.
25. 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.
26. 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**

27. Mr Sykes was due to pay his first tax payment by 31 January 2019 and did not do so.
28. The tax return was filed electronically on 20 November 2018 showing a tax liability of £2131.87. At some point prior to 31 January 2019 the Appellant applied to have this amount collected in the following tax year. As of 31 January 2019 he received no response to that application. Neither he nor his agent appear to have made any efforts to seek clarification or a response to the application prior to the date the monies became due. Upon seeing his statement of account which indicated that the payment was overdue, the Appellant's agent sought a response to that application by letter dated 22 February 2019.
29. On or around 19 March 2019 a penalty notice was issued to Mr Sykes. On 26 March 2019 the Appellant or his agent received a response to his letter of 22 February 2019 indicating that the application had been unsuccessful. On or around 23 April 2019 the Appellant appealed the penalty.
30. The Appellant knew that the Respondent considered that he had outstanding unpaid tax at the date of 22 February 2019 if not before. That tax remains unpaid as at November 2019.
31. 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 19 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**

32. Relevant statutory provisions are included as an Appendix to this decision.
33. I have concluded that the tax for the 2017-18 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.
34. 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.
35. I acknowledge that Mr Sykes appears to have believed that he would be eligible to pay his tax in a subsequent tax year. His representative appears to have researched the point and found information on the Respondent's website indicating that an application to do so would succeed. In furtherance of that intention an application was made to the Respondent. I am not provided with a date for that application, but by making an application the Appellant appears to accept that being permitted to pay the tax in the following tax year is not automatic and that he would need to seek the permission of the Respondent. It follows that he would have expected a response. He did not receive one. Upon the 31 January 2019 Mr Sykes would have been aware – as would his agent - that ordinarily he would be required to pay tax on that day. It would therefore have been clear that no response had been received to the application made by that date, and yet I am not told of any efforts to chase the Respondent for a response, or to enquire as to the absence of a response until 22 February of that year.

36. In not chasing the response at that date I consider the Appellant and his agent to have failed to exercise sufficient diligence in ensuring that his tax obligations were met. Having not had a response by 31 January 2019 the position should have been checked at that point. I am supported in that conclusion by the fact that a self-assessment statement was sent dated 5 December 2018 which indicated that the Respondent considered a tax payment to be due on 31 January 2019. The fact that the position was not checked until a statement of account was received, suggests that the procedures used to ensure compliance with the SA tax regime were insufficient.
37. Even if I accepted that the three-week delay was reasonable in the circumstances, the tax outstanding has not been paid. Any reasonable excuse must exist throughout the failure period. Had the tax been paid at 22 February 2019 no penalty would have been incurred. On 26 March 2019 HMRC responded to the letter from the Appellant's agent chasing the response to the application and refused that application on the basis that the underpayment could not be coded out as Mr Sykes did not have enough PAYE income from his employer to collect the tax due. As of 26 March 2019 therefore the Appellant can have been under no misunderstanding or doubt that his tax had been due by 31 January 2019, and yet it remains unpaid.
38. Mr Sykes appears to be arguing that in fact he should have been permitted to have his tax coded out in his next tax codes, and that the refusal of his application was wrong. However, having not had his application determined in his favour by the date the tax was payable, he was in my judgment obliged to either obtain permission to delay in some way or pay the tax. In fact HMRC assert that the application was properly refused because he did not meet the conditions set out in the notes guidance on how to complete his tax return. In the letter from the Respondent dated 22 July 2019 there is reference made to a telephone call in March 2019 between an HMRC representative and the Appellant's agent, and the subsequent letter sent at the end of March, in which the Respondent apparently made it clear that the tax could not be coded out because the PAYE income received by the appellant is too low to allow for that. I accept this, and cannot see any good reason for the ongoing delay in payment after that letter was received, but in any event, the application having not been determined in his favour by the due date obliged him in my judgment to pay the tax owed or incur penalties.
39. In *Perrin v HMRC* [2018] UKUT 156 the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. This Appellant is experienced in tax affairs and has been registered in the SA regime for a number of years. 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. In my judgment it is not objectively reasonable for Mr Sykes to have believed that no tax was outstanding. Having filed his SA return indicating that an amount of tax was due, he then applied to defer payment. That application was not granted. He having not been told that his tax could be deferred it would be unreasonable to assume or believe that it could be. HMRC are entitled to assume that tax payers will ensure that they are properly informed regarding the payment of their tax obligations.
40. It appears that the Appellant's agent may not have properly advised him of the rules governing coding out underpayments. They should have realised that the underpayment could not be collected. If they have wrongly advised him, then it may be that Mr Sykes has some recourse against his agent, however, his reliance upon an agent cannot be a reasonable excuse unless he took reasonable care to ensure that his obligations were complied with. The responsibility for complying with his tax obligations rests with him. Mr Sykes was aware of the failures to pay following receipt of correspondence from the

Respondent but has made no payment. In my judgment it was unreasonable to fail to ensure that he had confirmation that his payment was not required by 31 January 2019, before failing to pay tax. On the evidence before me neither he nor his agent had that confirmation, and there is nothing on the evidence to suggest that the agent misled him that such confirmation had been received. Even if I had concluded that it was reasonable to assume that the application had been granted, it is certainly not reasonable to continue to do so after the penalty notice was received. He does not appear to have contacted HMRC and sought any payment plan to clear the liability. He clearly therefore made insufficient efforts to exercise the necessary reasonable care and cannot rely on an assertion of reasonable excuse.

41. I conclude that the Appellant has not shown a reasonable excuse for the late payment of his tax liabilities for the tax year 2017-18.
42. 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.
43. 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 Sykes.
44. 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 Sykes relied upon was his initial belief that his tax could be deferred. I have explained above why I do not consider that erroneous belief and failure to properly respond to communication from HMRC can provide Mr Sykes with a reasonable excuse for his late payments. Similarly, I conclude that ignorance of the severity of the Schedule 56 penalty regime does not constitute a special circumstance which would make it right for me to reduce the penalty which has been imposed.

## **CONCLUSION**

45. I therefore confirm the fixed penalty of £106 for the tax year 2017-18. Interest has been properly accrued and is payable by the Appellant (*HMRC v Gretton* [2012] UKUT 261 (TCC)).

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

46. 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: 02 MARCH 2020**

**APPENDIX  
RELEVANT STATUTORY PROVISIONS**

**Finance Act 2009**

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

**Schedule 56**

48. 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.

49. 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.

50. 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.

51. 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)).

52. 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**

53. 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.