



Neutral Citation: [2024] UKFTT 00400 (TC)

Case Number: TC09167

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/10110

*INCOME TAX – late payment penalties – Income and Corporation Taxes (Electronic Communications) Regulations 2003 – electronic service of notices – Regulation 6 certificate – special reduction applied - appeal allowed.*

**Heard on:** 18 March 2024

**Judgment date:** 8 May 2024

**Before**

**TRIBUNAL JUDGE SUSAN TURNER  
MEMBER JANE SHILLAKER**

**Between**

**GARETH BEZANT**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Gareth Bezant in person

For the Respondents: Paul Marks, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This is an appeal against late payment penalties imposed under sch 56 Finance Act 2009 (FA 2009) in respect of the tax year 21/22 in a total amount of £248.
2. The form of the hearing was V (video) and all parties attended remotely using the Tribunal's video hearing platform.
3. On 8 March 2024, the Tribunal allowed an application made by HMRC to amend their statement of case and to adduce additional late evidence. Mr Bezzant raised no objection. We therefore referred to an amended document bundle of 57 pages, including an amended statement of reasons prepared by HMRC; and an amended bundle of legislation and authorities of 127 pages. We also referred to the Paper Notice described at [5] below.
4. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

### THE FACTS

5. On 22 June 2023, HMRC sent a notice to complete a tax return for the 21/22 tax year to Mr Bezzant by post (the Paper Notice). According to HMRC's records, the filing due date for the tax return was 29 September 2023.
6. On 23 June 2023, Mr Bezzant enrolled for self-assessment. He had signed up to receive paperless communications on 19 April 2021, and communications following the Paper Notice were consequently made electronically.
7. An electronic return for the 21/22 tax year was filed by Mr Bezzant on 31 August 2023 and the self-assessment calculation showed that income tax for the 21/22 tax year was due.
8. The tax for the 21/22 tax year was due on 31 January 2023. It was paid 232 days late, on 20 September 2023.
9. On 5 September 2023, notice of: (a) a 30-day late payment penalty in an amount of £124; and (b) a 6-month late payment penalty in an amount of £124, was served on Mr Bezzant by way of electronic notification to Mr Bezzant's online tax account. At the same time, email alerts were sent to Mr Bezzant's verified email address.
10. On 6 September 2023, Mr Bezzant appealed the penalties to HMRC. HMRC issued a late appeal refusal letter on 22 September 2023. They subsequently identified that an incorrect late appeal refusal letter had been issued and wrote again to Mr Bezzant, upholding their decision to charge the late payment penalties.
11. On 30 September 2023, Mr Bezzant appealed the late payment penalties to this Tribunal.

### THE ISSUES

12. The Tribunal considered the following issues:
  - (1) Whether the late payment penalties were correctly assessed.
  - (2) Whether the late payment penalty notices had been correctly issued.
  - (3) Whether Mr Bezzant had a reasonable excuse for the late payment of tax for the 21/22 tax year.
  - (4) Whether HMRC's decision in relation to special reduction of the penalties was flawed.

## THE LAW

### Assessment of late payment penalties

13. The provisions governing the assessment of the relevant penalties are set out in sch 56 FA 2009. Paragraph 1(1) provides that:

1(1) A penalty is payable by a person (P) where P fails to pay an amount of tax specified in column 3 of the Table on or before the date specified in column 4.

14. The tax specified in this case is income tax payable under s 59(b)(3) Taxes Management Act 1970 (TMA 1970) and the date specified is the penalty date of 3 March 2023.

15. Where a person fails to make payment on or before the penalty date, a penalty may be assessed under para 3, sch 56 FA 2009, which provides for a penalty of 5% to be imposed, followed by a further penalty of 5% after five months.

### Notification of late payment penalties and electronic communications

16. Where a penalty arises, it must be notified to the taxpayer in accordance with para 11, sch 56 FA 2009 as follows:

Where P is liable for a penalty under any paragraph of this Schedule HMRC must-

- (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed.

17. HMRC must therefore prove to the satisfaction of the Tribunal, on the balance of probabilities, that they had fulfilled these requirements. In this case, HMRC must prove that they had notified Mr Bezant of the assessed penalties.

18. As set out by Judge Frost in *Walker v HMRC* [2023] UKFTT 865, the use of electronic communications for these purposes is governed by the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (2003/282) (the Electronic Communications Regulations). Part 3 of those regulations contains the evidential provisions relevant to this appeal.

19. The overarching effect of compliance with the Electronic Communications Regulations is set out in reg 5, which provides:

5 Effect of delivering information by means of electronic communications

(1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act, the relevant Finance Acts or the Management Act if, but only if, all the conditions imposed by

- (a) these Regulations,
- (b) any other applicable enactment (except to the extent that the condition thereby imposed is incompatible with these Regulations), and
- (c) any specific or general direction given by the Board, are satisfied or, but only in the case of the conditions mentioned in regulation 3(2A) (electronic delivery of company tax returns), are taken to be satisfied under regulation 3(8).

(2) Information delivered by means of electronic communications shall be treated as having been delivered on the day on which the last of the conditions imposed as mentioned in paragraph (1) is satisfied. This is subject to paragraphs (3) and (4).

(3) The Board may by a general or specific direction provide for information to be treated as delivered upon a different date (whether earlier or later) than that given by paragraph (2).

(4) Information shall not be taken to have been delivered to an official computer system by means of electronic communications unless it is accepted by the system to which it is delivered.

(5) For the purposes of this Part, information which is delivered by means of electronic communications includes information delivered to a secure mailbox.

(6) For the purposes of paragraph (1) “the relevant Finance Acts” means the Finance Act 2007, the Finance Act 2008 or the Finance Act 2009.

20. Therefore, a penalty notice which meets the requirements set out in reg 5 Electronic Communications Regulations is to be treated as having been delivered for the purposes of para 11, Sch 56 FA 2009.

21. Regulation 6 Electronic Communications Regulations provides for a means by which HMRC can create a rebuttable presumption that information was delivered electronically. Regulation 6 states:

6 Proof of content

(1) A document certified by an officer of the Board to be a printed-out version of any information delivered by means of electronic communications under these Regulations on any occasion shall be evidence, unless the contrary is proved, that that information-

(a) was delivered by means of electronic communications on that occasion; and

(b) constitutes the entirety of what was delivered on that occasion.

(2) A document purporting to be a certificate given in accordance with paragraph (1) shall be presumed to be such a certificate unless the contrary is proved.

22. As stated by Judge Frost at [20] of *Walker*, in accordance with reg 6 Electronic Communications Regulations, HMRC need only provide the Tribunal with a document purporting to be a duly-certified copy of the notice in order to create a rebuttable presumption that the notice was both delivered and contained the information set out in that copy.

**Reasonable Excuse**

23. Paragraph 16, sch 56 FA 2009 provides that a penalty does not arise in respect of the late payment if there is a reasonable excuse for the late payment and the failure to make the payment was rectified without unreasonable delay after the excuse had ended.

24. We follow the approach set out in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) at paragraph [81] when considering whether Mr Bezant had a “reasonable excuse” in relation to the late payment:

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

(1) First, establish what facts the taxpayer asserts 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).

(2) Second, decide which of those facts are proven.

(3) 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?"

(4) 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."

25. We consider whether Mr Bezant had a reasonable excuse for the late payment from [35] below.

### **Special Reduction**

26. Paragraph 9, sch 56 FA 2009 provides discretion for HMRC to reduce any penalty charged if they think it right to do so because of special circumstances.

27. Where a person appeals against the amount of a penalty, para 15(2) and (3), sch 56 FA 2009 gives the Tribunal the power to substitute HMRC's decision with another that HMRC had the power to make.

28. The Tribunal may rely on para 9, sch 56 FA 2009 only if they think HMRC's decision was flawed when considered in the light of the principles applicable in proceedings for judicial review, which are that: the decision-maker has taken account of all relevant factors; the decision-maker has taken account of no irrelevant factors; and that the decision is one that a reasonable decision-maker having regard to the available evidence could make.

### **DISCUSSION**

#### **Assessment of late payment penalties**

29. There is no dispute that the tax for 21/22 was due on 31 January 2023 or that it was paid 232 days late, on 20 September 2023. The late payment penalties were correctly assessed by HMRC.

#### **Notification of late payment penalties and electronic communications**

30. In *Walker*, Judge Frost considered whether an electronic notice had been adequately served, noting that the burden of proof would lie with HMRC. In that appeal at [31-33], complex evidence said to have been extracted from HMRC's internal systems was found to be ineffective in meeting the evidential requirements necessary to prove service without a witness statement to interpret the technical language of the documents and to show where the data had come from. Judge Frost drew attention at [27] to reg 6 Electronic Communications Regulations which provides for HMRC to certify that information was served in accordance with the Electronic Communications Regulations.

31. In this appeal, HMRC provided a certificate (the Reg 6 Certificate) as evidence of what was served electronically to Mr Bezant's personal tax account and email, including details of when those items were served.

32. The Reg 6 Certificate certified that the Form SA370 penalty notice dated 5 September 2023 and attached to the Reg 6 Certificate was delivered electronically to Mr Bezant's online self-assessment account. The Form SA370 includes the period in respect of which the penalty was assessed, fulfilling the requirements of para 11, sch 56 FA 2009. The Reg 6 Certificate also confirms that generic email communications had been sent on 6 September 2023 alerting Mr Bezant to the penalty notice.

33. We accept that the Reg 6 Certificate satisfies reg 6 Electronic Communications Regulations and, in turn, reg 5(1) Electronic Communications Regulations, creating a rebuttable presumption that the penalty notice had been delivered and contained the information set out in the attachments. Mr Bezant did not seek to rebut this presumption.

34. We therefore find that the late payment penalties were correctly assessed and issued, and turn to consider whether Mr Bezant had a reasonable excuse for the late payment.

### **Reasonable Excuse**

35. We considered the submissions and evidence presented to the Tribunal by Mr Bezant. Mr Bezant did not dispute the factual timeline set out at [5–11] above. In particular, there was no dispute that the tax showing on the tax return for the 21/22 tax year was due.

36. Mr Bezant told the Tribunal that an income tax liability had arisen in respect of the high income child benefit charge (HICBC). Mr Bezant noted that he had been aware of the HICBC but that he had not known that his income would exceed the relevant threshold for the 21/22 tax year. While his base salary had fallen under the threshold, receipt of benefits meant that he became liable to the HICBC. Juggling a busy family life and job, Mr Bezant accepts that he simply had not notified HMRC or made the payment on time. This alone cannot constitute a reasonable excuse.

37. However, Mr Bezant argued that the Paper Notice had informed him that his tax return was to be filed and his tax liability was to be paid within 3 months of the date of the Paper Notice to avoid late payment penalties. As he had paid the outstanding tax within that timeframe, Mr Bezant argued that the penalties should not apply.

38. Mr Bezant provided the Tribunal with a copy of the Paper Notice dated 22 June 2023 informing him of the need to complete a tax return for the 21/22 tax year which included the following information:

***“Deadline for sending your tax return and paying your tax***

*You must make sure we receive your tax return and pay all the tax you owe for the 2021-22 tax year within 3 months of the date on this letter.*

*If you miss the deadline, you'll have to pay:*

- *penalties for filing your tax return late*
- *penalties and interest for paying your tax late”*

39. This Paper Notice contained Mr Bezant's address and referred to the tax year 21/22. The reference in the footer was SA316 (2022).

40. HMRC included evidence of the notice served on Mr Bezant in their document bundle in the form of a proforma notice (the Proforma Notice). This Proforma Notice included the following paragraph:

***“Deadline for completing your tax return and paying your tax***

*You must make sure we receive your tax return(s) within 3 months of the date on this letter. If you miss this deadline, you’ll have to pay penalties for filing your tax return(s) late.*

*If there’s any tax to pay, it should already have been paid by 31 January following the end of the relevant tax year(s).*

*As you have now missed this deadline, you’ll need to pay penalties and interest for paying your tax late.”*

41. The Proforma Notice had blank spaces for the taxpayer’s address and details of the relevant tax year. In its footer, it included reference SA316 FTN.
42. The Paper Notice clearly differed materially from the Proforma Notice supplied to the Tribunal as evidence in the document bundle prepared by HMRC. In particular, the Paper Notice purports to allow three months from the date of that letter for payment of tax for the 21/22 tax year, whereas the Proforma Notice informs the taxpayer that the 31 January deadline has been missed and penalties apply.
43. We considered whether this could amount to a “reasonable excuse” for Mr Bezant’s late payment. We find this cannot constitute a reasonable excuse for the failure to meet the 31 January 2023 payment due date because the Paper Notice was neither sent nor received until June of that year, after the payment due date had passed.

**Special Reduction**

44. Finally, we considered our power under para 15(2) and (3), sch 56 FA 2009 to substitute HMRC’s decision with another that HMRC had the power to make.
45. We find that the existence of the Paper Notice, containing materially different information from the Proforma Notice provided in the document bundle, is a relevant factor which had not been taken into account by HMRC in reaching their decision to impose the late payment penalties.
46. On consideration of the Paper Notice at the hearing, Mr Marks submitted that, as the Paper Notice was issued before the before the 6-month late payment penalty date, a special reduction could be made under para 9, sch 56 FA 2009 to the 6-month late payment penalty. HMRC argued that there should be no special reduction in respect of the 30-day late payment penalty given that that penalty date had passed before the Paper Notice was issued.
47. However, the penalty notice of 5 September 2023 in respect of both the 30-day and the 6-month late payment penalties was issued after the Paper Notice, in which Mr Bezant was told that penalties would be imposed if he did not file his tax return and pay all of the tax owed for the 21/22 tax year within 3 months of the date on the Paper Notice. We therefore find that the Paper Notice gives rise to special circumstances which apply in the case of both the 30-day and the 6-month late payment penalties.
48. We find that it was not appropriate to impose late payment penalties in the particular circumstances of this case and that HMRC’s decision to do so was flawed.

**THE DECISION**

49. It follows that we ALLOW the appeal and reduce the late payment penalties to £0.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

50. 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.

**SUSAN TURNER  
TRIBUNAL JUDGE**

**Release date: 08<sup>th</sup> MAY 2024**