



Neutral Citation: [2024] UKFTT 1012 (TC)

Case Number: TC09350

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Decided on the papers

Appeal reference: TC/2023/09124

CAPITAL GAINS TAX – Late payment penalties – reasonable excuse – was a lack of funds resulting from the terms of a sale agreement entered into by the taxpayer a reasonable excuse? - no - failure to seek time to pay – could the taxpayer escape the consequences of apparent negligence by his agent? - no – appeal dismissed

Judgment date: [Hagley Road to insert Release Date]

Decided by:

TRIBUNAL JUDGE MALCOLM FROST

Between

DARREN WRAGG

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 18 January 2024 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 25 July 2023 (with enclosures), HMRC’s Statement of Reasons of 17 pages, a hearing bundle of 34 pages and a legislation and authorities bundle of 91 pages.

DECISION

INTRODUCTION

1. This appeal concerns a penalty imposed for late payment of capital gains tax.
2. For the reasons set out below the appeal is dismissed.

THE FACTS

3. On 31 January 2023, Mr Wragg's electronic return for the year ending 5 April 2022, was filed. The tax liability for the year was £54,528.27. Much of that tax liability was a capital gains tax liability arising from Mr Wragg's sale of his shares in Tiles Porcelain Limited.
4. On 3 February Mr Wragg's tax agent (Azets) contacted HMRC. Azets explained that Mr Wragg had sold his shares in a company but that he would not receive the proceeds until the company completed the sale of a property to go through before he could pay the tax. Once the sale went through Mr Wragg would pay the tax straight away.
5. The HMRC operator said that they could put a note on the record but that it would not stop interest or penalties being added. Azets accepted this. The HMRC operator suggested Mr Wragg contact HMRC's Debt Management department to agree a "Time to Pay" arrangement rather than just "letting it build up".
6. On 17 February 2023 Mr Wragg called HMRC and again explained that he hadn't received the proceeds so was unable to pay the tax. A call back was arranged.
7. On 20 February 2023 HMRC called Mr Wragg back. Mr Wragg confirmed that his return was correct, but he could not yet pay the amount owed for the year as he was awaiting funds from the sale of a warehouse. The HMRC operator sent Mr Wragg an email with a link to the Gov.uk website page which provided information for customers with payment problems.
8. On 24 February 2023 Azets telephoned HMRC about the outstanding sum and were advised to contact the Debt Management department.
9. Later that same day, Azets called HMRC's Debt Management department. Azets explained that Mr Wragg had sold shares and was still awaiting the sale of a warehouse. There had been delays in selling due to extra work done on the warehouse. Azets stated the sale was likely to go through on 3 March 2023 and they would appeal any late payment penalty charged. Despite having the opportunity to do so in the course of the call, Azets did not seek any Time to Pay arrangement.
10. On or around 14 March 2023, HMRC issued a notice of penalty assessment under paragraph 3(2), Sch 56 Finance Act 2009 ("FA 2009") in the amount of £2,656 (that being 5% of the tax liability which remained unpaid on the penalty date of 3 March 2023).

THE LAW

11. 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."

12. Item one in column 3 of the table referred to includes any amount of income tax or capital gains tax payable under section 59B Taxes Management Act 1970 ("TMA"). The corresponding date specified in column 4 is the date falling 30 days after the date specified in section 59B(3) or (4) of TMA as the date by which the amount must be paid.

13. Section 59B(4) TMA 1970 provides that (where no exceptions apply) the due date for payment is on or before 31 January following the year of assessment.

14. The ‘penalty date’ as defined at paragraph 1(4), Sch. 56 FA 2009 in relation to income tax and capital gains tax payable under section 59B TMA 1970 is the 31st day following the due date for payment. Where no exceptions apply, this is 31 March following the year of assessment.

15. Where a person fails to make payment on or before the penalty date, then a penalty may be assessed under paragraph 3, Sch. 56 FA 2009.

16. Under paragraph 3(2), a penalty for 5% of the outstanding tax due to be paid may be charged if a person fails to pay by the penalty date.

17. Therefore, where a taxpayer fails to pay an amount of capital gains tax on or before 31 March following the year of assessment (assuming no exceptions apply), a penalty may be assessed of 5% of the tax outstanding on that date.

18. Paragraph 16(1) of Sch 56 FA 2009 provides that liability to a penalty does not arise if a taxpayer satisfies HMRC or the Tribunal that there was a reasonable excuse for the failure. Paragraph 16 (2) provides:

“(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.”

19. Paragraph 9 of Sch 56 FA 2009 provides for the possibility of a special reduction, as follows:

“9 Special reduction

(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.”

THE ISSUES

20. The issues to be determined are:

(1) Whether the late payment penalty charged to Mr Wragg was correctly issued.

(2) Whether Mr Wragg has a reasonable excuse for the late payment of tax

(3) If a reasonable excuse exists, whether the payment was received without any unreasonable delay once any excuse had ended.

(4) Whether the Respondents' decision in relation to special reduction of the penalty was flawed.

Was the penalty correctly issued?

21. Mr Wragg has not raised any issue as to the correct assessment of the penalty. The tax was unpaid on the penalty date. I see no error in HMRC's issuing of the penalty. I find that it was correctly issued.

Reasonable excuse

22. Mr Wragg's primary argument is that the penalty should be set aside on the basis that he had a reasonable excuse. Mr Wragg's position on reasonable excuse can be summarised as:

(1) The majority of the tax liability for the year 2021-22 related to Mr Wragg's sale of shares in Tiles Porcelain Limited. Whilst the sale of the shares took place during the 2021-22 tax year, part of the agreement was that the proceeds could be paid to Mr Wragg once the company had sold a commercial property. The sale of the property had hoped to be completed by 31 January 2023, but due to various difficulties was not completed until mid-March.

(2) Mr Wragg paid the tax liability upon receipt of the proceeds from the property sale.

(3) HMRC were advised of Mr Wragg's position in various telephone calls by both Mr Wragg and Azets.

(4) Mr Wragg could not pay the CGT liability until he had physically received the relevant proceeds from the property sale.

(5) Mr Wragg is therefore being punished for a problem which was beyond his control.

Discussion

23. The correct approach to a question of reasonable excuse is that set out in *Christine Perrin v Revenue and Customs Commissioners* [2018] UKUT 0156 (TCC) at [81].

24. For present purposes, the key point to take from *Perrin* is that the excuse must be objectively reasonable, taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found themselves in at the relevant time or times. The Upper Tribunal suggested in *Perrin* that 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?"

25. The tax in question was due to be paid by 31 January 2023. Mr Wragg had not received the funds from the disposal of shares in Tiles Porcelain Ltd by that date, or by the penalty date. Is it sufficient for Mr Wragg to inform HMRC of that factual position in order to give rise to a reasonable excuse?

26. I bear in mind paragraph 16(2) Sch 56 FA 2009 which provides that an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control. However, I find that the terms of sale of Tiles Porcelain Limited were entirely within Mr Wragg's control. It would have been open to Mr Wragg to decline to sell his shares on terms that left him without the funds to pay the corresponding tax. As such paragraph 16(2) does not assist him.

27. It is a feature of any tax system that the due date for payment of tax may arise prior to the date upon which the relevant funds are received (a "dry tax charge"). A well-advised taxpayer will normally seek to structure transactions so as to avoid such charges.

28. Where a dry tax charge is unavoidable, a well-advised taxpayer would have been made aware of the issue and the need to either secure appropriate funding to meet the liability or to make suitable arrangements with HMRC.

29. I have not been provided with any evidence that Mr Wragg sought alternative funding to enable him to pay the tax. I cannot therefore find a reasonable excuse on that basis.

30. On the question of making arrangements with HMRC, Mr Wragg relies on having made a number of calls to notify HMRC of his lack of funds. I do not consider that simple notification is sufficient grounds for a reasonable excuse. Mr Wragg (or Azets) do not appear to have taken any steps to agree a payment timetable with HMRC.

31. Mr Wragg's position appears to be that HMRC should simply be expected to wait as long as necessary until he had been put in funds. If that were the case, HMRC would find it very difficult to collect tax as it fell due.

32. In this case, Azets were warned by HMRC that, without a Time to Pay arrangement, penalties would continue to accrue. Azets were advised to contact HMRC's Debt Management department in order to agree such an arrangement.

33. Azets contacted HMRC's Debt Management department but, for unknown reasons, did not seek to agree a Time to Pay arrangement. Instead, Azets repeated their explanation of Mr Wragg's cashflow difficulties and stated that any penalty would be appealed.

34. I find it difficult to understand why a properly-instructed professional adviser, knowing that their client would not be able to pay in time, and being advised by HMRC that a Time to Pay arrangement would be necessary, nonetheless did not ask for a Time to Pay arrangement.

35. As HMRC quite properly submitted, paragraph 10 of Sch 56 FA 2009 provides that where an individual fails to pay an amount of tax falling due but agrees a Time to Pay arrangement with HMRC, then a penalty is not due for failure to pay by the penalty date (so long as that arrangement is complied with).

36. If Mr Wragg/Azets had put forward a payment plan under which the tax would be paid over a number of instalments, this may well have been accepted by HMRC and provided Mr Wragg with sufficient time for him to obtain the funds. Even if HMRC had rejected a suggested arrangement, this could nonetheless form the basis of a reasonable excuse.

37. In the absence of any attempt to agree a Time to Pay arrangement (despite clear suggestions from HMRC to do so), I cannot see any basis for a reasonable excuse.

38. Mr Wragg may have sought to raise a reasonable excuse on the basis that he had relied upon Azets, and that Azets failure to seek a Time to Pay arrangement is not his fault.

39. However, paragraph 16(2)(b) of FA 2009 Sch 56 provides that where a taxpayer relies on another person to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid that failure. There is no evidence before me as to steps being taken to avoid the failure. As a result, Mr Wragg cannot escape the consequences of Azets' apparent failings.

40. I must therefore conclude that Mr Wragg does not have a reasonable excuse for failing to make payment on time.

Special reduction

41. Mr Wragg did not raise any arguments on this point. For completeness I note that I see no reason to interfere with HMRC's conclusion that there is no basis for a special reduction.

CONCLUSION

42. For the reasons set out above, I find that Mr Wragg does not have a reasonable excuse for the failure to make payment on time. The appeal is therefore dismissed and the penalty upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

**MALCOLM FROST
TRIBUNAL JUDGE**

Release date: 05th NOVEMBER 2024