



[2019] UKFTT 523 (TC)

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**

TC07319

Appeal number: TC/2019/01431

BETWEEN

ANTHONY SYKES

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ABIGAIL HUDSON
DEREK ROBERTSON**

Sitting in public at Manchester Tax Tribunal on 18 June 2019

We heard from Ms Halfpenny, Litigator of HM Revenue and Customs' Solicitor's Office for the Respondent. The Appellant failed to attend the hearing but the Tribunal was satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed. We do note that there were some traffic problems on the day of the hearing, as a result of which we waited until 11am before proceeding to hear the case. No contact was received from the Appellant who had been notified by letter dated 16 March 2019 that the matter may be determined in his absence if he did not attend the hearing.

DECISION

INTRODUCTION

1. This is an appeal by Anthony Sykes ('the Appellant') against penalties totalling £3,297.87, 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 years ending 5 April 2012, 2013 and 2014.

BACKGROUND

2. The Appellant's tax payment for the year ending 5 April 2012, was due by no later than 31 January 2012 and 31 July 2012, under Section 59B Taxes Management Act ('TMA') 1970. The Appellant's tax payment for the year ending 5 April 2013, was due by no later than 31 January 2013 and 31 July 2013. The Appellant's tax payment for the year ending 5 April 2014, was due by no later than 31 January 2014 and 31 July 2014.
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 2011-12 was paid five months late on 2 July 2013 and a penalty of £240 was therefore imposed under (i) above in relation to the tax year 2011-12. The Appellant's tax for the tax year 2012-13 was paid over a year late on 10 September 2018 and penalties of £240, £240 and £240 were therefore imposed under (i), (ii) and (iii) above. The Appellant's tax for the tax year 2013-14 was paid over a year late on 26 May 2016 and penalties of £240, £240 and £240 were therefore imposed under (i), (ii) and (iii) above.

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 2011-12 was issued on 6 April 2012 and so was due to be returned in paper form by 31 October 2012 or online by 31 January 2013. The tax was therefore due to be paid by that date. Payment was made on 2 July 2013 and was therefore 5 months late.
12. The Appellant’s SA return for the year 2012-13 was issued on 6 April 2013 and so was due to be returned in paper form by 31 October 2013 or online by 31 January 2014. The tax was therefore due to be paid by that date. Payment was made on 10 September 2018 and was therefore four years and almost eight months late.
13. The Appellant’s SA return for the year 2013-14 was issued on 6 April 2014 and so was due to be returned in paper form by 31 October 2014 or online by 31 January 2015. The tax was therefore due to be paid by that date. Payment was made on 26 May 2016 and was therefore one year and almost four months late.
14. The Appellant does not dispute that the payments were made late.
15. The Appellant appealed to the Tribunal on 28 February 2019.

16. The appellant's appeal was notified to the Tribunal late. However, since HMRC have stated that they are not objecting to the late notification, I give permission under s49G(3) or s49H(3) of the Taxes Management Act 1970 for the appeal to be notified late.

The Appellant's case

17. The Appellant's grounds of appeal are that a previous agent has been responsible for the default, because he was not told by them of outstanding monies.

HMRC's Case

18. 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

19. 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).

20. '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.].

21. 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.
22. If there is a reasonable excuse it must exist throughout the failure period.
23. The Appellant has not provided a reasonable excuse for his failure to make payment for the tax years 2011-12, 2012-13 and 2013-14 on time and accordingly the penalties have been correctly charged in accordance with the legislation.
24. 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

25. 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.
26. 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).

27. 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'.
28. 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.
29. 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

30. Mr Sykes was due to pay his tax by 31 January 2013, 2014 and 2015 respectively and did not do so. He was five months late in relation to his 2011-12 tax, and over a year late in relation to the following two years. None of that is in dispute.
31. The first payment in this case was due by 31 January 2013. HMRC records indicate that a debt letter was issued to the Appellant on 17 February 2013 who then removed his agent from the record, following which a new accountant - A Rehman - was notified to the Respondent on 3 May 2013. Default prior to that cannot have been the responsibility of Mr Rehman, he having not been put on the record until that date.
32. In letters dated 2018 Mr Sykes suggests that he didn't know anything about the outstanding tax until he contacted HMRC to inform them that his accountant was "a drug user and a compulsive liar". That telephone call is recorded as 23 May 2018. However we have seen a letter from Mr Sykes dated 23 January 2017 indicating that he had been receiving letters from the Respondent. Those letters must have referred to either the specific penalties or included a statement of account showing the outstanding amounts. He must certainly therefore have been aware before January 2017 that tax was outstanding and that penalties had been incurred.
33. Penalty letters were sent on or around 30 April 2013, 17 March 2015, 25 August 2015, 23 February 2016, 12 August 2016, 10 January 2017 and 11 July 2017. Those letters were sent to 6 Sandleigh Drive which is the address that Mr Sykes gave to the Respondent in September 2011 and was the only address provided until March 2018. There is no suggestion on the papers before us that that was not the correct correspondence address for the Appellant, and indeed his letter dated January 2017 lists that as his proper address. In June 2018 Mr Sykes has indicated that the Respondent's letters had been going to his previous address, however, he had clearly been receiving correspondence prior to 23 January 2017 according to his own letter. We have not been told of any postal difficulties in relation to that address throughout the relevant years, and we therefore conclude that the penalty letters were received at 6 Sandleigh Drive. Having given the address to the Respondent as a correspondence address, the Appellant was obliged to monitor that correspondence. We conclude that Mr Sykes did receive those letters and he was therefore aware of the outstanding monies upon receipt of those letters as early as April 2013, March 2015 and August 2016.

34. On 11 October 2016 Mr Sykes called the Respondent and asked them to communicate with his accountant. He was therefore certainly aware of outstanding monies by that date.
35. In a letter dated 29 March 2018 a Mr Rehman indicated that Mr Sykes had not been notified by him of “a Warrant”. That does not necessarily indicate that Mr Sykes would not have been made aware of any warrant by direct correspondence from the issuing court. Further, the court proceedings would be a late step in what was by that stage a long running issue.
36. Despite knowing that the Respondent considered that he had outstanding unpaid tax, that tax remained unpaid for many months and years, and no appeal against the penalties was notified until it was referred to in a letter dated 28 April 2018.
37. Mr Sykes has indicated that he has been in “intensive care due to an operation going terribly wrong”. It is not clear to us when this was or whether it can have had any relevance to the failures in 2013, 2014 and 2015. No medical evidence has been supplied. It may have some relevance to a failure to be proactive in remedying matters but absent any cogent information we are unable to conclude that such treatment had a material effect on the matters at issue.
38. 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. We are satisfied that the penalty notices dated on or around gave proper notice (*Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761) and were sent to the postal address linked to the Appellant’s SA account.

DISCUSSION

39. Relevant statutory provisions are included as an Appendix to this decision.
40. We have concluded that the tax for the 2011-12, 2012-13 and 2013-14 tax years was not paid on time. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.
41. 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.
42. 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. 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 our judgment it is not objectively reasonable for Mr Sykes to have believed that no tax was outstanding. Having authorised his SA returns, he must have had some understanding of the amounts due. Should he have misunderstood the returns and become confused, the conversation with HMRC in May 2013 and the receipt of penalty notices indicates that any continuing belief is unsupported. HMRC are entitled to assume that tax payers will ensure that they are properly informed regarding the payment of their tax obligations.
43. Although Mr Sykes has indicated that he has been ill, no date has been given for any illness and no medical evidence has been provided. We do not accept that illness demonstrates a reasonable excuse for the failures in this case.

44. Mr Sykes argues that his previous accountant was negligent in failing to inform him of his tax liabilities. However, the amounts payable were set from the figures he provided in his self-assessment which must have been authorised by him. Further, he was fully aware by April 2013, March 2015 and August 2016 respectively that there were outstanding monies. It is in our judgment wholly unreasonable to fail to deal with these issues for such a protracted amount of time. It may be that Mr Sykes has some recourse against his former 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. We have not seen evidence of any communication with the accountant. We consider it likely that we would have seen such correspondence if it were available. Mr Sykes was aware of the failures to pay following receipt of correspondence from the Respondent. He clearly therefore made no efforts to exercise the necessary reasonable care and cannot rely on an assertion of reasonable excuse.
45. The Tribunal decided that the Appellant has not shown a reasonable excuse for the late payment of his tax liabilities for the tax years 2011-12, 2012-13 and 2013-14.
46. 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.
47. Paragraph 15 of Schedule 56 provides that we are only able to interfere with HMRC's decision on special reduction if we consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and we do not consider that HMRC's decision in this case is flawed. Therefore, we have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mr Sykes.
48. We should add, that even if we did have the power to make our own decision in respect of special reduction, the only special circumstance which Mr Sykes relied upon was his initial belief that no tax was outstanding. We have explained above why we 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, we conclude that ignorance of the severity of the Schedule 56 penalty regime does not constitute a special circumstance which would make it right for us to reduce the penalty which has been imposed.

CONCLUSION

49. We therefore confirm the fixed penalty of £240 for the tax year 2011-12, £240, £240 and £240 for the tax year 2012-13, and £240, £240 and £240 for the tax year 2013-14. 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

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.

**ABIGAIL HUDSON
TRIBUNAL JUDGE**

Release date: 08 August 2019

**APPENDIX
RELEVANT STATUTORY PROVISIONS**

Finance Act 2009

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

Schedule 56

52. 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.

53. 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.

54. 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.

55. 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)).

56. 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

57. 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.