# TC03226

**Appeal number: TC/2013/04811**

***Income Tax – penalty for late payment – special circumstances – penalty reduced by 20%.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**GEORGE SEABORN** **Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE CHARLES HELLIER**
**ELIZABETH BRIDGE**

**Sitting in public in Sutton on 3 December 2013**

**The Appellant in person.**

**Karen Weare for the Respondents.**

## DECISION

1. Mr Seaborn appeals against the assessment of a penalty under schedule 56 FA 2009 of £2,032 for the failure to pay income and capital gains tax by the due date for the year ended 5 April 2012.

2. The effects of the following parts of the applicable legislation were uncontentious. Section 59B(4) of the Taxes Management Act 1970 (the "TMA") has the effect that the relevant tax was payable on or before 31 January 2013: and by virtue of paragraph 1 schedule 56 Finance Act 2009 Mr Seaborn became potentially liable to a penalty if that tax was paid more than 30 days after that date - that is to say in this case after 1 March 2013. By paragraph 3(2) that penalty was set at 5% of the unpaid tax.

3. Paragraph 9 Sch 56 permits HMRC to reduce the penalty in special circumstances; and paragraph 16 effectively absolves the taxpayer of any liability for the penalty if he has a reasonable excuse for his failure; and paragraphs 13 and 15 deal with an appeal to this tribunal. We shall return to those provisions later.

**The Evidence and the Facts.**

4. We had a bundle of documents before us and heard the oral evidence of Mr Seaborn. We find as follows.

5. Mr Seaborn is now retired. At some time in the past he had, as a result of his professional activities in the intellectual property field, acquired an interest in shares in a Jersey company. The shares were sold during 2011/12. A dividend was paid before sale. A number of other people had similar interest in the shares. Holworth Clark, accountants, negotiated the calculation of the capital gains arising with HMRC's Large Partnership Unit. They provided Mr Seaborn with an estimate of the tax which would be payable (this was in the order of £45,000), and schedules which showed the calculation of income and capital gains from the shares which arose during the year. The Schedule showed the boxes on his tax return in which the relevant entries should be made.

6. Mr Seaborn completed his tax return for 2011/12 before he received these schedules. He submitted the return on 17 September 2012. At the beginning of the return there were boxes for declaration of sources of income and gains in which the taxpayer was required to indicate whether supplementary pages for particular sources were to be provided. In the box under the heading "capital gains summary" Mr Seaborn indicated that he had made capital gains and that computations were to follow. Supplementary capital gains pages were not submitted with his return.

7. When (after some chasing) Mr Seaborn received Holworth Clark's schedules in October 2012 he sent them to HMRC with an inscription indicating that they contained additional information for the tax return previously submitted. It appeared to us that these schedules were received by HMRC on 26 October 2012 (although the date stamp could have been 16 October 2012).

8. On 4 December 2012 HMRC wrote to Mr Seaborn indicating that the dividend income and capital gains should be entered on standard schedules and submitted in that form. In doing that, the letter said, would enable HMRC to "amend [his] 2001/12 return".

9. Mr Seaborn completed these schedules and delivered them by hand to HMRC on 13 December 2012.

10. It appears that at some time before 6 December HMRC calculated the income tax due on the basis of the figures in the return submitted in September 2012 as 50p, for on 6 December 2012 HMRC sent a statement to Mr Seaborn which indicated that his total liability was 50p. This calculation was performed without reference to any capital gains.

11. On 24 January 2013 Mr Seaborn paid the 50p.

12. After the receipt of the completed supplementary pages HMRC calculated the additional tax which became due as a result of taking account of the additional information in relation to the share disposal. Their calculation showed that tax of £40,655.38 was due. It appears that this calculation was made on 3 December 2012.

13. Miss Weare told us that this calculation would have been made automatically when the supplementary tax return pages had been "captured" by the computer system. That had happened on 3 January. She told us that thereafter the calculation would have been sent to HMRC's Large Print Unit for transmutation into large print (Mr Seaborn received documentation on this form from HMRC). After transmutation she said it would have been sent to Mr Seaborn. HMRC's records showed that it had been sent on 16 January 2013.

14. Mr Seaborn told us, however, that he had no record or recollection of receiving a revised calculation in January 2013 or indeed subsequently. He says that he heard the first he heard of the revised calculation was in March 2013 when he received a revised statement of account, dated 4 March 2013, but received a few days after that. On 12 March 2013 Mr Seaborn paid an amount which included £40,654 .88, having had that sum available to pay the tax since 2012.

15. During January 2013 Mr Seaborn said that he had not been away on holiday and had checked the post daily. He had not had problems in the past with misdelivered letters. In an e-mail, delivered to the tribunal after the hearing, he noted that his correspondence address was 6 The Orchard, and that there was there was an Orchard Close in nearby to which the letter from HMRC might mistakenly have been delivered.

16. We believed Mr Seaborn's evidence that he did not receive the calculation which HMRC dispatched in January. We found Mr Seaborn a careful and painstaking man. He would not have failed to spot a letter from HMRC or have ignored it. His habits seemed to us to suggest that he would have dealt with it promptly. We find it did not arrive.

17. Mr Seaborn told us that having sent his tax return off in good time, and having sent the promised additional schedules before 31 October 2012 he thought he could safely wait until he was told by HMRC how much tax he had to pay and when. As his prompt payment after the receipt of the March statement showed, he had no reason or interest to delay payment of tax.

18. Mr Seaborn had used professional accountants to prepare tax returns until about 2008, but for the years after that he had prepared himself and had made payments accordingly. He accepted that he was familiar with the self-assessment system but he had not previously paid capital gains tax and said he was unaware of the detailed mechanism for its payment.

**Discussion.**

19. There was no dispute that the payment of tax was late. The only questions for us with therefore whether Mr Seaborn had a reasonable excuse, and whether the special circumstances provisions of paragraph 9 schedule 56 should be given effect.

*Reasonable excuse*

20. Although he puts it more extensively and eloquently, the essence of Mr Seaborn's case is that because HMRC did not provide a statement showing the amount of tax which was due in good time he had a reasonable excuse for paying it late.

21. In this context we need to address the statutory provisions which require HMRC to provide an assessment of the tax due: for if the law requires HMRC to do something, it will be reasonable for the taxpayer to expect that HMRC will do it.

22. Section 9 TMA provides that every tax return shall include a self-assessment (that is to say computation of the income and capital gains tax due) unless the return is delivered before 31 October. When the return is delivered before 31 October section 9 (3) provides that:

> "(3) Where, in making and delivering a return a person does not [include a self-assessment] an officer of the Board shall ...
>
> (a) make the assessment on his behalf on the basis of the information contained in turn, and
>
> (b) send him a copy of the assessment so made.",

and section 9(3A) provides that such assessment shall be treated as part of the return (so that if the taxpayer does the calculation herself that is a real self assessment and if it is done by HMRC it is treated as a self assessment).

23. Section 8 requires a person to "make to make ... a return containing such information as may reasonably be required" if given notice by HMRC to do so.

24. At the hearing we asked whether the form of the return was prescribed. We ask that because the additional schedules provided by Mr Seaborn in October 2012 contained all the information required in the formal supplementary pages

which were completed later- even down to the box numbers into which the figures were to go. At the hearing neither Mr Seaborn nor Miss Weare could help us and so we investigated the issue after the hearing finished.

25. The importance of this question lay in section 9(3) TMA which (see above) provides that if a return is made before 31 October HMRC are required to compute the tax due (make an assessment) and send a copy of it to the taxpayer. If the additional schedules are properly to be taken as *part* of Mr Seaborn's tax return then, because they were submitted before 31 October 2012, HMRC would have been required to send him a calculation on the basis of the figures returned. In that case Mr Seaborn should be treated as knowing that HMRC were obliged to send him the calculation. That knowledge would affect what was reasonable for him to do or not to do while awaiting the calculation.

26. We found that the answer to this question lay in section 113 TMA. It provides that:

> "(1) Any return under the Taxes Acts such shall be in such form as the Board prescribe ..."

27. Thus if the additional schedules were not in the prescribed form - which is to say the form of the supplementary pages - they could not be treated as part of Mr Seaborn's tax return. Since they were not in that form they do not form part of the return and HMRC were not therefore required to send him a tax calculation based on them.

28. We also considered the effect of section 9ZA TMA. This provides that:

> "(1) A person may amend his return under section 8 or 8A of this Act by noticed to an officer of the Board.",

(its relevance was suggested by the letter referred to at paragraph 7 above).

29. So far as we could see the TMA does not prescribe any form for the notice making the amendment. It seems that an amendment may validly be made simply by telling HMRC what alterations should be made to the boxes in the original tax return.

30. It therefore seemed that the schedules which Mr Seaborn delivered in October could be taken as an amendment to his original return because they specify clearly what new entries should be made in which boxes in the original return.

31. On that basis the question arises as to whether, because no self assessment calculation had been delivered and because the amendment was made before 31 October, HMRC were required by section 9(3) to produce an assessment reflecting the amendments and to send Mr Seaborn a copy.

32. It seemed to us however that section 9(3) did not have the effect of requiring HMRC to provide a revised assessment where an amendment had been made to return. That was because (i) that subsection applied in relation to the "making and delivering of a return" rather than the amendment of a return; and (ii) because HMRC's original assessment is treated by section 9(3A) as part of the original term, the notice of amendment was to a return which did include an assessment,

and so could not trigger the obligation under section 9(3) to make a new assessment.

33. We therefore concluded that HMRC were under no obligation to make a revised assessment on the receipt before 31 October 2012 of the additional schedules.

34. And as a result the Mr Seaborn cannot rely on any legal obligation that HMRC to supply an assessment of the tax due.

35. Mr Seaborn says that an ordinary person would expect to pay for something when he got the bill for it and not and would not expect to be in default until that time.

36. Were Mr Seaborn's obligation to pay tax on receipt of the bill we would have found that he would have had a reasonable excuse. But that was not the nature of his obligation. The reason for Mr Seaborn's failure to pay was in substance the fact that he did not know that he had a statutory duty to pay the capital gains tax and additional income tax on 31 January 2013, not that he was misled into thinking that it was a later date. We were sure that if he had known of his statutory liability he would carefully and precisely have complied with it. But ignorance of the law can be no excuse.

37. Nor did the facts indicate that Mr Seaborn was in any way misled: it seems to us that the only reason why Mr Seaborn did not pay the tax on time was that he was unaware of the legal provisions. He was not misled by HMRC: (a) when he received the assessment showing 50p tax due, because he would have known from the form of that assessment itself, and from the estimate previously received (of some £45,000) from Holworth Clark, that this did not include any amount of capital gains tax, or (b) by not receiving an amended assessment after the submission of the supplementary pages: to be misled requires something more positive than the failure of something to arrive in the post.

38. We therefore find that Mr Seaborn did not have a reasonable excuse.

*Special circumstances.*

39. Paragraphs 9 and 15 Sch 56 provide:

> "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 5 a penalty includes a reference to—
> (a) staying a penalty, and
> (b) agreeing a compromise in relation to proceedings for a penalty."

"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))."

40. Paragraph 13(1) and (2) refer respectively to an appeal against a penalty, and an appeal against the amount of a penalty. Although his stated preferred outcome is "no penalty", Mr Seaborn's notice of appeal does not make any clear distinction, and we do not think it would be just to treat his appeal as falling only in paragraph 13(1). Therefore paragraph 15(2) applies.

41. Miss Weare could not identify any consideration by HMRC of whether or not there were special circumstances which justified the reduction of the penalty.

42. Paragraph 13 of schedule 56 permits this tribunal to make a reduction in special circumstances only if HMRC's decision in relation to its discretion to make such reduction was "flawed" (in the light of the principles applicable in judicial review proceedings).

43. In *Algarve Granite Limited* (2002) UKFTT 463(TC) the tribunal conducted a detailed review of previous decisions on the question of whether the failure by HMRC to consider whether to apply para 9 should be treated as the making of a flawed decision. It concluded that it should. In *Robert Morgan and Keith Donaldson (2013)* UKFTT 317 (TC) the tribunal inclined to the view that the failure to consider whether there were special circumstances at the time the penalty assessment was first issued would not constitute a flawed application of the discretion given by para 9, but that the failure to consider it during the course of review should be treated, for the reasons given in *Algarve* and other cases as flawed.

44. In this appeal HMRC were asked to conduct a review and did so. There was not indication of any consideration of paragraph 9 in the letter of review.

45. In our view the failure to consider the possibility of such reduction was a flawed exercise of the discretion given by para 9. It is therefore open to this tribunal to make any reduction which HMRC could have made (see para 15(3).

What are special circumstances?

46. In *Warren* [2012] UKFTT 57(TC) the Tribunal said of "special circumstances":

> "[53.] We were not referred to (and could not find) any authority on he meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.
>
> [54.] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

47. The meaning of the expression "special circumstances", in the equivalent provisions of Schedule 24 Finance Act 2007, was also examined by the Tribunal in *Collis v Revenue & Customs* [2011] UKFTT 588 (TC) .The Tribunal said (at paragraph 40):

> "To be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves."

48. In *Algarve* the tribunal considered these and other cases and cited the decision of the Court of Appeal in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at page 1215 H:

> 20 "…to be special the event must be something out of the ordinary, something uncommon; …"

49. In *White* [2012] UKFTT 364 (TC) the tribunal had noted that "It was evidently the *Bakers Union* decision that those drafting [an equivalent provision] had in mind (see the Drafting Notes to the Finance Bill 2007)."

50. In *Morgan* the tribunal applied these principles to find that there were special circumstances which justified a reduction in the penalty to nil (although for other reasons the tribunal had also set aside the penalty). Those circumstances were that whilst Mr Morgan knew he was in default he had been given correct but

misleading advice by HMRC. The tribunal thought that Mr Morgan was not above criticism but nevertheless thee were special circumstances. It said:

> "137. We consider that overall there were special circumstances in this case. It is crucial to our finding that Mr Morgan attempted to resolve his default but that in direct contact with HMRC he was given misleading or at least less than complete information on the telephone and then received a letter from HMRC which in effect invited him to submit paper returns when it was not in his interests to so do.
>
> "142. We find that, had Mr Morgan been given full advice in the phone conversation which was that daily penalties were already accruing if he did a postal return but not an online return; and if the letter to him had invited him to submit either an online or paper return and pointed out the different dates from which the notice for daily penalties commenced depending on online or paper returns, then he would have submitted an online return at about the time that he actually submitted a paper return.
>
> "143. We take into account that Mr Morgan has no reasonable excuse for failing to file his return on the due date: but Parliament has established that the penalty for so failing is in the first instance £100. Mr Morgan paid this. We are looking at liability to the daily penalties, and we consider that had he been correctly advised by HMRC he would have filed online and avoided liability for them.
>
> "144. In other words, we think the 'special circumstances' are such that Mr Morgan would have put himself in a position where no daily penalties would have been incurred at all, were it not for the less than complete information provided by HMRC. Therefore, the appropriate reduction in this case is to 0%.

51. In this appeal we do not find Mr Seaborn to be above criticism. He knew he had a CGT liability and he knew its amount. In January he rather complacently sat back and waited for a calculation from HMRC. He could and should have been more active.

52. But the acceptance by HMRC of the original return, which did not contain the prescribed information appeared to have prompted Mr Seaborn to send the additional schedules rather than the supplementary pages. If HMRC had rejected his earlier return (as they concede they should have done) then in our view it is likely that he would have submitted a full return in proper form before 31 October and received an assessment before 31 January 2013 which he would have paid promptly.

53. These circumstances were peculiar to Mr Seaborn. They are, in our estimation, out of the ordinary – even for those who customarily submit tax returns. They operated on Mr Seaborn rather than on the general body of taxpayers, and it would in our view be unfair not to make any allowance for them.

54. We find that there were special circumstances and that the penalty should be reduced by 20%.

**Conclusions**

55. We find that the penalty should be reduced by 20%.

**Rights to appeal**

56. 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.

**CHARLES HELLIER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 16 January 2014**