



**TC03633**

**Appeal number: TC/2014/00390**

*Income tax – Penalty under Schedule 56 Finance Act 2009 for late payment of income tax – Appellant unable to pay tax because of personal circumstances – whether reasonable excuse – yes – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TIMOTHY COOKE**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MICHAEL S CONNELL  
                    MS ELIZABETH BRIDGE**

**Sitting in public at Ministry of Justice, Tribunals Service, Priory Courts, Bull Street, Birmingham on 27 March 2014**

**Mr Timothy Cooke, the Appellant in person**

**Mr Tony O'Grady, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal by Timothy Cooke ('the Appellant') against a late payment penalty imposed under Paragraph 1 of Schedule 56 Finance Act 2009 ('FA') for his failure to pay tax on time in respect of his personal self-assessment liability for the year ending 5 April 2012.

2. Under section 59B Taxes Management Act ('TMA') 1970, the Appellant was required to pay his income tax liability for the year ended 5 April 2012 by 31 January 2013. The tax paid late was £100,065.50, and was not paid in full until 24 October 2013.

3. HMRC imposed two penalties of 5% of the tax paid late in the total sum of £10,004.00.

4. The point at issue is whether the Appellant had a reasonable excuse for the late payment of tax, and if so, whether that excuse continued up to the date of payment.

### Background facts

5. On 25 October 2012, HMRC issued to the Appellant a notice to file his tax return for the year ended 5 April 2012.

6. The Appellant filed the return on 28 December 2012, registering a charge to tax in the sum of £78,759.46. This was captured on HMRC's system on 31 December 2012.

7. On 28 December 2012, the Appellant filed an amendment to the first return, registering a charge to tax in the sum of £100,065.50, i.e. further tax of £21,306.04 over and above the original charge of £78,759.46. The amendment was captured on HMRC's system on 20 January 2013.

8. Consequently, by 31 January 2013 the 2011-12 return had been filed with HMRC, and the Appellant was aware that he had to pay the total sum of £100,065.50 by that date.

9. By 3 March 2013 the whole amount of £100,065.50 was still outstanding, and the first late payment penalty of 5% was incurred. Penalties were levied on 19 March 2013 and 2 April 2013, on £78,759.46 at 5% = £3,937.97 (rounded to £3,937), and on £21,306.04 at 5% = £1,065.30 (rounded to £1,065).

10. By 3 August 2013 the whole amount was still outstanding, and the second late payment penalty of 5% was incurred. Penalties were levied on 14 August 2013 and 3 September 2013 respectively, on £78,759.46 at 5% = £3,937.97 (rounded to £3,937), and on £21,306.04 at 5% £1,065.30 (rounded to £1,065).

11. The Appellant finally paid the tax in full on 24 October 2013, and also paid the first late payment penalty in full and the second late payment penalty in part, leaving a

balance of £1,065.00 still unpaid. This balance is currently suspended pending the appeal.

12. The Appellant appealed against all of the late payment penalties charged, on the basis that he had a reasonable excuse for the late payment.

13. On 30 December 2014 HMRC reviewed but rejected the Appellant's appeal. On 15 January 2014 the Appellant appealed to the Tribunal.

#### Relevant legislation

14. Under s 59B (1) Taxes Management Act 1970, the difference between the amount of income tax and capital gains tax contained in a person's self-assessment under s 9 Taxes Management Act 1970 for any given year of assessment, and the aggregate of payments on account made by that person in respect of that year, and any income tax which in respect of that year has been deducted at source, shall be payable by that person as mentioned in subsections (3) or (4) below.

15. Under s 59B (3) TMA 1970, where a person was not given notice to file a tax return under s 8 TMA 1970 until after 31 October following the end of the tax year to which that return relates, then the difference is payable at the end of the period of three months beginning with the day upon which the notice to file the return was given.

16. Otherwise, under s 59B (4) TMA 1970 the difference shall be payable on or before 31 January next following the end of the year of assessment.

17. In this case, the notice to file was issued before 31 October 2012, so the difference referred to in s 59B (1) TMA 1970, i.e. £100,312.23, should have been paid on or before 31 January 2013, in accordance with s 59B(4) TMA 1970.

18. Under Paragraph 1 of Schedule 56 to the Finance Act 2009, 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. For the purposes of this appeal, one is concerned with the first row in the table - income tax or capital gains tax (Column 2) - amount payable under s 59B(3) or (4) TMA 1970. (Column 3).

19. By 3 March 2013, all of the tax of £100,065.50 remained unpaid. A penalty arose under Paragraph 1 of Schedule 56 to the Finance Act 2009.

20. The penalty is incurred on the date falling 31 days after the date specified in s 59B(3) or (4) TMA 1970 as the date by which the amount must be paid. (Column 4).

21. Under Paragraph 3 of Schedule 56 to the Finance Act 2009, where any payment falls within item 1 in the table, (P) is liable to a penalty of 5% of the unpaid tax, and if any amount of the tax is still 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.

22. In this case the penalty date was 1 March 2013, which triggered the first 5% penalty, and by 3 August 2013 as the whole of the tax was still outstanding, a second 5% penalty was charged.

5 23. Under Paragraph 16(1) of Schedule 56 to the Finance Act 2009, liability to a penalty does not arise in relation to a failure to make a payment if (P) satisfies HMRC, or (on appeal) the First-tier Tribunal or Upper Tribunal, that there is a reasonable excuse for the failure. For the purpose of Sub-paragraph (1), conditions at sub-paragraph (2) state:

10 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control;

(b) reliance on any other person to do anything is not a reasonable excuse unless the person took reasonable care to avoid the failure;

15 (c) where the person had a reasonable excuse for a failure but that excuse has ceased, they are treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

24. 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.

20 25. Schedule 56(11) requires HMRC to assess any late payment penalty which arises under Schedule 56 and the assessment is to be treated in the same way as an assessment to tax.

26. Schedule 56(15) provides for a Tribunal to:

25 (1) on an appeal under para 13(1), to affirm or cancel HMRC's Decision

(2) on an appeal under paragraph 13 (2) to

(a) affirm HMRC's Decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make

30 (3) rely on paragraph (9) if the Tribunal applies Para 15 (2)(b)

27. Schedule 56(9) sub-paragraph (1) provides for HMRC to reduce any late payment penalty, because of "special circumstances". Sub-paragraph (2)(a) specifies that "special circumstances" does not include inability to pay.

### The Appellant's case

28. The Appellant says that in April 2011 he sold shares in a company that he worked for, which realised £380,000. The sale created a taxable capital gain of £360,400 and a capital gains tax liability in the year ended 5 April 2012 of £100,065.50, payable on 31 January 2013.

29. The Appellant says that he had been in financial difficulties and used £70,000 from the share sale to pay off his Individual Voluntary Arrangement. A further £30,000 was used to discharge a loan.

30. At the time he was living with his wife and children at 7 Greenacres, Ketley Bank, Telford, TF2 ODU. The property was in mortgage and the amount owed to the lender, of £140,000 or thereabouts, exceeded the value of the property, which the Appellant placed at £125,000.

31. In May 2011 the Appellant and his wife purchased 7 St John's Walk, using most of the balance of £280,000 left from the share sale. The Appellant says that it was his intention at that time to raise £100,000 by way of mortgage of the property, after moving in, in order to pay his CGT liability by the due date of 31 January 2013.

32. In March 2012 Mr and Mrs Cooke separated and Mrs Cooke started divorce proceedings. The Appellant wanted to sell or mortgage the property at 7 St John's Walk in order to pay off the CGT liability, but Mrs Cooke's solicitor arranged for a matrimonial restriction to be registered against the property which prevented the Appellant from either mortgaging or selling the property without his wife's consent. Through his solicitor he asked his wife for consent to sell the property, but says his requests were ignored until August 2012, when the property was finally put on the market at an asking price of £244,000.

33. The Appellant says that he then contacted HMRC in order to advise them of the position. By December 2012, because the property had not sold, he reduced the asking price by £35,000. He says that he telephoned HMRC on a number of occasions in January 2013 to advise them that he would not be able to discharge the CGT by 31 January 2013. He says that he was told not to worry, that HMRC would allow time for payment and that penalties would not be charged.

34. The property at 7 St John's walk was eventually sold on 24 October 2013, when the Appellant discharged the CGT liability in full from the proceeds of sale. He paid the outstanding CGT on the same day.

35. The Appellant says that the first penalties imposed in March 2013 came as a total shock. He says that he had had a number of conversations with HMRC during January 2013 and was never told that penalties would be charged, only statutory interest. He says that the advice given by HMRC regarding the penalties was the wrong advice, and that he had marketed the house based upon their advice.

36. The Appellant therefore says that he has a reasonable excuse for the late payment, firstly based on an insufficiency of funds caused by events outside his

control and secondly because he was given incorrect advice by HMRC on which he relied.

HMRC's case

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37. HMRC does not agree that the Appellant has a reasonable excuse for the failure to pay his tax on time. Nor is it agreed that he was told that no late payment penalties would be charged.

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38. HMRC say that no time to pay was agreed. A time to pay agreement is entirely within the discretion of HMRC. If the customer contacted HMRC to request time to pay before they became liable to a penalty, they can be considered to have met the conditions in Schedule 56 (10) of the Finance Act 2009 and will not be liable to a late payment penalty. However the Appellant did not do this. Furthermore, any time to pay agreement must be structured and confirmed in writing. In this case it is clear that there was no agreed time to pay.

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39. The Appellant also claims that HMRC agreed that no penalties would be applied. However, there is no evidence of this in the recorded transcripts of telephone conversations with the Appellant, and in fact the telephone records show that on 3 April 2013, in a telephone conversation with the Appellant, this was flatly denied by an HMRC officer.

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40. The Appellant says that he has a reasonable excuse for not paying the tax on time due to insufficiency of funds and that he could not sell 7 St John's Walk in order to raise the money to pay the tax which was due. The legislation says that insufficiency of funds cannot constitute a reasonable excuse unless attributable to events outside P's control.

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41. The question is whether the Appellant's shortage of funds was attributable to events outside his control. At the time that the Appellant received the disposal proceeds from the share sale he was living in 7 Greenacres, Ketley Bank. Having received the disposal proceeds for the shares, he chose to purchase 7 St John's Walk mortgage free and then, at a later stage, take out a mortgage on 7 St John's Walk in order to raise the money to pay his 2011-2012 tax.

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42. Notwithstanding the fact that 7 Greenacres was in negative equity, the Appellant could have carried on living in this property. In a conversation with an officer of HMRC, he agreed that he could have continued to meet the mortgage repayments as they fell due each month, allowing him to use the share sale proceeds to clear all or most of his outstanding debts on 7 Greenacres, still leaving a substantial balance of £100,000.00 or more to cover his tax liability. Instead, the Appellant chose to clear just some of his debts and then move house. Accordingly there were no events which were outside the Appellant's control which prevented him from settling his tax liability.

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43. HMRC sympathises with the change in the Appellant's personal circumstances during the 2011-12 tax year, but the circumstances as described do not amount to a reasonable excuse.

5 44. HMRC therefore are unable to agree that the Appellant has any 'reasonable excuse' for the failure to make payment of £100,065.00 on 31 January 2013.

### Conclusion

45. The self-assessment system places a greater degree of responsibility on taxpayers for their own tax affairs. This includes ensuring that tax is paid on time without waiting for a tax demand or prompt for payment.

10 46. The self-assessment system is based on voluntary compliance, so it is important that taxpayers who pay on time feel confident the system does not reward non-compliance in any way.

47. The legislation at Paragraph 16 Schedule 56 provides for a penalty not to be charged if it can be proven there was a 'reasonable excuse' for the failure.

15 48. When a person appeals against a penalty they are required to have a reasonable excuse. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of a particular case. A reasonable excuse is normally an unexpected or unusual event either unforeseeable or beyond a person's control which prevents him from complying with an obligation. The  
20 reasonable excuse must also exist throughout the entire period of default.

49. It is necessary to consider the actions of the Appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation.

25 50. The Appellant could not have known at the time that he purchased 7 St John's Walk that his marriage of thirteen years was about to fail. At that time he was entitled to manage his financial affairs as he saw fit and proposed to raise mortgage facilities on 7 St John's Walk after he had moved in. That should not have presented any difficulty and is what would have happened had his marriage not broken down. That was clearly an unforeseen event which was entirely beyond his control. We do not  
30 accept HMRC's argument that the Appellant should have remained in 7 Greenacres and retained £100,000 from the share sale to discharge his tax liability in January 2013. He could not have reasonably expected events to conspire to prevent him from discharging his tax liability on time.

35 51. For the above reasons we therefore find that the Appellant had a reasonable excuse for the late payment of his tax.

52. The appeal is therefore allowed and the £10,004.00 penalties are discharged

53. 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.

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**MICHAEL S CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 21 May 2014**