[2018] UKUT 0412 (TCC)

Appeal number: UT/2016/0163

INCOME TAX – late payment penalties-reasonable excuse - whether the FTT erred in its application of the legal test - para 3 sch 56 FA 2009

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TIMOTHY RAGGATT QC **Appellant**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Ashley Greenbank

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 20 November 2018

The Appellant in person

Joshua Carey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is the appeal of the appellant ("Mr Raggatt"), from the decision ("the Decision") of the First-tier Tribunal ("FTT") (Judge Peter Kempster and Leslie Brown) released on 6 June 2016, by which the FTT dismissed Mr Raggatt's appeal against penalties charged by the Respondents ("HMRC") for late payments of income tax. The matters under appeal were late payment penalties pursuant to Schedule 56 of the Finance Act 2009 as follows:

(1) Tax year 2012/2013 – penalties totalling £9,795; and

(2) Tax year 2013/2014 – penalties totalling £3,640.

2. The issue before the FTT was whether Mr Raggatt had a reasonable excuse for all the late payments. Mr Raggatt had been in professional practice as a barrister for 40 years, during which time there had never been any suggestion of his not attempting to pay his tax liabilities but he had encountered exceptional financial circumstances in 2012 to 2014 for a number of reasons, in particular because of the government's cuts to criminal legal aid which had severely affected his professional practice, resulting in cash flow problems.

3. The FTT were not satisfied that in all the circumstances Mr Raggatt had exhibited the exercise of reasonable foresight and of due diligence and a proper regard to the fact that the tax liabilities concerned would become due on particular dates and accordingly concluded that there was not a reasonable excuse (within the meaning of paragraph 16 of Schedule 56 to the Finance Act 2009) for the late payments and dismissed Mr Raggatt's appeal.

4. With the permission of the Upper Tribunal, Mr Raggatt now appeals against the Decision. His grounds of appeal, as set out in his application for permission to appeal, can be summarised as follows:

(1) the issue of reasonable excuse is a mixed one of fact and law and in this case the FTT misinterpreted and gave insufficient weight to the facts of the case; and

(2) whilst the FTT had identified the correct legal test (namely that summarised at [3] above) it was incorrectly applied to the facts in that it failed to consider how his business income came in. He had a reasonable expectation of having money to pay his tax liabilities through ongoing income and that he would be able to meet his liabilities through current income. He could not have foreseen the change in the environment regarding the cuts to legal aid. Furthermore, in the past, his bank had increased its credit facility as and when required. He could not have foreseen the bank's subsequent change to its lending policy and consequent amendment to his overdraft facility.

5. In their response to these grounds of appeal, HMRC contend that the evidence before the FTT was that Mr Raggatt had habitually failed to pay his tax liabilities on time from 2008 onwards and that his difficulties in respect of the years under appeal were not an isolated incident. They also contend that the cuts to the legal aid budget had been known for several years and Mr Raggatt should have foreseen the difficulties they would pose. HMRC is content with the reasons given by the FTT for determining that Mr Raggatt had no reasonable excuse for the late payments.

The Facts

6. The Decision does not explicitly make any detailed findings of fact in one place. At [7] to [13], it sets out, in summary, the evidence relied upon by the parties. In our view, it is implicit from the FTT's findings on the reasonable excuse issue, to which we refer below, that it accepted the parties' evidence in full. The FTT then made some explicit findings of fact in its findings on the reasonable excuse issue at [16] and [17].

7. The FTT's overall findings of fact can therefore be summarised as follows:

(1) Mr Raggatt had been in professional practice as a barrister for 40 years, during which time there had never been any suggestion of his not attempting to pay his tax liabilities. Mr Raggatt's tax returns disclose six-figure earnings which fluctuated from year to year but for the accounts year ended 30 April 2012 had been at the level of £290,000. No tax on those earnings would have been due until January 2014. However, he had encountered exceptional financial circumstances in 2012 to 2014.

(2) In 2010, he had concluded a divorce settlement with a large lump sum and annual maintenance. The amounts had been agreed by reference to his past earnings. The government's cuts to criminal legal aid had severely affected his professional practice, resulting in cashflow problems. In summer 2014 he had agreed a clean break with his ex-wife involving the payment of a substantial lump sum. Payment of the lump sum was deferred for one year, which was recognition by the Family Court that he had no means to pay the sum until the sale of his house had completed.

(3) In 2012, his bank, C Hoare & Co, had changed its lending policy and had required him to secure his professional overdraft against his house, but without extending the overdraft limit (then £200,000) to recognise the equity in the property. In 2014 the bank had stated it would not continue to act and stopped honouring standing orders and other payments. In January 2015 he had moved to NatWest and had chosen not to take an overdraft facility.

(4) From 2008 Mr Raggatt's practice had been to make occasional tax payments as and when his professional income permitted, but without any particular discipline as to the due dates. A schedule in evidence before the FTT showed the payment history back to 2008, revealing multiple late payments. When the penalty regime was introduced by Schedule 56 to the Finance Act 2009 (for the tax years 2010/11 onward) Mr Raggatt agreed a time-to-pay instalment plan with HMRC for the tax year 2011/12. Those monthly instalment obligations were met by Mr Raggatt's bank until he exhausted his

£200,000 overdraft facility, and the bank declined to extend it, in August 2012. Mr Raggatt made a significant payment in November 2012 – again, following his usual practice, out of his professional income as it became available – and HMRC accepted that as not incurring any liability to penalties for 2010/11 and 2011/12. However, the breach of the time-to-pay agreement meant that HMRC were not prepared to extend a similar facility for 2012/13.

(5) Despite his cash flow difficulties, Mr Raggatt had managed to make significant payments of tax from time to time. For example, in addition to the payment in November 2012 referred to above he made further payments around £20,000 in April 2013, around £18,000 in October 2013, and around £16,000 in January 2014.

(6) He had no investments apart from his house and his pension plan. His house sale had not completed until early 2016, due to the sluggish market. Access to his pension plan had not been possible, under the rules then in force, until his 65th birthday, which had been in 2015. When access had become possible he had drawn out such sums as he was able without triggering a tax charge.

(7) In respect of 2012/13 and 2013/14, Mr Raggatt continued his long-established practice of paying irregular lump sum instalments to HMRC as and when he could afford to do so out of his professional income. However, there was a period of around 18 months between payments in January 2014 and July 2015 with no explanation of why no tax payments were made despite fee receipts in that period – for example, £10,625 (net of VAT) in February 2014, £8,500 in December 2014, and £35,038 in February 2015.

(8) During 2015 and early 2016 he had been able to bring his tax affairs up to date with payment of all income tax and interest liabilities. This had been achieved by payment of substantial sums – for example, around £113,000 in July 2015, around £20,000 in November 2015, and around £28,000 in February 2016. His practice had by this time diversified and there were no further payment problems. But for the prior period, while his practice statement showed large receipts, there were chambers expenses to be accounted for out of such fee receipts. Unlike other professional practices, a legal aid barrister did not have aged debts that could be borrowed against. For around 18 months he had in effect been living hand to mouth.

8. There were a number of other factual matters referred to by Mr Raggatt during the hearing before us which were not specifically referred to in the Decision. Clearly we should not admit fresh evidence on appeal without a formal application in that regard, a matter that we were warned by Mr Carey to have in mind, but we are conscious of the fact that Mr Raggatt's appeal to the FTT was classified as a basic case which meant that there would have been no formal witness statements, the hearing being conducted primarily on a "turn up and talk" basis, so that it is likely that the evidence before the FTT would have been a mixture of the written material that was before us and a significant amount of oral evidence given by Mr Raggatt during the course of what were otherwise submissions.

9. In that regard, we are satisfied that the matters referred to at [10] below by Mr Raggatt were in evidence before the FTT and Mr Carey did not submit otherwise.

10. The matters concerned were as follows.

(1) First, the clean break agreement referred to at [7(2)] above occurred during 2012, and not in the summer of 2014, as referred to by the FTT.

(2) Secondly, Mr Raggatt purchased outright a house for himself for the sum of £405,000 in 2011. That house was subsequently put on the market in 2013 following the decision of Mr Raggatt's bank not to extend his overdraft, but was not sold until 2015. The sale realised the sum of £395,000. The proceeds of that sale together with sums drawn from his pension plan were available to meet the then outstanding tax liabilities.

(3) Finally, in a letter dated 18 April 2011 Mr Raggatt's bank made available to him an overdraft facility of £200,000 on his professional account. It was made clear in that letter that the facility was the maximum that the bank was prepared to support and that it expected Mr Raggatt to monitor his drawings carefully to ensure that the facility was not exceeded. Mr Raggatt was also warned that if the bank had cause to return items (which did indeed subsequently happen on a number of occasions), he could expect the bank to seek full repayment of all outstanding borrowings and to require him to make alternative banking arrangements. When that facility was reviewed in October 2012, the amount made available was reduced to £100,000.

The Law

Relevant statutory provisions

11. Paragraphs 1 and 3 of Schedule 56 to the Finance Act 2009 ("Schedule 56") make provision for penalties where income tax is paid late. Paragraph 3 provides (so far as relevant):

> "(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."

12. There was no dispute before the FTT that the penalties imposed on Mr Raggatt had been correctly calculated in accordance with the provisions set out above.

13. Paragraphs 13 to 15 of Schedule 56 provide a right of appeal to the FTT against penalties imposed pursuant to the power set out in paragraph 3 to that Schedule.

14. Paragraph 16 of Schedule 56 provides:

> "(1) Liability to a penalty under any paragraph of this Schedule 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.
>
> (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."

Relevant authorities

15. In the recent case of *Perrin v HMRC* [2018] UKUT 0156 (TCC), this Tribunal provided guidance to the FTT as to how the question of "reasonable excuse" should be approached in the context of the tax penalties legislation. That case concerned a penalty imposed for the late filing of a return, but, in our view, the principles are the same where the penalty has been imposed because of a failure to pay tax on time.

16. At [34] to [44] of *Perrin* the Upper Tribunal discussed the circumstances in which the findings of fact made by the FTT may be challenged on the basis that the FTT made an error of law in the manner in which it carried out the fact-finding exercise.

17. The Upper Tribunal considered the position both in relation to primary facts and also the evaluation of those facts, that is whether the primary facts found answer to some particular description or satisfy some particular test. As regards primary facts, the Upper Tribunal referred at [35] to the well-known case of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 in which it was said that a finding of primary fact can be overturned on appeal if "the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it".

18. That situation does not arise in this case; Mr Raggatt makes no challenge to any of the primary findings of fact made by the FTT, as summarised at [7] above.

19. As regards the evaluation of primary facts, in *Edwards v Bairstow*, where the issue was whether what the taxpayer had done amounted to "an adventure in the nature of trade", it was established that if "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" then there will have been an error of law: see page 36 of the judgment of Lord Radcliffe, as referred to at [38] of *Perrin*.

20. In *Edwards v Bairstow* itself, the House of Lords determined that, having examined the primary facts, the only "one true and reasonable conclusion" was that

there was an adventure in the nature of trade and therefore the first instance tribunal had made an error of law in finding to the contrary.

21. As referred to at [41] of *Perrin*, Jacob LJ in *Proctor and Gamble UK v Revenue & Customs Commissioners* [2009] EWCA Civ 407, observed at [9] that often a statutory test will require a multi-factorial assessment based on primary facts, and an appeal court should be slow to interfere with that overall assessment, commonly called a "value-judgment".

22. *Perrin* was a case where the FTT had to decide whether the appellant had a reasonable excuse for her failure to file her tax return on time. The Upper Tribunal observed at [43] that in deciding whether a reasonable excuse existed, the FTT was carrying out its own value judgment, applying its understanding of the concepts of "reasonable excuse" to the primary facts which it found.

23. The Upper Tribunal summarised the approach the FTT should take in carrying out its value judgment at [70] and [71] as follows:

> "70….the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.
>
> 71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times…

24. The Upper Tribunal emphasised at [79] that the FTT's evaluation of the facts could only be overturned if it were satisfied that the FTT had plainly misapplied the correct test to the facts in reaching its conclusion. It observed at [80] that it does not matter whether it would reach a different conclusion from the FTT, the only question being whether the FTT was, as a matter of law, entitled to reach the conclusion that it did; the standard of "reasonableness" involving no question of principle but simply a matter of degree so that the Upper Tribunal should approach with great caution the matter of differing from the FTT in its evaluation of that standard.

25. In its final comments, the Upper Tribunal summarised how the FTT can usefully approach the question of a "reasonable excuse" defence at [81] as follows:

> "(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."

26. The Upper Tribunal has also considered specifically the correct test for establishing a "reasonable excuse" where a late payment of tax has been caused by insufficiency of funds. In *ETB (2014) Limited v HMRC* [2016] UKUT 0424 (TCC) at [11] the Upper Tribunal referred to the judgment of the Court of Appeal in *Customs and Excise v Steptoe* [1992] STC 757). In that case, the Court of Appeal held that although insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency – the underlying cause of the taxpayer's default – might do so. The Upper Tribunal then summarised (at [15]) the test which emerges from the judgment of the majority of the Court of Appeal in *Steptoe* as follows:

"In summary, the question to be asked when considering whether someone has a reasonable excuse for failing to pay an amount of tax on time because of a cash flow problem is whether the insufficiency of funds was reasonably avoidable. A cash flow problem would usually be regarded as reasonably avoidable if the person, having a proper regard for the fact that the tax was due on a particular date, could have avoided the insufficiency of funds by the exercise of reasonable foresight and due diligence. If the cash flow problem was reasonably avoidable then the mere fact that the taxpayer could not afford to pay the VAT at the proper time would not, without more, be a reasonable excuse. On the other hand, if such foresight, diligence and regard would not have avoided the insufficiency of funds then the taxpayer will usually be regarded as having a reasonable excuse for the VAT having been paid late until it would be reasonable to expect the taxpayer to have found alternative funding or taken other action to counteract the insufficiency."

The Decision

27. The essence of the FTT's reasoning for its conclusion that Mr Raggatt did not have a reasonable excuse for the late payment of his tax liabilities in the relevant period is to be found at [17] of the Decision. The FTT decided that despite expressing sympathy for Mr Raggatt's financial difficulties in the relevant period, it was not satisfied, quoting from Lord Donaldson's judgment in *Steptoe,* that Mr Raggatt

exhibited “the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular day”. The FTT found that Mr Raggatt “has really just continued his long-established practice of paying irregular lump sum instalments to HMRC as and when he can afford to do so out of his professional income”. The FTT observed that even on that basis, there was a period of around 18 months between payments in January 2014 and July 2015 “with no explanation of why no tax payments were made despite fee receipts in that period”.

28. At [18] the FTT found that it was not appropriate for Mr Raggatt to blame his bank for not extending his overdraft facility in August 2012 because the facility letter emphasised that the £200,000 facility granted was the maximum the bank was prepared to support and that the bank expected him to monitor his drawings carefully to ensure that facilities were not exceeded.

29. The FTT then concluded at [19] by acknowledging that Mr Raggatt had recently taken matters in hand and brought his tax affairs up to date, including drawing significant sums out of his pension plan, but, because in the period relevant to the penalties under appeal his approach did not have proper regard for the fact that the tax would become due on a particular date, he had no reasonable excuse for the late payments.

Issues to be determined

30. Bearing in mind what was said in *Perrin* and *ETB*, and this being a case where Mr Raggatt says he has a reasonable excuse due to events outside his control, principally the substantial reduction in his income which resulted from the cuts to the legal aid budget and the withdrawal of banking facilities by his bank, we take the view that we should approach this appeal by considering whether the FTT’s conclusion that Mr Raggatt did not exercise reasonable foresight and due diligence and a proper regard to the fact that the tax liabilities concerned would become due on particular dates was one within the range of reasonable conclusions that was open to it on the evidence that was before it. If we decide that it was, notwithstanding that we may have made a different decision ourselves in the same circumstances, we must dismiss the appeal. If we decide that the FTT’s conclusion was not open to it on the evidence, we should set the Decision aside and remake it, exercising the powers in that regard in s 12 of the Tribunals, Courts and Enforcement Act 2007.

Discussion

31. Mr Raggatt submits that the FTT made an error of law in that its decision was against the weight of the evidence before it. In his submission that evidence could only have led to the conclusion that the position he found himself in in respect of his obligation to meet his tax payments in respect of the years 2012/13 and 2013/14, namely that he could not meet his payment obligations on time, was due to events beyond his control. The events concerned were what he described as a “perfect storm” which could not have been foreseen, namely the continuous reduction over a number of years in rates of remuneration for barristers undertaking criminal legal aid work, his revised divorce settlement in 2012 which required him to make a substantial lump

sum payment (an obligation that derived from a court order and which he therefore could not defer behind his obligation to pay his tax) and the actions of his bank in failing to extend his overdraft in 2012, notwithstanding that at that time it became a secured facility. This combination of circumstances led to temporary difficulties in meeting his obligations which has now been corrected.

32. Mr Raggatt submits that the FTT, having identified the correct legal test, failed to apply it to the facts by giving proper weight to the evidence of these matters. Mr Raggatt does not accept that his behaviour was cavalier and in his view he did his best in very difficult circumstances. A barrister leads an episodic life; he receives and makes payments according to the occurrence of those episodes. He had been granted a time to pay agreement for the tax year 2011/12, the extension of which for a further year was unreasonably refused by HMRC in circumstances where, although he had failed to make just one payment on time, he caught up with all the payments required by the end of the period of the arrangement and indeed settled the entire amount due under the arrangement before the final payment was due. He submitted that the FTT had imposed a counsel of perfection which turned out to be unreasonably harsh. Mr Raggatt asked the question: what more could somebody who found himself in his position reasonably have done to ensure that he met his obligations?

33. It is clear to us from the decision that the FTT placed strong weight on Mr Raggatt's long-established practice of paying irregular lump sum instalments to HMRC as and when he could afford to do so out of his income as he received it. It is implicit in the weight that the FTT gave to that finding that it considered that a reasonable taxpayer in Mr Raggatt's position wishing to comply with his obligations would have been more prudent in creating sufficient reserves out of the income he received to deal with the possibility that the high levels of income which he had previously been receiving would suffer significant reductions in the future, which might make it difficult for him to meet his past years' tax payment obligations out of current income. It is also, in our view, implicit in the FTT's findings that by exercising reasonable prudence in creating reserves Mr Raggatt would have been in a position to deal with the impact of the divorce settlement and the decision of the bank to restrict his overdraft facilities.

34. We would not go so far as Mr Carey suggested in this regard. Mr Carey referred to remarks of Nolan LJ in *Steptoe* (at page 768f-j) to the effect that because the scheme of collection (for VAT in that case) involves at the outset the trader receiving from his customers the amount of tax which he must subsequently pay over to HMRC, by using it in his business he puts it at risk of being lost so that it cannot handed over to HMRC when the date of payment arrives. In those circumstances, Nolan LJ said the taxpayer would be "hard put" to persuade the tribunal that he had a reasonable excuse for venturing and thus losing money of which he was the temporary custodian.

35. Mr Carey submitted that what Mr Raggatt was doing was using money owed to HMRC for his own purposes and that was the real reason that he was left without sufficient money to pay the tax that he owed.

36. We do not accept that the remarks of Nolan LJ in *Steptoe* to which Mr Carey referred are apt to apply to the receipt by a self-employed person of professional income in respect of which income tax may be payable at some future time, depending upon the calculation of the taxpayer's total income and the submission of a self-assessment. As we have mentioned, Nolan LJ made his remarks in the context of the scheme of collection for VAT, where the amount of tax is clearly identified as such on an invoice rendered by that trader and must be accounted for to HMRC within a relatively short period of time. Even in that context, Nolan LJ was careful to limit his comments to the circumstances of a trader, who is accounting for VAT under the cash accounting scheme, on the basis of payments less receipts, as opposed to the normal trader who accounts for VAT on the basis of output tax due less input tax owing (see page 768j).

37. The particular remarks of Nolan LJ in *Steptoe* (at page 768f-j) to which Mr Carey referred are taken from a quotation by Nolan LJ from his own judgment in *Customs and Excise Commissioners v Salevon Ltd* [1989] STC 907. In *Steptoe*, Nolan LJ proceeds to make it clear (at page 768j) that his comments in *Salevon* were directed at traders who account for VAT under the cash accounting scheme. They were not intended to suggest that there was any particular restriction on the availability of a reasonable excuse defence to traders who account for VAT in the usual way but experience cash flow difficulties. It was a trader who is accounting for VAT under the cash accounting scheme to whom Nolan LJ referred as generally unable to "[put] forward delays in payment by his customers as a reasonable excuse for his non-payment of tax".

38. We agree that a prudent trader accounting for VAT under the cash accounting scheme would earmark amounts he or she receives in respect of VAT as payable to HMRC and if he fails to do so we would agree that he or she would normally struggle to establish a reasonable excuse defence on the grounds of delays in payment by customers which led to an insufficiency of funds. But that is very different to the present case. Mr Raggatt did not account for income tax on a cash basis. In common with many self-employed individuals, he paid tax by reference to profits shown in his accounts for the period after allowing for deductible expenses. His tax payments in respect of a particular item of income could fall due some time after he had actually received the amount in question or, in some cases, before he had received it.

39. That having been said, although there is no legal requirement on the part of a self-employed professional person to reserve for his or her tax liabilities, in our view, a person with such an episodic life would be well advised to take reasonable steps to make some provision for tax liabilities or to ensure that he or she has appropriate bank facilities available to meet his or her expected tax liabilities if he or she subsequently wishes to rely on a reasonable excuse defence. Taking such reasonable steps might not in the event prevent the taxpayer being able to deal with unforeseen events, but if it appears that the taxpayer did all that could be reasonably expected of someone in his or her position then the tribunal may well take a sympathetic view if nevertheless the taxpayer could not meet his or her liabilities when due.

40. In the current case, it is not clear to us that the reductions in Mr Raggatt's income from criminal legal aid (his only source of income in the relevant period) were such that he could not have (at least substantially) met his obligations had he made prudent reserves out of the years in which he was still receiving high levels of income. Mr Raggatt told us that the reductions in legal aid remuneration commenced in 2008, became much worse in 2010 following reforms implemented by the Coalition Government and much worse again in 2012, resulting in a 40% cut in real terms over the whole of that period. That is clearly an exceptional circumstance, and not one that has been faced by very many taxpayers even during a period of austerity where many have seen their real incomes decline. We accept that he could not reasonably have foreseen that steep decline in 2008.

41. Nevertheless, as the schedule of Mr Raggatt's income over the three tax years preceding the two tax years in respect of which the penalties were charged, those tax years and the first year thereafter show, Mr Raggatt earned an average annual income of £190,788 over those six tax years, giving rise to an average annual tax payment of £70,342. His highest total income was £310,776, in respect of 2010/11, at a time when the cuts were beginning to bite quite significantly and his lowest was £123,308 in 2011/2012. In the year following that his total income rose to £245,981. It is therefore not clear to us, and we think it is implicit in the FTT's findings that it was not clear to them, why if Mr Raggatt had made prudent reservations for tax (which would necessarily be estimates) out of moneys he received in respect of those years when he was receiving higher levels of earnings, he would not have been in a position to have funds available to supplement the tax payments he was able to make out of the lower amounts of income that he was receiving in the years in which the payments fell due. By not making any provisions, which (as the FTT found) was consistent with his practice in the years before the legal aid cuts began to bite Mr Raggatt was taking a commercial risk that he would not have sums available to meet his tax liabilities when they fell due.

42. Furthermore, it would appear that Mr Raggatt had funds available to purchase a house for himself following his divorce. The house was bought in 2011, at a time when his income appears to have dropped considerably but he would have been aware at that time of significant tax liabilities to come. In those circumstances, he might have made a different choice and provided accommodation for himself by renting a property or purchasing a property subject to a mortgage, at least until his financial position improved.

43. We think that the matters that we have referred to at [40] to [42] above provide an answer to Mr Raggatt's question as to what more he could have done to avoid the position he unfortunately found himself in during 2012 and thereafter and which led to the imposition of the penalties which are the subject of this appeal. Furthermore, in our view the FTT was entitled to find, as it did, that the actions of the bank in not extending Mr Raggatt's overdraft were not to be given significant weight. As we have mentioned, the bank's letter extending the facility made it absolutely clear that it expected the limits to be met. Therefore, the FTT was entitled to find that there was no reasonable expectation that the facilities would be extended or increased on the basis of what was said in that letter. Whilst the decision of HMRC not to extend the

time to pay agreement might be considered harsh in the circumstances, it is a matter of discretion on the part of HMRC whether to grant such an arrangement and a taxpayer should not organise his or her affairs on the basis that it could be expected that such an arrangement would be granted were it sought.

44. We therefore do not accept Mr Raggatt's submission that the FTT imposed a counsel of perfection which turned out to be unreasonably harsh. As the authorities demonstrate, the FTT had to consider whether what Mr Raggatt did (or omitted to do) was objectively reasonable for him in the circumstances and, in particular, whether he exercised reasonable foresight and due diligence and a proper regard to the fact that the tax liabilities concerned would become due on particular dates. In our view, the FTT's conclusion, applying that test to the facts, that there was not a reasonable excuse for the late payments was one within the range of reasonable conclusions that was open to it on the evidence that was before it.

45. In common with the FTT, we have considerable sympathy for the predicament that Mr Raggatt found himself in. We cannot say that a differently constituted tribunal might not have come to a different decision. A differently constituted FTT might have placed more weight on the effect of the legal aid cuts when weighing up that factor against the fact that Mr Raggatt had adopted a practice of seeking to meet his tax obligations out of current income as and when he could. We cannot, however, say that it was not open to the FTT to place the weight that it did on the latter factor.

46. Accordingly, we can find no error of law on the part of the FTT in the Decision.

Disposition

47. The appeal is dismissed.

JUDGE TIMOTHY HERRINGTON **JUDGE ASHLEY GREENBANK**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 18 December 2018