



**TC04258**

**Appeal number: TC/2014/05324**

*INCOME TAX – self - assessment return – £100 late filing penalty – paragraph 3 Schedule 55 FA 2009 – Appellant in PAYE system – underpayment of tax – whether a reasonable excuse for late filing – no – whether special circumstances – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**STEFAN WOJTOWYCZ**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GUY BRANNAN**

**Sitting in public at Cambridge on 5 January 2015**

**The Appellant appeared in person**

**Justin Kruyer, Presenting Officer, for the Respondents**

## DECISION

### Introduction

- 5 1. This is an appeal against a penalty imposed under paragraph 3 Schedule 55 Finance Act 2009 ("FA 2009") for the year ending 5 April 2013. The penalty was imposed for the late filing of a self-assessment tax return for that year. The main question in this appeal is whether the appellant had a reasonable excuse.

### The facts

- 10 2. Based on the appellant's oral evidence, HMRC's computerised records and other papers which were produced to the Tribunal, I find the following facts.

3. The appellant was issued with a Form P800 tax calculation by HMRC on 31 July 2013. This calculation showed that the appellant had received income of £10,303 from which PAYE had been deducted in the amount of £710.80. In addition, however, 15 Form P800 also showed that the appellant had received Employment and Support Allowance of £2,779 and Incapacity Benefit of £1,361 – neither of these two amounts had been subject to income tax by deduction of tax under the PAYE system. The appellant's total taxable income was £14,444. After subtracting the personal allowance of £8,105, the appellant had total taxable income of £6,339. Basic rate 20 income tax (20%) on £6339 was £1, 267.80. The result was that the appellant had underpaid tax by £557.

4. According to HMRC's records, HMRC issued a voluntary payment request to the appellant on 1 August 2013. At the hearing, the appellant could not find this request among his papers. I have noted, however, that the file of papers presented to 25 the Tribunal contains a letter to the appellant from HMRC dated 1 August 2013 requesting payment of tax. On this letter in manuscript is an HMRC address and, underneath, is written the name "Catherine". As we shall see, the appellant spoke to an HMRC Helpline officer called "Catherine" in October 2013, suggesting that he did in fact receive the 1 August 2013 letter. Be that as it may, the appellant did, however, 30 receive the second voluntary payment request which was issued on 24 October 2013 and helpfully produced it at the hearing.

5. This voluntary payment request was headed in bold type "Unpaid Income Tax". It stated:

35 "On 30 July 2013 we sent a P800 *Tax Calculation* to let you know that you have underpaid tax during the period the 5 April 2013 in the amount of £557.00. We wrote to you on 1 August 2013 and asked you either to pay the tax you owe or to contact us. We have not received a payment or full payment of the outstanding amount and our records show £557.00 is still outstanding. If you have already written to us 40 about this, please tell us by phoning our helpline number shown above."

6. The letter gave instructions on how to pay the outstanding amount. It also explained that if the appellant did not pay the amount owed, HMRC would have to consider collecting the tax through the self-assessment tax system. The letter stated that HMRC preferred to keep the number of self-assessment taxpayers to a minimum but stated that this was the only way of collecting tax from individual taxpayers. The letter further explained that if HMRC needed to use self-assessment, the appellant would have to fill in a self-assessment tax return.

7. On receiving HMRC's 24 October 2013 letter, the appellant telephoned HMRC and spoke to an officer called "Catherine". He explained that he had no input into the amount of tax deducted from his income and that any underpayment was not his fault. "Catherine" asked him to explain the position in writing.

8. Accordingly, the appellant wrote to HMRC on 31 October 2013 in relation to the £557 of underpaid tax. In the letter he stated:

"As I have absolutely no input with the amount of pension or tax that I get paid or pay respectively I consider that either yourselves or my pension providers [name of Pension Fund] have been negligent in this matter. I therefore think it is for whoever is at fault to make this matter right.

I look forward to either of you to inform me that the situation has been rectified."

9. HMRC did not reply to the appellant's letter. I think this was unfortunate and was remiss of HMRC.

10. On 4 March 2014, just over four months later, HMRC allocated the appellant's underpayment of tax to be dealt with by self-assessment. Form OCA 120 and a self-assessment Notice to Complete a Tax Return for the year ended 5 April 2013 were issued on 13 March 2014. Form OCA 120, of which a sample was included in the hearing bundle, noted that HMRC had sent the P800 tax calculations but the appellant had still not paid the underpaid tax. The letter explained that HMRC were, therefore, now sending the appellant a self-assessment return in order to collect the tax the appellant owed for the relevant year. Form OCA 120 warned that if the appellant did not fill in and send HMRC the tax return by a specified date (three months and seven days from the date of the letter) HMRC would charge a penalty and interest.

11. The appellant received Form OCA 120 and a Notice to Complete a Tax Return some days after 13 March 2014. He looked at the date on the return and saw it related to the tax year ended 5 April 2013. He also noted that the filing deadlines on the form referred to 31 October 2013 in respect of paper returns and 31 January 2014 in respect of online returns – both these dates having by then passed. He concluded that these forms had been sent to him in error. Moreover, he had not had a response from HMRC to his letter of 31 October 2013. He assumed this meant that the underpaid tax issue raised in HMRC's letter of 24 October 2013 had been settled. What the appellant did not observe was that, in addition to the 31 October and 31 January dates, the Notice to Complete a Tax Return also informed him that he should make sure that

HMRC received his tax return three months after the date of the letter, *if that was later than 31 October 2013 or 31 January 2014.*

12. Therefore, the appellant was given over three months to complete and submit his tax return for the year ended 5 April 2013.

5 13. The filing date for the 2013 tax return was 20 June 2014. At the date of the hearing, the appellant had still not submitted this return.

14. HMRC issued a penalty notice in the amount of £100 pursuant to paragraph 3 Schedule 55 FA 2009 on 24 June 2014.

10 15. After receiving the penalty notice, the appellant telephoned HMRC. HMRC's computer records show that the telephone conversation took place on 28 June 2014. The notes of the telephone conversation are as follows, although I have attempted to supplement the abbreviations for the sake of clarity:

15 "Tp [taxpayer] teli re 12/13 LFP [Late Filing Penalty]. Adv rtn [Advised return] needs completing re 12/13 PAYE u/p [underpayment]. Adv [Advised] no response re u/p is the reason for SATR [self-assessment tax return] req [requirement/request]. Tp refuses to comp [complete] rtn. Tp states u/p not his fault. Adv [Advised] re consequences of not completing rtn. Tp is going to write in."

20 16. After having had his appeal against a penalty rejected by HMRC and unsuccessfully going through a review process, the appellant appealed to the Tribunal on 15 September 2014. It is worth noting, however, that the review letter dated 1 September 2014 clearly explained the appellant's obligation to submit a return. The review letter stated:

25 "A notice to file letter was issued to you on 13 March 2014. A notice to file letter replaces the issue of a tax return. It advises you of your obligations, and that filing a return as necessary. Under Self Assessment, in accordance with Section 8 Taxes Management Act 30 1970, if you are issued with a tax return/notice to file, for whatever reason, it remains your responsibility as an individual taxpayer to complete and return your tax return to HMRC. Your tax return must be returned by the due date without prompt or reminder from HMRC. HMRC records show that an underpayment of tax arose on your PAYE 35 records for the year ending 5 April 2013 and it did not appear that this underpayment could be recovered through your earnings/pension in a later tax year. Therefore several requests were issued to you for voluntary payment of that underpayment. In the absence of any reply being received, you were placed within Self-Assessment, whereby a tax return/notice to file is issued to you for completion of the return and payment of the liability. As the Notice to file a 2012 – 13 return 40 was issued to you late on 13 March 2014 you would have had three months and seven days to submit the return and this would have been shown on the notice. You should now complete and submit a 2012 – 13 Self-Assessment return as soon as possible to avoid incurring

further penalties. I am sorry but I cannot accept your appeal on the grounds of reasonable excuse and the penalties correctly charged."

**The law**

17. Section 8 Taxes Management Act 1970 ("TMA 1970") provides:

5                                    **"Personal return**

(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—

10                                   (a) to make and deliver to the officer. . . , a return containing such information as may reasonably be required in pursuance of the notice, and

15                                   (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

18. It will be seen, therefore, that HMRC are given the power to require a taxpayer to make a tax return. It does not matter whether the taxpayer's income tax liability is normally collected through the PAYE system. As long as HMRC require the tax return for the purposes set out in section 8 (1) the taxpayer must comply with by submitting a return by the due date.

19. It was not disputed that the due date for the return was 20 June 2014: section 8 (1H) – (1G) TMA 1970.

20. The obligation to submit a tax return is backed up by the penalty regime contained in Schedule 55 FA 2009.

25 21. The penalty imposed on the appellant in this case arises under paragraph 3 Schedule 55 FA 2009 (when read with paragraph 1 of that Schedule). The penalty arises in relation to the late submission of a self-assessment income tax return for the year ended 5 April 2013.

30 22. Paragraph 3 Schedule 55 FA 2009 imposes a £100 penalty if the return is not received on or before the filing date (in this case 20 June 2014: see section 8 (1E) – (1G) TMA 1970).

23. Paragraph 23 (1) Schedule 55 FA 2009 provides a defence in respect of penalties if the taxpayer can show that there was a reasonable excuse for the late filing of his/her tax return. Paragraph 23 (2) (c) provides:

35                                   "... where [the taxpayer] had a reasonable excuse for the failure but the excuse has ceased, [the taxpayer] is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased...."

24. The burden of proof lies on HMRC to show that *prima facie* a penalty is due (e.g. the return is late). The burden of proof in establishing that there was a reasonable excuse for the late submission lies upon the taxpayer. The standard of proof is the civil standard of the balance of probabilities.

5 25. Paragraph 16 Schedule 55 FA 2009 provides that:

"If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule."

26. While 'special circumstances' are not defined, the courts accept that for circumstances to be special they must be 'exceptional, abnormal or unusual'  
10 (*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).

27. Paragraph 2 Schedule 55 FA 2009, however, provides that the Tribunal can only substitute its decision for that made by HMRC if it decides that HMRC's application of the "special circumstances" provision was "flawed when considered in the light of the principles applicable in proceedings for judicial review." Thus, I cannot substitute  
15 my own decision in relation to "special circumstances" unless I conclude that HMRC's decision was unreasonable in the public law sense.

### Decision

28. In this case, the due filing date for the appellant's self-assessment return for the year ended 5 April 2013 was 20 June 2014. At the date of the hearing, this return had not been submitted. Therefore, I find that the appellant was *prima facie* liable to the £100 penalty imposed under paragraph 3 Schedule 55 FA 2009.  
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29. The next question is whether the appellant had a reasonable excuse for the purposes of paragraph 23 (1) Schedule 55 FA 2009. Paragraph 23 (2) Schedule 55 FA 2009 provides, so far as material:  
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"(c) where [the taxpayer] had a reasonable excuse for the failure but the excuse had ceased, [the taxpayer] is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

30. In this case, the appellant argues that the underpayment of tax in respect of the year ended 5 April 2013 was not his fault. It was either the fault of his pension provider or that of HMRC. Having written a letter to HMRC on 31 October 2013, to which he received no reply, the appellant thought no more about the matter. When he received the Notice to Complete a Return in March 2014, he assumed this was a  
35 mistake because it related to a year for which the filing deadlines had already passed. He did not think he was liable for the underpayment because, in his view, it occurred through someone else's fault. He said he was a conscientious taxpayer who had always, for many decades, paid his taxes through PAYE. He should not be put in the self-assessment system.

31. In my view, the appellant was a transparently honest and conscientious taxpayer. I have carefully considered the appellant's arguments but I regret that I cannot agree with them. The subject matter of this appeal was not whether the appellant had underpaid his tax for the year ended 5 April 2013 nor was it to establish  
5 whose fault led to any such underpayment. This appeal concerned the failure of the appellant to submit a self-assessment tax return when required to do so by the notice issued to him on 13 March 2014.

32. The appellant appears to have laboured under the misapprehension that if the underpayment was not his fault, HMRC cannot require him to complete a tax return.  
10 That is simply incorrect is a matter of law. The powers conferred on HMRC by section 8 TMA 1970 to require a person to make a return are subject to no such qualification.

33. I do not accept that the appellant had a reasonable excuse for thinking that the Notice to Complete a Tax Return dated 13 March 2014 and Form OCA 120 were  
15 simply sent to him by mistake. They related (and Form OCA 120 did so expressly) back to the earlier correspondence concerning the underpayment (in particular, the letter requesting voluntary payment dated 24 October 2013). Moreover, the Notice to Complete a Tax Return indicated, had the appellant read it more closely, that he had three months to complete the return.

20 34. Even if the appellant did have a reasonable excuse at this stage, by the time of the telephone conversation with HMRC on 28 June 2014 and the subsequent review decision of HMRC, the appellant can have been left in no doubt concerning his obligation to submit his self-assessment tax return for the tax year ended 5 April 2013. He cannot then have considered that the issue of the Notice to Complete a Tax  
25 Return had been a mistake. Even at the date of the hearing, the appellant had not submitted his tax return. The appellant has not remedied his failure without unreasonable delay and, therefore, any reasonable excuse which the appellant may have had has long since expired: see paragraph 23(2)(c) Schedule 55 FA 2009.

35. HMRC have stated that they had taken into account whether there were "special  
30 circumstances" for the purposes of paragraph 16 Schedule 55 FA 2009 and concluded that no such special circumstances existed. As noted above, I can only substitute my own decision on the question of "special circumstances" if I consider that HMRC's decision is flawed in the judicial review sense. There is nothing in the circumstances in this case that would lead me to conclude that HMRC's decision was flawed. In  
35 reaching this conclusion I have specifically taken account of HMRC's failure to reply to the appellant's letter of 31 October 2013.

36. Accordingly, I dismiss this appeal.

37. 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  
40 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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**GUY BRANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 January 2015**

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