



**TC004346**

**Appeal number: TC/2014/05819**

*INCOME TAX – penalty for late filing of self assessment tax return – paragraph 3 of Schedule 55 to Finance Act 2009 – whether reasonable excuse – no – whether special circumstances – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHRISTOPHER COLIN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JANE BAILEY**

**The Tribunal determined the appeal on 9 March 2015 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 23 October 2014 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 24 November 2014.**

## DECISION

1. The Appellant appeals against a penalty of £100 imposed under Paragraph 3 of Schedule 55 to Finance Act 2009 for the late filing of his self assessment tax return for the year ended 5 April 2011.

### **Application for permission to appeal out of time**

2. Although this point does not appear to have been noticed by the parties, the Appellant's appeal to this Tribunal was made out of time. The review decision of HMRC against which the Appellant appeals is dated 23 September 2014. The Appellant's notice of appeal is dated 23 October 2014 but was emailed to the Tribunal on 24 October 2014. As the Appellant has 30 days, beginning with the date of the decision appealed against, to appeal to the Tribunal against this decision, the Appellant's appeal was submitted two days late.

3. Under Rule 20(4)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009 No. 273, as amended) ("Tribunal Rules") a notice of appeal which is made out of time must include a request for permission to appeal out of time and the reason why the appeal was not made in time. As this point does not appear to have been noticed at an earlier stage, pursuant to Rule 7(2)(a) of the Tribunal Rules I waive the requirement for the Appellant's notice of appeal to include an application for permission and the reason why the notice of appeal was not provided in time. As an appeal which is submitted to the Tribunal out of time may be admitted with the permission of the Tribunal under Rule 20(4), as a preliminary point I consider whether to grant the Appellant permission to appeal out of time and to admit the appeal.

4. In considering whether the Appellant should be given permission to appeal out of time the Tribunal should have regard to the length of the delay, the Appellant's reasons for the delay, the consequences for the parties if permission to appeal out of time is not granted, and the consequences for the parties if permission to appeal out of time is granted. The Tribunal should also bear in mind the need for litigation to be conducted efficiently and the overriding objective in the Tribunal Rules to deal with cases fairly and justly.

5. In this case the delay is minor and the Appellant would suffer prejudice if permission to appeal was not granted as he would lose his opportunity to contest the penalty which has been imposed. HMRC have prepared submissions in relation to the issues on the substantive appeal and do not appear to have noticed the delay.

6. In the circumstances of this case I consider it appropriate to grant the Appellant permission to appeal out of time, and to admit the appeal.

40

## Chronology and facts found

7. Turning to the substantive appeal, from the papers which accompanied HMRC's Statement of Case, and from the notice of appeal submitted by the Appellant, I find the following facts:

- 5 a) In the tax year 2010/11 the Appellant had two employments.
- b) On 28 April 2011, following an initial reconciliation of the records available in relation to both of the Appellant's employments, HMRC issued a form P800 to the Appellant showing that he had overpaid tax of £1,550.40 for 2010/11.
- 10 c) HMRC undertook a subsequent reconciliation following receipt of further information, and on 25 May 2013 HMRC issued a further form P800 to the Appellant showing that he had underpaid tax of £579.60 for 2010/11.
- d) In September 2013 the Appellant wrote to HMRC challenging the underpayment and suggesting that the underpayment was due an error on the part of his employer. HMRC responded by letter on 8 October 2014 confirming that the original reconciliation was incorrect.
- 15 e) On 9 October 2013 a further form P800 confirming the underpayment of £579.60 was issued to the Appellant.
- f) On 10 October 2013 a Voluntary Payment Request Letter was issued to the Appellant. This explained how the Appellant could make payment of the £579.60 which was underpaid and that the payment would be recovered through self assessment (which would require completion of a tax return) if the Appellant did not pay. The Appellant did not respond.
- 20 g) On 2 January 2014 a further Voluntary Payment Request Letter was sent to the Appellant, in the same terms as described in f) above. Again the Appellant did not respond.
- 25 h) On 25 April 2014 HMRC issued the Appellant with a notice to file a tax return for 2010/11.
- i) The Appellant has not filed a tax return for 2010/11.
- 30 j) On 19 August 2014 HMRC issued the Appellant with a £100 penalty under Paragraph 3 of Schedule 55 to Finance Act 2009 in respect of the Appellant's delay in submitting his return.
- k) On 5 September 2014, the Appellant appealed against the £100 penalty.
- l) On 23 September 2014 HMRC wrote to the Appellant, stating their conclusion that the Appellant did not have a reasonable excuse for the late filing. It is against that decision of HMRC that the Appellant now appeals.
- 35

### **Late submission of the return**

8. Under paragraph 3 of Schedule 55 to Finance Act 2009 a person is liable to a penalty of £100 if he fails to deliver a return which is due under Section 8(1) Taxes Management Act by the date it is required to be delivered to HMRC.

5 9. The burden of proof lies first upon HMRC to show that the Appellant's return was due and that it has not been submitted by the date allowed and so, on the face of it, a penalty is due. The standard of proof is the civil standard of the balance of probabilities.

10 10. The notice to file a return for 2010/11 was issued to the Appellant on 25 April 2014. Under Section 8(1A)(b) of Taxes Management Act 1970 the deadline for the Appellant to file his return for 2010/11 was the last day of the three month period which began with the day on which the notice was given. Unless there is evidence to the contrary, the notice should be assumed to be delivered in the ordinary course of post. From HMRC's Statement of Case it appears that HMRC treat a document  
15 posted in the ordinary course of post to be delivered within seven calendar days which does not seem unreasonable. Therefore the three month period for the Appellant to file his return for 2010/11 expired on 2 August 2014 (whether the return was filed electronically or non-electronically).

20 11. There is apparently no dispute that the Appellant has yet to file a return for 2010/11.

12. Therefore I find that the Appellant's return for 2010/11 was not filed within time and, on the face of it, a penalty of £100 is due.

### **Reasonable excuse**

25 13. Under Paragraph 23 of Schedule 55 to Finance Act 2009, liability to a penalty does not arise if the person who would otherwise be liable to the penalty can establish that there was a reasonable excuse for his failure.

30 14. Therefore the next issue to be considered is whether there was a reasonable excuse for the Appellant's failure to submit a return for 2010/11 within time. The burden of proof in establishing that there was a reasonable excuse for late submission lies upon the Appellant. The standard of proof is the civil standard of the balance of probabilities.

### The Appellant's submissions

15. In his grounds of appeal the Appellant set out the following reasons for his failure to submit his return for 2010/11 on time:

35 a) That he was willing to pay the amount due from him but considered it was harsh to have to pay a penalty when there had been insufficient explanation of how he could pay the underpaid tax;

- b) That he thought the issue of a tax return must be a mistake as he understood the underpayment notified to him would be recovered through his PAYE tax coding;
- 5 c) That he had not known what to do when required to file a return as he had no records from 2010/11; and
- d) That the situation was unfair as it had taken a considerable period for the underpayment to come to light, and that he was expected to pay the underpaid tax despite it being a long time since 2010/11.

HMRC's submissions

10 16. In its Statement of Case HMRC argue in response:

- a) That every taxpayer is under an obligation to file a return when required to do so, and it is incumbent upon taxpayers to maintain the appropriate records to enable them to be able to complete a return;
- 15 b) The Appellant's ignorance or confusion about his obligations is not a reasonable excuse for failure to file a return; and
- c) The correspondence sent to the Appellant had explained the position regarding how he could pay the underpaid tax but he had chosen not to make payment.

17. Taking the Appellant's reasons in turn, it appears from the papers which are  
20 before me that the Appellant was provided with several explanations of the underpayment position by HMRC. Given the extent and nature of the correspondence I do not agree that the process was poorly explained by HMRC. There is no evidence that the Appellant attempted to contact HMRC at this stage to seek further explanation. Despite the assertions in his grounds of appeal that he was willing to pay  
25 the tax due, it appears that the Appellant chose not to make voluntary payment when given the opportunity to do so. That decision resulted in the Appellant being required to file a tax return.

18. Given the nature of the correspondence from HMRC which preceded the issue of the notice to file, I do not accept that the Appellant could reasonably have believed  
30 that the return had been issued to him by mistake. It should have been clear to the Appellant why he was required to file a return. There is no evidence that the Appellant tried to contact HMRC once he had received the notice to file in order to seek an explanation of why a return was required.

19. The Appellant's next point is that he had not known what to do when required  
35 to file a tax return as he no longer held records from that year. While it may be the case that the Appellant no longer holds records from 2010/11, it would have been open to him to request duplicate information from his employers, or from HMRC, to assist him in filing his return. There is no evidence that the Appellant tried to contact HMRC for assistance as might reasonably have been expected, and I do not accept  
40 that the Appellant could reasonably have believed that due to his lack of records it would be acceptable for him to do nothing in respect of his obligation to file a return.

20. The Appellant's final point is that it has taken a long period of time for the underpayment to come to light. While I agree that it has taken longer than normal, HMRC have acted within the time allowed to them to require the Appellant to file a return. Having been validly required to file a return, it was incumbent upon the  
5 Appellant to make that return, however long ago the tax year in respect of which the tax is due. While the effluxion of time might make it more difficult for the Appellant to comply, it cannot extinguish his obligation to file a return.

21. In my opinion none of the reasons given by the Appellant constitute a reasonable excuse for his failure to submit a return for 2010/11 within time.

## 10 **Special circumstances**

22. Having concluded that the Appellant does not have a reasonable excuse for the delay in submitting his return, I also consider whether there are special circumstances within the meaning of Paragraph 16 of Schedule 55 FA 2009 which would make it right to reduce or cancel the penalty.

15 23. Under paragraph 16(1) of Schedule 55 FA 2009, HMRC may reduce the penalty if they "think it right because of special circumstances". In this context "special" means something "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152).

20 24. Paragraph 22 of Schedule 55 to Finance Act 2009 provides that the Tribunal may reduce or cancel the penalty due to special circumstances only if the decision taken by HMRC is flawed when considered in the light of the principles applicable in proceedings for judicial review. In this case the decision referred to is that set out in HMRC's letter dated 23 September 2014.

25 25. There is no evidence in HMRC's letter of 23 September 2014 that the possibility of special circumstances was addressed by the reviewing officer. This letter only addresses the issue of reasonable excuse. It is asserted in HMRC's Statement of Case that "HMRC have considered special reduction but their view is that there are no special circumstances which would allow us to reduce the penalty".  
30 However, there is no evidence in the papers before me to support the assertion that the issue of whether there are special circumstances has been considered by HMRC, nor is there any indication of the reasons for the conclusion which has been said to have been reached.

26. A decision will be flawed if HMRC fails to consider the issue at all (*Algarve Granite v HMRC* [2012] UKFTT 463 (TC)). Accordingly I find that the decision of  
35 23 September 2014 is flawed in this regard.

27. Under Paragraph 22(2) the Tribunal may substitute its own decision for a decision which HMRC had power to make and so, if I find there are special circumstances, I may reduce or cancel the £100 penalty imposed upon the Appellant.

28. In this case I have considered whether any of the reasons put forward by the Appellant could constitute an exceptional, abnormal, unusual or out of the ordinary run event (even though they do not constitute reasonable excuse). I have concluded that none of the reasons put forward by the Appellant could amount to special  
5 circumstances in relation to the Appellant's failure to submit his return within the time allowed.

### **Decision**

29. Accordingly, this appeal is dismissed. The penalty of £100 is confirmed.

30. This document contains full findings of fact and reasons for the decision. Any  
10 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  
15 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JANE BAILEY**

20

**TRIBUNAL JUDGE**  
**RELEASE DATE: 7 April 2015**