



TC04430

Appeal number: TC/2014/03434

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**

BRIAN HIGGINS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JANE BAILEY
MR IAN PERRY**

Sitting in public at Birmingham Tribunals Centre on 13 May 2015

Mr Parker, Parkers, for the Appellant

Mr Foster, HMRC presenting officer, for the Respondents

DECISION

1. By Notice of Appeal dated 19 June 2014, the Appellant appeals against a
5 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 2013.

Chronology and facts found

2. From the bundle of papers prepared by the Respondents (“HMRC”), the notice
of appeal submitted by the Appellant and the submissions of the parties, we find the
10 following facts:

- a) On 6 April 2013 HMRC issued the Appellant with a notice requiring him to
complete a tax return for the year ended 5 April 2013.
- b) In late October 2013 the Appellant first instructed his current accountants,
Parkers to act on behalf of the company of which he was a director. This
15 instruction did not initially include instructions to file the Appellant’s
personal return but from an unspecified date between October and
December 2013, Parkers recognised that the Appellant was liable to file a
return.
- c) In December 2013, Parkers applied to HMRC for an authorisation code
20 which would enable them to file the Appellant’s tax return online. Although
the Appellant was registered for online filing, Parkers required an
authorisation code in order to file a return on behalf of the Appellant. No
authorisation code was received in response to this December request.
- d) In the middle of January 2014, Parkers applied again to HMRC for an
25 authorisation code. This was received on 6 February 2014.
- e) On 11 February 2014, Parkers filed the Appellant’s tax return for the year
ended 5 April 2013.
- f) On or about 18 February 2014 HMRC issued the Appellant with a £100
30 penalty under Paragraph 3 of Schedule 55 to Finance Act 2009 in respect of
the Appellant’s delay in submitting his return for the year ended 5 April
2013.
- g) On 10 March 2014, the Appellant sought a review of HMRC’s imposition of
the £100 penalty.
- h) On 12 June 2014, HMRC wrote to the Appellant, stating their conclusion
35 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.

Late submission of the return

3. 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.

4. 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.

5. The notice to file a return for the year ended 5 April 2013 was issued to the Appellant on 6 April 2013. Under Section 8(1D) of Taxes Management Act 1970 the deadline for the Appellant to file this return was 31 October 2013 (for a non-electronic return) or 31 January 2014 (for an electronic return).

6. It is common ground that the Appellant's return was filed electronically on 11 February 2014.

7. Therefore we find that the Appellant's return for the year ended 5 April 2013 was not filed within time and, on the face of it, a penalty of £100 is due.

Reasonable excuse

8. 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.

9. Therefore we now consider whether there was a reasonable excuse for the Appellant's failure to submit a return for the year ended 2013 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

10. In his grounds of appeal, and in Mr Parker's arguments before us, the Appellant set out the following reasons for failing to submit his return for the year ended 5 April 2013 on time:

a) He could not file his return on time because his accountants did not receive the authorisation code until 6 February 2014; the return had been filed without delay once the authorisation code had been received; and

b) He should not have to file a tax return as he had no tax liability for the year ended 5 April 2013.

11. On behalf of the Appellant, Mr Parker submitted that in the circumstances the penalty should be cancelled as it was not possible for the Appellant to have filed his return at an earlier date.

12. In response to HMRC's arguments, Mr Parker also submitted that this appeal raised a practical point: the HMRC system did not show when an authorisation code had been requested and (in Mr Parker's experience) approximately 15-20% of requests did not result in a code being issued. If the HMRC system showed when an authorisation code had been requested then it would have shown Parkers making a request in December 2013.

13. Mr Parker accepted that it could be argued that an authorisation code could have been sought in October 2013 or August 2013, but the Appellant had been busy running his business earlier in the year. Seeking an authorisation code in December 2013 should have been sufficiently early action.

HMRC's submissions

14. In response to the Appellant's submissions, Mr Foster on behalf of HMRC submitted:

- a) Every taxpayer is under an obligation to file a return when required to do so;
- b) The Appellant had been filing tax returns since 2008 and it was not until this appeal that it had been suggested that it was inappropriate for him to do so;
- c) It was not accepted that Parkers' failure to receive an authorisation code until 6 February 2014 constituted a reasonable excuse for the Appellant's failure to file his return on time as the Appellant had had from 6 April 2013 to seek an authorisation code. Mr Foster referred to *Hegedus v HMRC* [2014] UKFTT 1049 (TC) ("*Hegedus*") in support of this point; and
- d) The Appellant's reliance upon his accountants was not reasonable as the Appellant had not allowed Parkers sufficient time to file his return on his behalf.

15. Taking the Appellant's submissions in reverse order, the Appellant had been required by HMRC to file a return by 31 January 2014. Once required under Section 8 Taxes Management Act 1970 to file such a return, it is not relevant whether the Appellant had a liability for the relevant year – he was obliged to file the return required. Therefore we do not consider the Appellant's suggested lack of liability for the year ended 5 April 2013 constitutes a reasonable excuse for the Appellant's delay in filing his return for that year.

16. We now consider the Appellant's primary submission, which is that it was not possible for his return to be submitted on time as HMRC had not issued an authorisation code to his accountants in time. In response to this argument HMRC referred us to *Hegedus*. Although we are not bound by *Hegedus*, we agree with the reasoning in that Decision.

17. By a notice sent on 6 April 2013 the Appellant was required to file a return. However, it was not until December 2013 that the Appellant turned his attention to the issue of his tax return and instructed his accountants to seek an authorisation code. As Mr Parker accepted in his submissions before us, the Appellant could have
5 addressed the issue of his obligation to file a tax return earlier than December 2013.

18. It was the Appellant's responsibility to ensure that his tax return was filed by the statutory deadline. It was open to the Appellant to have instructed accountants at an earlier date. It was also open to the Appellant to have filed his return online himself when Parkers had not received the authorisation code by 31 January 2014.
10 We do not consider that the Appellant's decision to wait until his accountants received an authorisation code before filing his return was the decision of an ordinarily prudent taxpayer who was conscious of his statutory obligations and anxious to meet those obligations. It follows that we do not consider that the fact that Parkers did not receive an authorisation code until 6 February 2014 constitutes a
15 reasonable excuse for the Appellant's delay in filing his return.

19. In our opinion, neither of the reasons provided by the Appellant constitutes a reasonable excuse for the Appellant's failure to submit a timeous return for the year ended 5 April 2013.

Special circumstances

20 20. Having concluded that the Appellant does not have a reasonable excuse for the delay in submitting his return, we 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. Neither of the parties addressed us on the issue of special circumstances.

25 21. 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).

30 22. 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 12 June 2014.

35 23. There is no evidence in HMRC's letter of 12 June 2014 that the possibility of special circumstances was addressed at all by the reviewing officer. This letter only addresses the issue of reasonable excuse. A decision will be flawed if HMRC fails to consider the issue at all (*Algarve Granite v HMRC* [2012] UKFTT 463 (TC)). Accordingly we find that the decision of 12 June 2014 is flawed in this regard.

40 24. Under Paragraph 22(2) the Tribunal may substitute its own decision for a decision which HMRC had power to make and so, if we find there are special

circumstances, we may reduce or cancel the £100 penalty imposed upon the Appellant.

25. In this case we have considered whether either 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). We have concluded that neither of the reasons put forward by the Appellant do amount to special circumstances in relation to the Appellant's failure to submit his return within the time allowed.

Decision

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

27. 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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JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 21 May 2015

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