



TC04569

Appeal number: TC/2014/05914

*INCOME TAX – self-assessment return – £100 late filing penalty –
paragraph 3 Schedule 55 FA2009 – online filing access difficulties –
whether reasonable excuse – no – standards of reasonableness not met –
whether special circumstances – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

M JACKSON

Appellant

- and -

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

**TRIBUNAL: JUDGE DR HEIDI POON
 MEMBER SUSAN STOTT**

**Sitting in public at the Immigration Appellate Authority, King’s Court, North
Shields, on 26 May 2015**

The Appellant, in person

Mrs L Shepherd, presenting officer, for the Respondents

DECISION

1. Mr M Jackson (no note of his first name in any of the documents) appeals
5 against the £100 penalty imposed under paragraph 3 of Schedule 55 to the Finance
Act 2009 ('FA2009') in consequence of the late filing of his self-assessment return
for the year 2012-13.

2. The decision is in relation to the £100 penalty only, even though the appellant
has indicated that it was the imposition of the daily and further penalties following the
10 fixed penalty that had motivated him to pursue this appeal.

The Facts

3. The appeal was originally allocated to the default paper category, but was re-
allocated to the 'basic' category on the appellant's request for an oral hearing. HMRC
did not serve a statement of case. From the appellant's oral evidence, and documents
15 produced to the Tribunal, we find the following facts.

4. The appellant is a member of an accrediting body known as The Welding
Institute (TWI). He had been in business for some eleven years trading as 'Tudor
Fabrications', specialising in jointing techniques and metal welding for ornamental
gates and railings. Though still trading under 'Tudor Fabrications', the appellant
20 worked from 2008-09 onwards as a sub-contractor, mostly to architects, on contracts
that lasted for three to four months at a time, in a capacity he described as
'supervisory', which involved duties similar to that of a project manager in overseeing
the supply of materials, equipment, and staff on renovation projects.

5. In May 2012, the appellant ceased trading. The cessation accounts for the one
25 month of April 2012 fell to be returned in 2012-13, and the due date for filing the
return online would be midnight of 31 January 2014. The appellant tried to file his
return online on 31 January 2014. HMRC produced the activity report of the
appellant's attempts to access the filing service and we note the following entries:

(a) 31 January 2014 18:25 GsoResetPasswordOnline (Success)

30 (b) 31 January 2014 18:28 IdsAuthenticationWithUserId (Failure)

6. The 'password reset success' message came up once more at 18:50 among
multiple entries of User ID authentication failures until 18:54 on 31 January 2014,
after which, there is no evidence that the appellant made any further attempts to
access the service. Before the 31 January 2014 attempts, the report available to us
35 started with two entries dated 30 January 2014 at 00:46, with the narrative as
'Message Archived' and 'Message Unread And Expired', the meaning of either entry
is unclear to the Tribunal.

7. From the evidence available, the Tribunal cannot ascertain whether there had
been attempts immediately previous to 31 January 2014 by the appellant to access his
40 online account. In correspondence, the appellant claimed he tried on 29 January 2014

(letters dated 17 October 2014 and 13 May 2015), though this earlier date of his attempts was not referred to in oral evidence. Nor did the activity report produced to the Tribunal show any entries for 29 January 2014, even though the ‘conclusion review’ officer who requested the report has asked for confirmation of ‘any online activity prior to 31/01/14’. The report available to the Tribunal started with the *Message Archived* and *Message Unread* entries of 30 January 2014, and did not indicate whether there was any activity on 29 January 2014.

8. By notice dated 18 February 2014, the £100 penalty was imposed for the failure to file the return by 31 January 2014. The appellant appealed against the penalty on Form SA370 on 7 March 2014, stating as his ground of appeal:

‘I was unable to log onto the online services. The password (or number) had been changed. In previous years I had no problem completing my tax return online.’

9. By letter dated 2 April 2014, HMRC considered the appeal against the late filing penalty for his 2012-13 return and upheld the penalty. The appellant requested a review of the decision, and HMRC’s *Conclusion of Review* by letter dated 19 May 2014 analysed the appellant’s activities on Government Gateway as follows:

‘HMRC records show that you requested a replacement password online on 31 January 2014. You then had a “failed log-in” at both the Government Gateway and HMRC sites. The records also show that you continued to fail to log in at either site and requested a replacement password again. Online services have confirmed that you would have received the first half of the password onscreen and the second half would have been sent to the email address you originally registered with.’

10. We heard in evidence from the appellant that he had a new email address from 2013-14; that as a result of disconnecting his broadband service after he ceased trading, he had ‘lost’ his previous email address that would have been originally registered with Government Gateway; that he had been assisted for the previous eleven years in submitting his returns online by a staff member; that there had been ‘absolutely no problems’ in the past and he had expected that he would have been able to submit without any problems for his 2012-13 return; and that ‘HMRC had created the situation’ by changing his password.

11. The Tribunal notes that the appellant was not entirely accurate, in oral evidence and in his stated ground of appeal on Form SA370, by claiming that he ‘*had no problem completing [his] tax return online*’ in previous years. There was, in fact, a similar failure in filing his 2009-10 self-assessment return, which was documented in HMRC’s internal log of ‘Action Notes’, with the entry dated 18 April 2011 stating:

‘2010 appeal accepted – customer had on line filing issues. SEES determination ltr issued with advisory note to **say this excuse not allowed in future**, penalty canx [cancelled], appeal closed ...’
(emphasis added)

12. The appellant informed the Tribunal that he did not have a broadband connection during 2014, and had relied on the local library or friends to gain access to the Internet. The Tribunal asked the appellant the extent of online services he was in the habit of using. Apart from the email service, the appellant does not use online services for what may be considered common daily tasks such as banking, shopping and travel booking. He told the Tribunal that he only shops very occasionally on eBay and ‘with difficulty’. The Tribunal found the appellant not an adept user of online services.

13. Between February and June 2014, the appellant made intermittent efforts in contacting HMRC to resolve the online filing difficulties. At one point, he also requested a paper copy of the 2012-13 return as an alternative to filing online, but was informed by HMRC that it was out of time for a paper return to be issued.

14. In any event, the online access difficulties were resolved by July 2014. The appellant received a letter from Government Gateway dated 8 July 2014, which provided him with a new User ID. The appellant produced the letter to the Tribunal during the hearing, and it reads as follows:

‘You recently asked us to send you your Government Gateway User ID. This is printed on the card at the top of this letter.

You can use this User ID, **together with your password**, to log in to the Government Gateway at www.gateway.gov.uk or the website for the online service you want to use.

The **new User ID** replaces any that you may have been sent or have used in the past.’ (emphasis added)

15. The Gateway letter also contains a note on how to obtain User ID reminders:

‘**Please note:** If you have provided an email address for your online account, you can request future User ID reminders online. The first half of your User ID will then be displayed to you on-screen and the second half will be sent to you in an email making the process much quicker.’ (emphasis original)

16. The appellant gave evidence that by using the new number from the Gateway letter (ie: the new User ID), he successfully logged on to his online account at his local library in July 2014. However, having successfully accessed his online account for the first time since 31 January 2014, the appellant did not persist in his efforts to get his return submitted on that occasion. He gave various reasons for not filing the return online in July 2014 – that he did not have the paper work with him at the time, and that he had assumed his letter of 30 January 2014 would have been sufficient.

17. The appellant’s letter of 30 January 2014 is included in the bundle and it reads:

‘I have made many attempts to file my tax return on line with no success. When I tried to log on to your website I was advised that you had changed my password. After many attempts with the new password and the old one I was still unable to log on to your website. I

find this very unusual. I would have assumed that the choice of password would have been with the user.

My company, namely Tudor Fabrications, ceased trading in May 2012.

The expenditure for April of that Tax Year was £175.55.

5 There was no income for this period.

The losses from the previous Year was £7346.00

I will continue to try to submit this figure online.’

18. Notwithstanding what the appellant said he would do in continuing ‘to try to submit this figure online’, as at the date of the hearing on 26 May 2015, the appellant
10 2012-13 tax return remained outstanding.

HMRC’s Case

19. By letter dated 19 May 2014, the Appeals Review Officer concluded to the appellant, referring to the earlier instance of online access issues as follows:

15 ‘You filed your 2009-10 self assessment return late saying you had online filing issues and was advised at that time that this excuse would not be accepted again. You have filed successfully in other previous years and should be familiar with the process. You should always keep your Password and User ID safely. I am sorry but I cannot accept your appeal on reasonable excuse grounds and the penalty is correctly
20 charged.’

The Appellant’s Case

20. Almost a year after the Review Officer’s conclusion, the appellant submitted to the Tribunal by letter dated 13 May 2015 that:

25 ‘The main reason I was unable to file my return on the due date was because **the Revenue had changed my password** and I was not made aware of the relevant changes.

The password I had used had previously been employed for a 11 year period with no problems. ...

30 It would appear from all of the correspondence I have received from the Revenue to date they will not accept that the problems I encounter were because of their actions.’ (emphasis added)

The Law

The penalty provisions

21. Once a tax return is required of a taxpayer, the obligation for the taxpayer to
35 submit the return by the stipulated due date is underpinned by the penalty regime contained in Schedule 55 FA 2009. The penalty of £100 specific to this appeal is under paragraph 3 of the Schedule, and is imposed if the return is not received by the due date for filing.

The provisions of reasonable excuse

22. Under paragraph 23 Schedule 55 FA 2009, it is provided that:

5 ‘(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] 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) –

...

10 (c) 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.’

23. There is no statutory definition for *reasonable excuse*. The term is to be given its normal everyday meaning, as referring to an unexpected or unusual event, either
15 unforeseeable or beyond a person’s control, which prevents one from complying with an obligation. Whether or not a person has a reasonable excuse is an objective test, and ‘is a matter to be considered in the light of all the circumstances of the particular case’ (*Rowland v HMRC* [2006] STC (SCD) 536 at [19]).

24. In *The Clean Car Company Ltd v The Commissioners of Customs & Excise*
20 [1991] VATTR 234 (*The Clean Car Company*), Judge Medd QC remarks:

25 ‘It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects
shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered.’

The consideration of special circumstances

25. Paragraph 16 of Schedule 55 to FA 2009 provides that:

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

The legislation does not define ‘special circumstances’. From case law, it is accepted that for circumstances to be special they must be ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or ‘something out of the ordinary run of
35 events’ (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152).

26. Paragraph 22 of Schedule 55 to FA 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
40 judicial review’. Unless the decision by HMRC in considering special reduction is unreasonable in the public law sense, the Tribunal will not step in to interfere with such a decision.

The onus of proof

27. HMRC have the burden of proof that there is a *prima facie* case that a penalty is due, because the return was not submitted by the due date. The taxpayer has the burden to establish that he has a reasonable excuse for failing to submit the return on time. The standard of proof is the civil standard of the balance of probabilities.

Discussion

28. The issues for the Tribunal to decide in this appeal are:

- (1) whether the £100 penalty has been correctly applied;
- (2) whether the appellant has a reasonable excuse in filing the return late;
- (3) whether special circumstances warrant a reduction of penalty.

29. On the first issue, it is a matter of fact that the 2012-13 return was not submitted by the due date, and the £100 penalty is correctly applied as a consequence in terms of paragraph 3 Schedule 55 FA2009.

30. On the second issue, the appellant has argued that he has a reasonable excuse on the premise that his problems were ‘created’ by HMRC, that his failure to file on time was due to HMRC having changed his password without notifying him. It is not our place to give the diagnostics as to why the appellant failed to access his online account on 31 January 2014. We can only infer from the various strands of evidence that the access failure would appear to be caused by User ID authentication issues, not by a change in password as the appellant has suggested. Regarding the log-on attempts made on 31 January 2014, the Gateway activity report clearly states that ‘password reset’ was *success*, but ‘user ID authentication’ was *failure*. Furthermore, the Government Gateway letter dated 8 July 2014 resolved the access problems by giving the appellant a new User ID, not a new password.

31. The User ID is a 12-digit number, which might have been mistaken for a password by the appellant. It was quite probable that the appellant had been mixing up his User ID and his password, for he has maintained that it was his password that had been changed, while the evidence suggests that it was his User ID that failed authentication, and it was a new User ID that ultimately resolved the log-on issues.

32. The Gateway letter dated 8 July contains a note, informing the recipient that User ID reminders are given by displaying the first half on-screen, and by sending the second half to the email address registered. The same procedure was verified by HMRC online activity report provided to the conclusion review officer regarding what had happened with the appellant’s online attempts on 31 January 2014 (see §9): ‘*Online services have confirmed that you would have received the first half of the password onscreen and the second half would have been sent to the email address you originally registered with.*’

33. We heard in evidence that the email address under which the appellant was registered with the Gateway service became defunct when he discontinued with his broadband server. On the balance of probabilities, it was the failure in authenticating

the User ID that created the access problems, and that the User ID authentication issues could have been resolved more immediately had the appellant not 'lost' his email address under which he was registered with Government Gateway.

5 34. The appellant was probably completely unaware of the consequence in 'losing' his registered email address in this scenario. This fact in itself does not give rise to a reasonable excuse, but serves to support the Tribunal's finding that the appellant is not an adept user of online services.

10 35. On the balance of probabilities, it would appear that the unavailability of the registered email account was a cause, if not *the* cause, for the delay in resolving the online access problems. The origin of the problems did not appear to lie with HMRC, and we do not accept that HMRC 'created' the access problems the appellant encountered. It was improbable that HMRC could have changed the appellant's User ID, any more than they could have changed the appellant's password as alleged; (the security of the system would not have permitted it).

15 36. Having discussed what might have caused the access problems in January 2014, we now consider whether the appellant has a reasonable excuse and make the following observations:

20 (1) That there had been a previous similar failure for the 2009-10 return, and that in April 2011 (less than 3 years ago at the material time when the appellant encountered difficulties filing his 2012-13 return), the appellant had been given an advisory note that this excuse would not be allowed again;

25 (2) That *whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered* (§24);

30 (3) That up to his recent retirement, the appellant had been a man of business which required of him to have a responsible attitude to his duties and obligations as a trader; that in his supervisory role as a 'project manager', he would have been attuned to the importance of getting things done in good time as a matter of business necessity and good practice; and that anticipating difficulties and making provisions to mitigate their consequences should be part of his business acumen;

35 (4) That the appellant is not an adept user of online services; this is the singular attribute that is of special relevance in assessing if the appellant has a reasonable excuse;

(5) We consider what a taxpayer who is not an adept user of online services but who *has a responsible attitude to his duties as a taxpayer* would have done;

40 (6) Such a taxpayer could have attempted filing the return on paper by 31 October 2013 to forestall the prospect of having to file online; that he would be mindful of the previous experience of access difficulties; that he would be conscious of the fact that he no longer had the customary help from a staff

member as had been the case in all the previous 11 years; that he would have sought professional assistance if he still decided to file online; (it is known that for a modest fee, the service of a tax agent can be engaged to file a return for an individual through an agent's log-in with HMRC, bypassing the need to access the individual's log-in through Government Gateway); that if he were to attempt filing himself, he would consider it a cautionary measure to start the task months before the due date to allow for any issues to be resolved in good time;

(7) That the appellant had managed to access his online account successfully in July 2014, and there is no satisfactory explanation for the continual failure to file his return.

37. We make no criticism of the appellant for not being an adept user of online services – but the attribute in itself does not give rise to a reasonable excuse. Its relevance as an attribute is to be taken into account in assessing what a reasonable taxpayer with such an attribute would have done, alongside his other attributes as a man of business. As a man of business who is not adept in using online services, we would expect the appellant to have the acumen to know, and to have taken the reasonable steps in ensuring that his return was filed on time.

38. On this assessment, the appellant has not met *the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer*. We conclude therefore that there is no reasonable excuse for his failure to file his return by 31 January 2014.

39. The Tribunal is critical of the fact that the return was not filed in July 2014 when the appellant managed to access his online account successfully.

40. To confirm the fixed penalty as being correctly imposed, it is not necessary for the Tribunal to consider the reason given by the appellant for his continual failure in filing his return. However, for completeness we will consider whether the appellant's explanation constitutes a reasonable excuse for his continual failure.

41. The explanation offered by the appellant that he had presumed his letter of 30 January 2014 (§17) was sufficient is inconsistent with his own action in making intermittent efforts to file his return between February and July 2014, and to request for a paper return to file at one point. We also note from the protracted correspondence between the appellant and HMRC over the fixed penalty (and the daily and further penalties) that the appellant has been reminded almost every single time by HMRC of his '*overdue tax return*'. No reasonable person would have chosen to ignore these reminders, which are consistent and persistent in their warning of the implications of further penalties arising from an overdue return.

42. What could have been the appellant's belief or presumption (which would have required a subjective test to establish) is of no direct relevance in assessing whether the appellant in this case has a reasonable excuse. As highlighted in *Coales v HMRC* [2012] UKFTT 477 (TC) at [32]:

'The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse.'

5 ‘The word “reasonable” imports the concept of objectivity’ (*Coales* at [31]). ‘The
excuse must be objectively reasonable and that test must be applied to the facts of the
individual case’ (*Coales* at [36]). The assessment of reasonable excuse is therefore
essentially an objective test, to be applied to the particular facts of the appellant’s
case, and in so doing, the Tribunal concludes that the appellant has no reasonable
excuse for either his immediate or continual failure in filing his 2012-13 return.

10 43. As for the third issue relating to special reduction, we cannot trace any record of it
having been considered by HMRC. In accordance with paragraph 22 of Schedule 55
to FA 2009, the Tribunal steps in to consider special reduction. We conclude that
there is no scope for special reduction as the penalty is fixed. Further, we are of the
view that the access problems encountered by the appellant were nothing exceptional,
abnormal or unusual, out of the ordinary run of events to warrant special reduction.

Decision

15 44. The appeal is accordingly dismissed. The penalty of £100 for the late filing of
the 2012-13 self-assessment return is confirmed.

20 45. 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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**HEIDI POON
TRIBUNAL JUDGE**

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RELEASE DATE: 30 JULY 2015