



TC04822

Appeal number: TC/2015/05238

Income Tax – penalty for late filing of return – whether complaint against HMRC conduct reasonable excuse – meaning of “special circumstances” – whether special circumstances exist – whether HMRC decision flawed – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DYLLIS FAIFE

Appellant

- and -

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

TRIBUNAL JUDGE: THOMAS SCOTT

The Tribunal determined the appeal on 4 December 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 1 September 2015 (with enclosures), HMRC’s Statement of Case submitted on 2 October 2015 (with enclosures), and the Appellant’s Response to that Statement of Case dated 2 November 2015 (with enclosures).

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DECISION

Introduction

- 5 1. Mrs Faife appealed against a fixed penalty of £100 for the late filing of her individual tax return for the year ended 5 April 2011.
2. The appeal was on the basis that Mrs Faife had a reasonable excuse for the late filing, or that special circumstances existed which meant that the penalty should be reduced.

10 *Legislation*

3. By virtue of paragraph 3 of Schedule 55 to the Finance Act 2009 (“**Schedule 55**”) failure to file an individual tax return by the due filing date gives rise to a penalty of £100.
- 15 4. Paragraph 23 of Schedule 55 provides that such a penalty does not arise if the taxpayer satisfies the tribunal on appeal that there is a reasonable excuse for the failure to file by the due date.
5. Paragraph 16 of Schedule 55 provides that if HMRC think it right because of special circumstances, they may reduce any penalty arising under Schedule 55.
- 20 6. Under paragraph 20 of Schedule 55, a person may appeal against a penalty or its amount. Paragraph 22 of Schedule 55 states that on an appeal under paragraph 20, the tribunal may affirm or cancel HMRC’s decision. On an appeal against the amount of a penalty, the tribunal may substitute for HMRC’s decision another decision that HMRC had power to make. In so doing, the tribunal may rely on paragraph 16 (special circumstances) to the same extent as HMRC, or to
- 25 a different extent, but only if the tribunal thinks that HMRC’s decision in respect of the application of paragraph 16 was flawed.

Facts

- 30 7. HMRC issued to Mrs Faife a notice to file for the year ending 5 April 2011 on 2 October 2014. The relevant filing date, given the notice was issued outside the normal cycle, was 9 January 2015.
8. The return was not received by the filing date, and HMRC issued a notice of penalty assessment on 13 January 2015 for £100.
- 35 9. On 23 February 2015 Mrs Faife wrote to HMRC appealing against the penalty. The letter included the following statements:

“I do not understand why you have sent me this demand, as I was still a full time employee up until 31st March 2011. I did not register as a self-employed person until the 28th July 2011. I therefore do not agree that I owe you any penalty fee.

Please confirm that this demand has been sent to me in error.

In addition to the above, I wish to formally inform you that in terms of my standard tax assessment for the year 2010-11 as an employee, which I have previously made a formal complaint about and have been in dispute with HMRC about, I am now taking my complaint forward via my MP to the Parliamentary and Health Services Ombudsman.”

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10. By letter of 12 June 2015 HMRC wrote to Mrs Faife rejecting her appeal and offering a review.

11. On 8 July 2015, Mrs Faife wrote to HMRC requesting a review. The letter stated:

10 “I have received a letter from the Parliamentary and Health Ombudsman dated 21st May, confirming that they have decided that my complaint does meet their criteria and that they will further investigate my concerns and my complaint against HMRC.

15 My position is therefore that I think it is impossible for you to state that I am owing a late penalty payment for the 2010-11 tax year when the fundamental issue of whether I actually owe any tax for that year is still in dispute and my complaint is still in the process of being investigated and has not yet been concluded.”

12. HMRC carried out a review and wrote to Mrs Faife on 17 August 2015 stating that the conclusion of the review was that the penalty charge was correct. The review concluded that there was no reasonable excuse for the late filing, and that there were no special circumstances justifying a reduction of the penalty.

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The Appeal

13. On 1 September 2015, Mrs Faife appealed to the tribunal against the penalty. The stated grounds for appeal were as follows:

25 “This whole situation, including the penalty fee appeal, arises from my original longstanding complaint against HMRC, going back for several years but now specifically relating to the tax year 2010-11.

30 “My complaint has been about how HMRC has dealt with the issue of my being given the wrong tax coding and therefore having been taxed incorrectly. I have now received confirmation from the Parliamentary and Health Ombudsman on 11st August that my complaint will be formally investigated by them. Due to the high demand for their services, they have informed me that investigating my complaint may take some months.

35 My position is that do not consider the amount of tax that HMRC says that I owe for the year 2010-11 to be correct. I consider that I do not owe any tax because mistakes were made by HMRC and my employers and I am not satisfied with the conclusion of the Adjudicator’s complaint investigation.

40 I think that it is completely illogical to say that I am due to pay a late penalty fee for not returning a self-assessment form for 2010-11, when firstly, I was paying tax through PAYE for that period, I was not self-employed, and secondly because no final agreement has been reached yet as to whether I am actually due to pay any tax. The complaints process has not yet been fully completed and I believe that HMRC are not following due process by attempting to charge me a late penalty fee at this stage.

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So, my point is that there cannot be a penalty fee when the complaints process has not been completed and so I cannot be late.

5 I think that the penalty fee should be waived completely at this stage and when the final complaints process has been fully completed, then the situation can be looked at with a fresh perspective.

I consider that my situation is an ‘unexpected or unusual event’.

10 ***Discussion and Decision***

14. The grounds of appeal summarise clearly the basis of Mrs Faife’s objection to the penalty. The background is an ongoing dispute between Mrs Faife and HMRC both as to her tax liabilities for 2010-11 and HMRC’s conduct and
15 behaviour in relation to those liabilities.

15. It is important to make clear at the outset that the issues raised by that ongoing dispute are only relevant to this appeal to the extent that they afford a reasonable excuse for the failure to file, or constitute special circumstances justifying a reduction of the penalty. Save to that extent, the fairness or
20 reasonableness of HMRC’s conduct is not the subject of the appeal.

16. Some background to that dispute is nevertheless helpful. Mrs Faife was issued with tax assessments for the years 2008-09, 2009-10 and 2010-11, following discovery by HMRC of underpayments for those years. Those underpayments had arisen as a result of the wrong tax code being operated. It was Mrs Faife’s
25 contention that this wrong coding arose because of her employer’s mistake, and HMRC’s failure to identify that mistake. Mrs Faife contested the assessments, HMRC refused to amend them, and Mrs Faife complained formally to the HMRC’s Adjudicator’s Office.

17. The Adjudicator partly upheld Mrs Faife’s complaint, awarding redress of £100
30 for poor case handling and £150 for worry and distress. However, the Adjudicator upheld the assessment for 2010-11. Following that review, in 2014, HMRC issued Mrs Faife with a notice to file a return for 2010-11. Mrs Faife did not agree with that aspect of the Adjudicator’s Review, and did not file that return.

35 18. Mrs Faife initiated a complaint in 2015 regarding HMRC’s conduct to the Parliamentary and Health Services Ombudsman. The outcome of that complaint was not known at the date this appeal came to be determined.

19. Having reviewed the evidence in this appeal, it is entirely understandable that Mrs Faife might feel that HMRC have behaved inappropriately in their dealings
40 with her. However, unless such behaviour affords a reasonable excuse for the failure to file, or constitutes special circumstances under paragraph 16 of Schedule 55, HMRC’s behaviour does not form a basis on which I can allow the appeal or reduce the penalty.

20. This is made clear by the decision of the Upper Tribunal in *HMRC v Hok Limited* [2012] UKUT 363 (TCC). That decision, which is binding on this tribunal, establishes that the First-tier tribunal has no jurisdiction to overturn or mitigate a penalty on the grounds of fairness. The Upper Tribunal in *Hok* sets out the position with helpful clarity (at [56] and [57]):

“Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paragraph 36 and 43 above the [Tribunals, Courts and Enforcement Act 2007] gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal’s jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include – whatever one chooses to call it – a power to override a statute or supervise HMRC’s conduct.

If that conclusion leaves “sound principles of the common law ... languishing outside the Tribunal room door”, as the judge rather colourfully put it, [in *Foresight Financial Services Ltd v Revenue and Customs Commissioners* [2011] UKFTT 647(TC)] the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal.”

21. The first question is whether Mrs Faife had a reasonable excuse for the failure to file by the due date within the meaning of paragraph 23 of Schedule 55.

22. The existence of a reasonable excuse “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].

23. In the present case, there was no circumstance or event which prevented Mrs Faife from filing the return for 2010-11 by the due date. Rather, she reached a decision not to file, because she disputed the tax assessed by HMRC, and she believed that it was wrong for a filing obligation to be imposed until her complaints against HMRC had been finally determined.

24. Mrs Faife argued that there was a reasonable excuse in this case because she could not reasonably have foreseen the factual background which led to the assessment for 2010-11. She also argued that she originally had no expectation of having to complete a self-assessment return for that period because she was an employee for that year. However, regardless of the tax liabilities, and consequential filing obligations, which Mrs Faife might originally have expected, there was no dispute that the notice to file for 2010-11 had been validly served by HMRC on Mrs Faife and that she had failed to file by the due date. The fact that an unforeseen tax assessment might, as in this case, flow from an HMRC enquiry does not afford a reasonable excuse for a failure to file following a valid HMRC notice.

25. Having considered all the circumstances, I conclude that there was no reasonable excuse for the failure to file by the due date. The proper course of action for Mrs Faife to have taken would have been to appeal against any notice to file or self-assessment which she considered to be incorrect or invalid. Judicial review might also have been pursued. I note that the HMRC Adjudicator upheld HMRC's assessment for 2010-11. The existence of any further enquiry by the Parliamentary and Health Ombudsman into HMRC's conduct would not afford a reasonable excuse for failure to file the return for that year.
26. The second question is whether HMRC were wrong to have refused to reduce the penalty because of "special circumstances" within paragraph 16 of Schedule 55.
27. To a lay person, the terms "reasonable excuse" and "special circumstances" might well sound very similar. However, as explained in *Rodney Warren & Co v HMRC* [2012] UKFTT 57 (TC), a special circumstance must logically mean something different from reasonable excuse.
28. There are several decisions on the meaning of special circumstances which have been adopted by the Tribunal. Some of those decisions in effect supply synonyms for "special" – such as exceptional, uncommon or unusual. It may be the case that the circumstances of this appeal are special in that they are unusual, though perhaps not exceptional.
29. However, paraphrasing "special circumstances" as "something unusual" would be an unduly simplistic approach. In the context of the penalty legislation, it would produce considerable uncertainty if HMRC, or the tribunal in reviewing HMRC's decision, had to decide in every penalty situation the degree as to which a particular case was unusual or uncommon, in whatever respect.
30. It is preferable in interpreting the phrase to consider it as a whole: what are "special circumstances?" In this context, the circumstances must mean in effect the factual backdrop to the failure which has given rise to the penalty. I find assistance in this context in the decision of the First-tier Tribunal in *Wayne Pendle v HMRC* [2015] UKFTT 27 (TC) at paras [16] and [17]:
- "The Oxford English Dictionary defines "circumstances" as :
- "The logical surroundings or "adjuncts" of an action: the time, place, manner, cause, occasion etc, amid which it takes place".
- From this I find that the "circumstances" are normally something external to the person doing the action in question, in contrast to something within his control. So an illness, a burglary, or (as in Mr Donaldson's case at [137] of *Morgan & Donaldson*) where incorrect information is provided to the taxpayer by HMRC – may all constitute "circumstances"."
31. As in relation to reasonable excuse, for the reasons given at [19] and [20] above, the existence of special circumstances must not be confused with whether HMRC have behaved fairly in relation to the taxpayer.

32. In this case, the causative effect of the failure giving rise to the penalty was a deliberate decision by Mrs Faife. While the “circumstances” in which that decision was made included the HMRC conduct in relation to 2010-11 of which Mrs Faife continued to complain, that conduct, even if “special”, did not necessitate or cause the filing failure. That failure was within the control of Mrs Faife, and, unlike the situation in *Robert Morgan and Keith Donaldson v HMRC* [2013] UKFTT 317 (TC) referred to at [30] above, was a decision made following the provision by HMRC to the taxpayer of full and accurate information about the filing obligations and consequential penalty.
33. Notwithstanding this, one might have hoped that, given the issues regarding HMRC’s conduct and the existence of an ongoing complaint, HMRC would have exercised its discretion under paragraph 16 of Schedule 55. That discretion includes, in paragraph 16(3)(a), the ability to stay a penalty. That option would potentially have been appropriate in this case, pending the outcome of Mrs Faife’s complaint to the Parliamentary and Health Ombudsman.
34. The question is not, however, whether or not I would regard special circumstances as having existed which justified the penalty being stayed. It was clear that HMRC considered the relevant circumstances, and reached a decision that paragraph 16 did not apply. In this appeal, I can substitute my decision for HMRC’s only if I think HMRC’s decision was “flawed”. This means flawed in a judicial review sense: paragraph 22(4) of Schedule 55.
35. HMRC’s decision was flawed only if HMRC failed to consider the exercise of its discretion at all; HMRC failed to consider a relevant issue; HMRC considered an irrelevant issue, or HMRC came to a decision it could not reasonably have reached.
36. Having considered all the factors discussed above, I conclude that HMRC’s decision was not flawed in any of these senses. It might seem harsh, but it was clearly a decision which could reasonably have been reached for the reasons given at [32] above, and which was so reached on the basis of the relevant facts.
37. The appeal is therefore dismissed, and the penalty stands.

Right to Apply for Permission to Appeal

38. 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.

THOMAS SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 13 JANUARY 2016

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