



TC05110

Appeal number: TC/2015/04916

Penalties under Para 1 Schedule 55 Finance Act 2009 for failure to deliver self-assessment return - whether penalties could be suspended or reduced - whether special circumstances - no - whether penalties disproportionate - no - appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARREN FOLEY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Fox Court, Brooke Street, London on 19 January 2016

The Appellant in person

Mr Darren Bradley Officer of HMRC for the Respondents

DECISION

The Appeal

5 1. This is an appeal by Mr Darren Foley (“the Appellant”) against a decision by HM Revenue & Customs (“HMRC”) dated 16 November 2011 to impose penalties for the late submission of Self-Assessment tax returns for the years ended 5 April 2011, 5 April 2012 and 5 April 2013 by the due dates.

2. The Appellant also appeals HMRC’s refusal to allow suspension of late filing penalties.

10 3. The appeals are late and HMRC object to the Appellant’s application for permission to appeal out of time.

4. Having considered the background to the late appeals the Tribunal grants leave to appeal.

Background

15 5. On 9 December 2014 HMRC received Mr Foley’s Self-Assessment tax returns for the years ended 5 April 2006, 5 April 2007, 5 April 2008, 5 April 2009 and 5 April 2010. The tax returns were submitted in paper format.

6. Penalties were not charged for the late submission of these returns as the tax due was negligible or nil.

20 7. On 21 November 2014 tax returns were submitted to HMRC in respect of the years ended 5 April 2011, 5 April 2012 and 5 April 2013, in electronic format.

8. As a result of the late tax returns HMRC charged penalties as follows.

Year	Penalty			
	Initial	Daily	6 Month	12 Month
2010-11	£100	£900	£300	£300
2011-12	£100	£900	£300	£300
2012-13	£100	£900	£300	

25 9. The Appellant’s agents, Towne & Co, wrote to HMRC on 16 January 2015 notifying an intention to appeal against the late filing penalty notices and on 16 March 2015 submitted an appeal against the penalties.

10. HMRC wrote to the Appellant on 23 July 2015 rejecting the appeals as out of time.

30 11. On 13 August 2015 the Appellant submitted an appeal against the penalties to the Tribunals Service.

Legislation and case law

Taxes Management Act 1970 Section 8 - Personal return

5 (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—

- a) to make and deliver to the officer., on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and
- 10 b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is—

- a) the 31st January next following the year of assessment, or
- 15 b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given].

Schedule 55 Finance Act 2009

Paragraph 1(4)

20 In this Schedule –

“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

“penalty date”, in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

25 *Paragraph 3*

A person is liable to a penalty under this paragraph of £100.

Paragraph 4

(1) A person is liable to a penalty under this paragraph if (and only if)

- 30 (a) The failure continues after the end of the period of 3 months beginning with the penalty date,
- (b) HMRC decide that such a penalty should be payable, and
- (c) HMRC give notice to the person specifying the date from which the penalty is payable.

35 (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c) —

- (a) may be earlier than the date on which the notice is given, but
- (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

5 *Paragraph 5*

(1) A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of -

- (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300

Paragraph 6(1) & 6(5)

(1) A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 12 months beginning with the penalty date.

15 (5) The penalty under this paragraph is the greater of -

- (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300

Paragraph 16

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

(2) In sub-paragraph (1) “special circumstances” does not include —

- (a) ability to pay, or
- (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to —

- (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.

Paragraph 20

30 (1) A person may appeal against a decision of HMRC that a penalty is payable by them.

(2) A person may appeal against a decision of HMRC as to the amount of the penalty payable by them.

Paragraph 22(1) & 22(2)

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may —

- 5 (a) affirm HMRC's decision, or
(b) substitute for HMRC's decision another decision that HMRC had power to make.

Paragraph 23

(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 person satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that; there is a reasonable excuse for the failure.

10 (2) For the purposes of sub-paragraph (1) —

- (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside the person's control,
(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless he/she took reasonable care to avoid the failure, and
15 (c) where the person had a reasonable excuse for the failure but the excuse has ceased, he/she is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

Taxes Management Act 1970

20 Section 118(2) - where a person had a reasonable excuse for not doing anything required to be done, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse ceased.

Appellant's case

25 12. In his Notice of Appeal the Appellant accepts his self-assessment tax returns were submitted late, but asserts that the penalties should be cancelled or suspended. His agent Towne & Co argue that the penalties could be suspended on the basis that the necessary SMART conditions could be imposed. [HMRC may suspend penalties for careless inaccuracies in returns or documents if they are able to set at least one suspension condition that will help the taxpayer avoid penalties for similar
30 inaccuracies in the future. Each condition must be Specific, Measurable, Achievable, Realistic and Time bound.]

35 13. In subsequent correspondence with HMRC, the Appellant's agents accept that Schedule 55 FA 2009 does not allow for the suspension of penalties for late returns (rather than inaccuracies in returns), but they argue that Schedule 55, para 16 states that, "If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule." Paragraph 16(3) notes, "the reference to reducing a penalty includes a reference to staying a penalty, and agreeing a compromise in relation to proceedings for a penalty."

40 14. They therefore contend that staying a penalty means stopping or postponing enforcement of a penalty. Agreeing a compromise allows all or part of a penalty to be

forgiven. The agent asserts that HMRC accept that penalties for late filing/failure to make a return fall within these “special reduction” powers.. The agents did not elaborate on why they considered special circumstances existed for the purpose of reducing or staying the penalties.

5 15. The agent further argues that the Appellant’s combined tax assessment for the three year period is £2,035 with two of the years’ assessments being minus (i.e. monies owed to the Appellant). The total penalty of £4,885 is wholly disproportionate. They refer to the case of *C & DDH Ltd v HMRC* [2014], where the Tribunal stated that:

10 “The only power in this respect is that if the Tribunal considers the amount of the penalty is wholly disproportionate to the gravity of the offence, if it is not merely harsh, but plainly unfair, then the penalty can be discharged.”

15 16. At the hearing the Appellant was unrepresented and did not feel able to pursue the lines of argument raised by his agent, but said that he had been suffering from an alcohol problem during the years when his returns were late. He knew that he had to file returns but because of his condition “could not apply myself and get round to dealing with the returns”. He said “I should have tackled the problem earlier. Eventually I went to Towne & Co and they sorted the returns for me”. He said that despite his condition he had nonetheless been able to continue in either full or part time employment throughout the period of default. He accepted that his grounds for asking for a reduction of the penalties were very limited.

20 17. Having had the SMART suspension provisions contained in Paragraph 14 of Schedule 24 Finance Act 2007 explained to him, the Appellant accepted that the provisions did not apply to a late tax return.

25 **HMRC’s case**

18. It is not in dispute that tax returns for the years ended 5 April 2011, 5 April 2012 and 5 April 2013 were late.

19. The appeal does not contest the imposition of a penalty or the amount of penalties charged.

30 20. Paragraph 1 Schedule 55 Finance Act 2009 states that a penalty is payable where a person fails to deliver a Self-Assessment Tax Return on or before the filing date.

35 21. Paragraph 20 Schedule 55 states that a person may appeal against a decision by HMRC that a penalty is payable and also against the amount of the penalty. However Schedule 55 Finance Act 2009 does not allow for the suspension of penalties and as a result cannot be considered by HMRC.

22. HMRC can consider the suspension of penalties in certain conditions in accordance with Paragraph 14 Schedule 24 Finance Act 2007. Schedule 24 penalties are payable where a person submits a document to HMRC which contains an

inaccuracy because of careless behaviour which leads to an understatement of tax. However, HMRC have not issued any penalties under this legislation. The outcome sought by the Appellant, that is, the suspension of the penalties, is not permitted by legislation and is not, therefore, within the jurisdiction of the Tribunal.

- 5 23. The late submission of tax returns up to the year ended 5 April 2010 were dealt with under s 93(5) Taxes Management Act 1970 which states that liability to a penalty should not exceed the liability to the amount of tax due from the return. As the amount of tax due for the years ended 5 April 2006, 5 April 2007, 5 April 2008, 5 April 2009 and 5 April 2010 was negligible or nil, no penalty was charged.

10 **Conclusion**

24. The obligation to ensure that his returns are filed on time is on the Appellant. It is not in dispute that returns for the years were late.

25. The Appellant has not shown that he has a reasonable excuse for the failure to deliver his returns on time.

- 15 26. Paragraph 16(1) Schedule 55 FA 2009 allows HMRC to reduce a penalty if they think it is right because of special circumstances. While “special circumstances” are not defined, the courts accept that for circumstances to be special they must be exceptional, abnormal or unusual or something out of the ordinary run of events. There were no such circumstances in this appeal.

- 20 27. The Appellant accepts that the penalties cannot be suspended.

28. The penalties are not disproportionate. They are not “plainly unfair”. They are laid down in legislation and have been correctly calculated. The Tribunal has no statutory power to adjust the level of a penalty for late delivery of a return unless it is incorrectly levied or inaccurately calculated.

- 25 29. For the above reasons given above there is no reasonable prospect of the appeal succeeding and it is therefore struck out in accordance with Rule 8(3)(c) of the Tribunals Procedure Rules 2009.

- 30 30. 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.

35 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 18 MAY 2016